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**THE
LAWYERS REPORTS
ANNOTATED**

**NEW SERIES
BOOK 1**

**BURDETT A. RICH, HENRY P. FARNHAM,
EDITORS**

1906

ROCHESTER, N. Y.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY

1906

122007

JUL 29 1942

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THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
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PREFACE.

The present volume begins a New Series of the Lawyers' Reports Annotated. All that has made the former series valuable will characterize the New Series. The only change is by addition. The exhaustive annotation which has been characteristic of these Reports, and which has won for them the extraordinary appreciation of the legal profession, will be equally conspicuous in the new Reports. No time or expense will be spared in the preparation of the monographic Subject Notes. In these all the authorities on the question will be analyzed, compared, and marshaled in the light of the principles which govern them. These exhaustive Subject Notes will be still the great feature of the annotation, and will be carried to an extent even greater than in the past.

Without in any way superseding any of the exhaustive Subject Notes which characterize these Reports, a new feature will be added in the annotation, by brief Case Notes, of all the remaining cases. These Case Notes are for those cases only that, except for this new feature, would be unannotated. Each of these Case Notes, without attempting the exhaustiveness of the monographic Subject Notes, may be relied upon to make a valuable addition to the case by showing its status with respect to the general principles on the subject, or by throwing upon it the light of other kindred decisions. Brief as they may be, they are made with a thoroughness of research that involves great expense.

The New Series will contain about 1,200 cases per year, in six volumes of not less than 1,250 pages each. This will very nearly double the number of cases that have hitherto been published in these Reports.

With this simple statement of the facts, this first volume is submitted to the profession, with full confidence that the great favor which has been given to the Lawyers' Reports Annotated will continue toward a new series which preserves every feature that has made those Reports valuable, and changes them only by signal enlargement and improvement.

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LA WYERS' REPORTS

ANNOTATED.

NEW SERIES.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE TERMINAL
COMPANY et al., Appts.,

v.

JOHN T. LELLYETT, Trustee, etc.

(.... Tenn.)

1. Nuisance—injury to health.

Allegations of injury to health may be inserted in a complaint for injuries to real estate by the maintenance of a nuisance, as specifications of damage done to the property as a place of residence.

2. Same—legislative authority.

The legislature cannot authorize railroad and terminal companies, in locating station houses, roundhouses, and terminal facilities, seriously to impair or destroy property not taken, but which becomes impaired or is destroyed by the use of that which is taken.

3. Same—location of railroad terminal.

A terminal company, in exercising the discretion conferred by the legislature to lo-

cate its yards and terminal facilities, acts at its peril not to create a nuisance to neighboring property.

4. Same—growth of traffic.

Discomfort to the owner of a residence located near a railroad track, which is caused solely by the growth and increase of travel and traffic, gives him no right of action against the company.

5. Same—destruction of property value.

A property owner is not entitled to damages for every inconvenience or discomfort caused by the operation of a railroad near his property, even though it may be material or considerable; but he can recover only where the usable and rental or permanent value of his property is injured.

6. Same—damages—rental value.

The measure of damages in case of injury to neighboring property by the careless operation of a railroad, so that the presumption is that the evil will be remedied and recurring damages for injuries to the use and enjoyment of the property may be recovered, is to be governed to a large

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I. Introductory; general principles.

The legislature will never be presumed to have intended to authorize a private nuisance.

extent by the rental value of the property, and to what extent that value is diminished.

7. Same—injury to fee.

The injury to the fee or permanent value of the property is the proper measure of damages where neighboring property is injured by the location and operation of railroad terminals which are intended to be permanent, and, notwithstanding their careful and proper operation, constitute a nuisance diminishing the value of the property.

8. Same—excessive damages.

The allowance of \$4,000 as damages for injury to the rental value of a \$7,000 house for thirty-two months by the maintenance of a nuisance in the vicinity is excessive.

9. Same—evidence—other causes.

Upon the question of injury to property by the maintenance of a nuisance upon it,

evidence is admissible to show that it is injuriously or prejudicially affected by similar causes from other sources, but not the effect thereof on other property near or contiguous to it.

10. Same—effect on neighboring property.

How other neighboring property was affected by the maintenance of a nuisance cannot be shown in an action to recover for injury to a particular tract.

11. Same—comparison with other localities.

Upon the question of nuisance to adjoining property in the maintenance and operation of a railroad terminal, no comparison is proper between the noise in its vicinity and in other portions of the city; nor is evidence admissible that the city is generally a dirty, smoky, and noisy place.

(March 25, 1905.)

sance. So far as possible, all statutes which may be claimed to have done so will be construed against such contention. The question rarely arises in cases of individuals, but it does quite frequently arise under corporate charters; and, as has been seen in a note to *Missouri, K. & T. R. Co. v. Mott*, 70 L. R. A. 579, before the question can arise as to whether or not the nuisance has been legalized, the charter must in terms authorize the precise act which is alleged to constitute the nuisance.

This note will be limited to a discussion of the particular subject stated. What constitutes a nuisance will not be considered; nor will any of the questions arising under the constitutional and statutory provisions in regard to the taking of private property for public use under the exercise of the right of eminent domain, except so far as they are alluded to incidentally in order to preserve the sense of the decision; nor will public nuisances be considered, except in those instances where they have peculiarly affected a private individual, which, so far as this discussion is concerned, makes such a case, so far as that individual is concerned, a private nuisance, under the well-known rule that a private action is maintainable for a public nuisance by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with others affected by the nuisance. *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 708; *Clark v. Peckham*, 9 R. I. 455; *Wylie v. Elwood*, 134 Ill. 281, 9 L. R. A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Milhau v. Sharp*, 27 N. Y. 625, 84 Am. Dec. 314; *Porth v. Manhattan R. Co.* 26 Jones & S. 366, 11 N. Y. Supp. 633; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 124; *Kaje v. Chicago, St. P. M. & O. R. Co.* 57 Minn. 422, 47 Am. St. Rep. 627, 59 N. W. 493; *Edmondson v. Moberly*, 98 Mo. 526, 11 S. W. 991; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Platte & D. Ditch Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515.

The discussion of the question will necessitate an exhaustive examination of the application, by the cases in the note, of cer-

tain well-known and well-established doctrines which have repeatedly been stated in many cases. One of these is that the act of a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect a claim of a private citizen for damages from any special inconvenience and discomfort not experienced by the public at large. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Nichols v. Pixley*, 1 Root, 129; *Churchill v. Burlington Water Co.* 94 Iowa. 462 N. W. 646; *Robinson v. New York & N. H. R. Co.* 27 Barb. 512; *Fletcher v. Auburn*, 8 S. R. Co. 25 Wend. 462; *Brown v. Cayuga & S. R. Co.* 12 N. Y. 487; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Sadler v. New York*, 40 Misc. 78, 81 N. Y. Supp. 30.

The correct doctrine is best stated in the opinion of the court in *Blanc v. Murray*, 1 La. Ann. 165, 51 Am. Rep. 9, as follows: "That which is authorized by the legislature, within the strict scope of its constitutional power, cannot be a public nuisance, but it may be a private nuisance; but the legislative grant is no protection against a private action for damages resulting therefrom." After approving this doctrine the court further said, and "the doctrine sometimes stated in the elementary works, in which has been held by some courts, that whatever is authorized by a legislature cannot be a nuisance of any kind, is exploded."

Another doctrine relating wholly to corporations is that a corporation is liable in a civil action, for erecting and maintaining a nuisance, the same as an individual; and that powers granted to corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of

APPEAL by defendants from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action brought to recover damages for the alleged maintenance of a nuisance. Reversed.

The facts are stated in the opinion. Messrs. John B. Keeble, Claude Waller, Hemons & Barthell, Baxter Smith, Percy D. Maddin, and James C. Bradford, for appellants:

There is a variance between the proof as to title and the allegation in the declaration. and, therefore, there is no evidence to support the verdict.

East Tennessee Iron Mfg. Co. v. Gaskell, 1 Lea. 742; Boyd v. Johnston, 89 Tenn. 284, 15 S. W. 904; 15 Enc. Pl. & Pr. p. 480; Henshall v. Roberts, 5 East, 150; Bragdon v.

Harmon, 69 Me. 29; Blackstone Nat. Bank v. Lane, 80 Me. 165, 13 Atl. 683; Barnum v. Stone, 27 Mich. 332; Beers v. Shannon, 73 N. Y. 292; Rich v. Sowles, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723; Willingham v. King, 23 Fla. 478, 2 So. 851; Sutton v. Mansfield, 47 Conn. 388; Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589; Sillings v. Bumgardner, 9 Gratt. 273; Morgan v. Potter, 157 U. S. 195, 39 L. ed. 670, 15 Sup. Ct. Rep. 590; M'Leod v. Mason, 5 Port. (Ala.) 223; Sutherland v. Goff, 5 Port. (Ala.) 508; Gregg v. Bethea, 6 Port. (Ala.) 9; Sanderson v. Sanderson, 17 Fla. 820; Hoare v. Harris, 11 Ill. 24; Bradley v. Amidon, 10 Paige, 235; Bowles v. McAllen, 16 Ill. 30; Longstreet v. Tilton, 1 N. J. L. 38; Burdett v. Cain, 8 W. Va. 282;

such powers were done by an individual. The authorities on this subject, so far as the application of the doctrine to municipal corporations is concerned, are: Haag v. Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; Stein v. Lafayette, 6 Ind. App. 114, 33 N. E. 912; Valparaiso v. Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; Bailey v. New York, 3 Hill, 539, 38 Am. Dec. 669; Noonan v. Albany, 79 N. Y. 170, 35 Am. Rep. 540; Harper v. Milwaukee, 10 Wis. 365; Hughes v. Fond du Lac, 73 Wis. 340, 41 N. W. 407; Winchell v. Waukegan, 110 Wis. 101, 84 Am. St. Rep. 902, 45 N. W. 668; Mootry v. Danbury, 45 Conn. 50, 29 Am. Rep. 703; Brower v. New York, 3 Barb. 254; Nevins v. Peoria, 41 Ill. 502, 10 Am. Dec. 392;—and, so far as they have been applied to railroad corporations, they are: Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 272, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; Mundy v. New York, L. E. & W. R. Co. 75 Hun. 479, 27 N. Y. Supp. 469; Jenkins v. Wilmington & W. R. Co. 110 N. C. 438, 15 S. E. 193; Staton v. Norfolk & C. R. Co. 111 N. C. 278, 17 L. R. A. 438, 16 S. E. 181; Evansville & C. R. Co. v. Dick, 9 Ind. 433; Chicago G. W. R. Co. v. First M. E. Church, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Tinsman v. Belvidere D. R. Co. 26 N. J. L. 148, 69 Am. Dec. 565; Borden-town & S. A. Turnp. Road v. Camden & A. R. & Transp. Co. 17 N. J. L. 314.

That the legislature may authorize small nuisances without compensation, but not great ones, is stated as a general rule in *Barnes v. Boston*, 154 Mass. 100, 23 N. E. 9.

The trouble in these cases, however, often lies in the definition of terms. In order to constitute a nuisance there must be an injury to health or property values, and many of the cases have been decided in favor of defendant because no nuisance was shown, not because the nuisance was small. The absence of nuisance in fact will require the omission from this note of many cases which might otherwise be regarded as authorities in favor of legislative sanc-

tion of nuisances. Of this class is the recent case of *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* 139 Fed. 537, in which it was held that, the use of locomotive engines being sanctioned by statute, there is no liability for fire started from sparks unless they are negligently suffered to escape. This, however, is not solely because of the legislative sanction, but because the use of locomotives is not generally a nuisance, and therefore, to create a liability in a particular instance, a nuisance or a negligent act must be shown.

So, not a little trouble experienced in the endeavor to arrive at what are the true principles governing this subject is due to the careless manner in which many of the courts confuse and confound the words "damage" and "injure," and "damaged" and "injured."

As was very appropriately said in *Sadlier v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, in considering the question it "is necessary to keep in mind carefully . . . that the phrases 'direct injury' and 'consequential injury' are not the same or of the same meaning as the phrases 'direct damages' and 'consequential damages.' The latter phrases are of the terminology of damages and the measure of damages, while the former are not, but are of the terminology of injuries. To illustrate: A direct injury may, in addition to direct 'damages,' do indirect, or, as it is often more loosely phrased, consequential, 'damages,' and the latter are recoverable as well as the former, unless they be not proximate, but remote, to use two other words which belong to the terminology of damages. In the case of a direct injury, the measure of damages includes both direct and indirect (or consequential) damages; but in the case of a consequential injury, there are no recoverable damages at all. Consequential (i. e., indirect) damages can only result from a direct injury; while no actionable damages of any kind or degree result from a consequential injury. Enough has been said to show the confusion which arises from the use of the words 'injuries' and 'damages'

Simpson v. King, 36 N. C. (1 Ired. Eq.) 11; Lemon v. Hansbarger, 6 Gratt. 301.

No two persons sustaining separate and distinct injuries from a single act can join as plaintiffs in the same suit.

Shipman, Common Law Pleading, 138; 17 Am. & Eng. Enc. Law, p. 601; Sandes v. Wildsmith [1893] 1 Q. B. 771; McKenzie v. Hatton, 9 Misc. 18, 29 N. Y. Supp. 18; Russell v. Corne, 1 Salk. 119; Brown v. Tripe, 2 Keble, 230; Andrews' Stephen, Pl. pp. 60, 62; Chitty, Pl. 16th ed. p. 75; 15 Enc. Pl. & Pr. p. 581; McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845; Fatman v. Leet, 41 Ind. 133; Summers v. Farish, 10 Cal. 347; Tenant v. Pfister, 45 Cal. 270.

Plaintiff, having sought to have the permanent impairment of the value of his prop-

erty by these terminal facilities determined, cannot recover in this suit any other class of damages.

Gulf, C. & S. F. R. Co. v. Fredericks (Tex.) 19 S. W. 125; Denison, B. & N. O. Co. v. Barry (Tex.) 83 S. W. 5.

The improvements in this case are permanent, and the doctrine of successive suits in cases of this kind can have no application.

Harmon v. Louisville, N. O. & T. R. Co. Tenn. 614, 11 S. W. 703; Sutherland, Damages, 1042; Elizabethtown, L. & B. S. R. Co. v. Combs, 10 Bush, 382. 19 Am. Rep. 6; Jeffersonville, M. & I. R. Co. v. Esterle, Bush, 667; Chicago, B. & Q. R. Co. v. Schaffer, 26 Ill. App. 280; Louisville, N. A. & R. Co. v. Sparks, 12 Ind. App. 410, 40 N. E. 546; Indiana, B. & W. R. Co. v. Eberle, 1

interchangeably. The phrases 'remote and consequential,' and 'remote or consequential,' in respect of injuries, are sometimes used, but are obviously tautological and lacking in scientific accuracy. It is enough to say injuries are consequential, for then they are nonactionable. In a loose sense they are remote, but that word belongs to such damages from a direct injury as are too remote to be allowed in a recovery."

While the facts of many cases which have gone off on the theory of consequential injuries are similar to those in which a liability for nuisance is considered, they are, as a rule, not considered in this note, because if the court, rightly or wrongly, holds that in a particular case nothing but a consequential injury exists, it has by that very holding eliminated the case from the subject under consideration, because if no legal injury has been done no nuisance exists.

There are very few cases in which the legislature has deliberately authorized the commission of a private nuisance. The claim that it has done so most frequently arises where it has granted a corporate charter authorizing the transaction of a certain business, and the corporation, in the exercise of its franchise, has created the nuisance. The question then arises. Does the charter merely permit the corporation to engage in the business specified, and thereby place it on the same footing as an individual, or does it, in addition, absolve it from all liability for the injurious consequences of its acts? There would seem to be no ground for contention in favor of the latter claim, and, if the contention was made, it would immediately raise the question of the constitutional power of the legislature to authorize a private nuisance. The better reasoned cases have adopted a construction of the legislative authority which nearly places the corporation on the same footing as an individual; but there are decisions in which the courts, without considering the question of the legislative power to do so, have held that the charter ab-

solved the corporation from the consequences of its acts.

II. Damnum absque injuria.

Of course, if a person is not injured in legal right he cannot be heard to complain that another person is committing a nuisance, whether it is under legislative sanction or not. Therefore cases which hold the plaintiff has established no legal right as of little value upon the question of the effect of legislative authorization of a nuisance, and are mentioned here merely to call attention to the distinction, that they must not confuse the subsequent discussion.

But the decisions disclose such a tendency on the part of the courts to dispose of cases erroneously on the principle *damnum absque injuria*, or its English equivalent, "consequential injury," that an examination of the doctrine may point the way to an avoidance of this error. The Latin phrase means simply loss or diminution in value without wrongdoing, i. e., a legal wrong. For there can be no recovery. The injury in the phrase "consequential injury" has the force of *damnum*, and not of *injuria*. A consequential legal wrong is not thinkable. Therefore the phrase means a loss or diminution in value without legal wrong or infringement of legal right. A nuisance is always an infringement of a legal right, and therefore there can be no consequential injury from a nuisance, and the principle is not applicable to the solution of the cases under consideration. The principle is applicable only when no nuisance exists. A lot owner in a residence neighborhood has no legal right to have it remain free from factories and therefore he has no right of action although the value of the lot is greatly diminished by the establishment of a factory next door. This is a consequential injury. But if that factory is operated in such a way that it creates a nuisance, the injury is no longer consequential, but direct, and a right of action at once arises, which even the legislature cannot take away.

There are expressions in some of the cases to the effect that what is authorized by the

Ind. 542, 59 Am. Rep. 225, 11 N. E. 467; *Idle v. Seaboard & R. R. Co.* 118 N. C. 96, 32 L. R. A. 708, 24 S. E. 730; *Troy v.eshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177.

No person is liable for damages incidentally occasioned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the state.

Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369; *Thurston v. Hancock*, 12 Mass. 20, 7 Am. Dec. 57; *Clark v. Foot*, 8 Johns. 21; *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Lansing v. Smith*, 8 Cow. 148, 4 Fend. 9, 21 Am. Dec. 89; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 5 Am. Rep. 445, 6 Atl. 453; *Smith v. Wash-*

ington, 20 How. 135, 15 L. ed. 853; *North-ern Transp. Co. v. Chicago*, 99 U. S. 635 25 L. ed. 336; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 6 Ch. Div. 773; *Att. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146; *Rockwood v. Wilson*, 11 Cush. 226; *Lasala v. Holbrook*, 4 Paige, 169.

A nuisance in legal phraseology is that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use, by a person, of his own property, real or personal.

Wood, Nuisances, 3d ed. 1; 21 Am. & Eng. Enc. Law, 2d ed. p. 684.

Erections, businesses, and avocations,

legislature cannot be a legal wrong. This idea has frequently resulted in erroneous decisions. Particular conduct must be judged in its relation not only to the public, but also to the individual. It may be right as to the former and wrongful to the latter. It is wrongful to the latter if it infringes his legal or property rights. A right to compensation at once arises, and upon this the legislative permission has no effect. The legislature represents the public, and its grants deal with the public, and not with private rights. Its permission to establish a business, therefore, merely prevents its being a public nuisance, and as to the public it cannot be a legal wrong. But the constitutional restrictions prevent the legislature from surrendering or giving away the property rights of private citizens. Its power of eminent domain may, in case of public necessity, compel the citizen to submit to the continuance of the business and to exchange his property for money; but the legislature cannot deprive him of that. In every case the inquiry primarily is, Has a legal right which forms part of the value of the injured property been infringed? If it has, legislative permission to commit the act will not deprive the property owner of the right to money compensation.

The position of the property holder with respect to the authority of the legislature and the rights of its grantee is stated in *Rainey v. Red River Texas & S. R. Co.* 89 S. W. 768 (Rehearing denied Feb. 19, 1906), as follows: "A railroad company is organized for the performance of duties to the public, as well as for private emolument; and when such is the case the legislature may legalize the nuisance, provided always that damages be fully compensated by the payment of money."

The Texas Constitution provides that private property shall not be damaged for public use without compensation, but the legislative power to authorize a nuisance is not under such a Constitution than under one without such provision.

The three following cases are good illustrations of what is termed by Gaynor, J., L.R.A. (N.S.)

in *Sadlier v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, "indirect" or "consequential" injuries, for which no damages can be recovered. And it is only in such cases that the injuries inflicted upon one party by the act of another can be considered *damnum absque injuria*. And the reason is plainly this, that in the first case the bridge company had no absolute right to a monopoly of tolls for the crossing of the river by its bridge, and therefore the building of the railroad bridge whereby a portion of the traffic which might otherwise have crossed the bridge of the bridge company was deflected therefrom and its income from tolls thereby lessened, gave it no right to an action for what it had lost against the railroad company. And so in the second case, simply because the turnpike company had first built its road, from which it was receiving benefits by reason of the tolls that it was authorized to charge for persons traveling thereon, it had no exclusive right to have all the travel go over its road, and therefore the taking away of a portion of such travel by the duly incorporated railroad company, thereby lessening the amount of its tolls, and to that extent injuring its revenue, was also what is usually termed *damnum absque injuria*. And in the third case the construction of the pier outside of and around the plaintiff's wharves, which reduced his income therefrom, did not give him a right of action against the commissioners for the loss of his income from wharfage uses. It may be said, however, that the real foundation of this is that the plaintiff in each case had no right which could be injured. It is very much like the case of a merchant in a town who is engaged in selling goods to the people of the place, whereby large profits inure to his benefit. Another comes in and locates a similar store, and thereby takes from the former a considerable portion of the trade, and of course the profits that resulted therefrom. The merchant first mentioned has lost, but he has no claim, either to enjoin the newcomer from prosecuting his legitimate business, or to recover from him

lawful in themselves, are not nuisances *per se*.

People v. Sands, 1 Johns. 78, 3 Am. Dec. 296; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; *Walker v. Chicago*, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224; *Kinney v. Koopman*, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119, 22 So. 593; *McCutchen v. Blanton*, 59 Miss. 116; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 37 L. R. A. 381, 62 Am. St. Rep. 532, 47 N. E. 2; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 61 L. R. A. 188, 72 S. W. 954.

The public, or quasi-public, character of railroad and terminal companies, and their duties, obligations, and relations to the public, are such that any other rule than that

the amount of profits that the latter has taken away.

The language of an act of the legislature incorporating a railroad was that the corporation should have power to construct a railroad or way commencing at or near a city, and running thence, on the north side of a river a certain distance. In order to reach the city it was essential that the railroad should cross the river from the north to the south side, the city lying on the south side of the river; and it was held that the language of the statute authorized the railroad to build a bridge that would sustain its road across the river as it was clearly the intent that the railroad should have authority to reach the city; and that, therefore, a bridge company duly incorporated by law, whose bridge crossed the river above, a projected bridge of the railroad company, could not maintain an action to restrain the latter from building its bridge, on account of damage that would ensue to the complainant by reason of loss of tolls, etc. *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554.

So, where a railroad company duly authorized to construct its road between two certain points frequently crossed, and in its whole route ran near the road of a previously duly incorporated turnpike company, and the effect of the proper exercise and running of the railroad trains was to frighten horses and create an apprehension on the part of people likely to travel upon such turnpike that to do so was dangerous, whereby the turnpike company claimed to have lost money in tolls, and been injured and damaged in consequence thereof, no action against the railroad company by the turnpike company could be maintained. *Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314.

Where an act of the legislature authorized certain state officers having *ex officio* control of the public lands to grant the land under the waters of a navigable river in their discretion, with a prohibition against granting to any others than the owners of the adjacent land; and thereafter 1 L.R.A. (N.S.)

which relieves them from liability, except for an abuse of their franchises, or failure to observe proper care and prudence in the conduct and operations, would work great injustice to them, and detriment to the general public.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138, 12 S. W. 537; *Chicago, B. & Q. R. Co. v. Atty. Gen.* 2 Cent. L. J. 335, Fed. Cas. No. 2,606; *Chicago, B. & Q. R. Co. v. Iowa* (Chicago, B. & Q. R. Co. v. Cutts), 94 U. S. 155, 2 L. ed. 94; *Citizens' Sav. & L. Asso. v. Tpeka*, 20 Wall. 655, 22 L. ed. 455; *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Munn v. Illinois*, 94 U. S. 111, 24 L. ed. 77; *Lawrence v. Chicago & N. W.*

such officers granted to one the land under a portion of said river, describing it as adjacent to his lot; and he built thereon a wharf, from the use of which he received valuable rents and wharfage; and then after the legislature by an act appointed certain commissioners, and authorized them to construct a pier outside of and around the said wharf,—it was held that the owner thereof could not maintain an action against such commissioners for interfering with his wharfage profits and reducing his income therefrom, the court holding that the object of the act authorizing the state officers to make the grants in certain cases was to prevent the necessity of frequent applications to the legislature for that purpose; and that the prohibition against granting to any others than the owners of the adjacent land was a salutary limitation of the power so given; but that it never could have been intended as a restriction upon the power of the legislature, and that therefore, the owner of the wharf was not entitled to maintain his action against the commissioners for the damage he sustained by reason of the construction of the pier. *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89, Affirming 8 Cow. 146. In that case the access from the wharf to deep water was not cut off, but merely rendered less easy, and therefore there was no legal injury.

A few additional cases which are not strictly in point upon the question of the power of the legislature to authorize a nuisance, since they turn upon the question of fact whether or not a nuisance existed, are mentioned here in order to emphasize the distinction between the two classes of cases. If an act is held not to be a nuisance, because it causes no injury to adjoining property, and therefore does not require legislative sanction, except so far as may be necessary to prevent its being a public nuisance because of its being committed on public land, quite a different question is presented than would be the case if the act wherever done, would be a nuisance unless legislative authority intervened to rescind it from its illegality. Moreover, if a de

1 Co. 94 U. S. 164, 24 L. ed. 97; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 60; 2 Elliott, Railroads, §§ 641, 720.

No liability for damages incidental to the operations of the railroads and the terminal yards exists.

Ryan v. Louisville & N. Terminal Co. 42 Tenn. 111, 45 L. R. A. 303, 50 S. W. 44; Tennessee C. R. Co. v. Campbell, 100 Tenn. 655, 73 S. W. 112; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 316.

As to what is a reasonable use of one's property must necessarily depend upon the circumstances of each case; for a use for a particular purpose in a particular way in one locality would be lawful and reasonable, and might be unlawful and a nuisance in another.

Decision is rested on a ruling that no nuisance exists, because of a legislative sanction, without considering the constitutional authority to grant such immunity, the decision stops at the point where the fundamental rights of the citizen begin.

An act of the legislature of Missouri which granted a charter to a railroad company authorized it to build the road "along or across any state or county road, or street or wharves of any town or city; but said road shall not be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass." And in Porter v. North Missouri R. Co. 33 Mo. 128, it was held that the use of the street for the ordinary purposes of a road as a means of travel and transportation is not a perversion of the highway from the original purpose, and that it was authorized by the general assembly in the charter of the defendant, and that the damage to the property of an adjoining owner, resulting from such construction, was *damnum absque injuria*. The court distinguished Lackland v. North Missouri R. Co. 31 Mo. 180, saying that that case was decided upon the ground that the city did not and could not authorize the entire conversion of the street, by permanent structures of various kinds, to such uses as virtually block it up for all the purposes of a street, but that here the obstruction did not prevent the public from using the street, except that part of it on which the track was laid, when in actual use by the defendants, and that the plaintiff's access to his lot was not affected.

Where an act of the legislature authorized a railroad company to extend its road through a certain street in a city, and through such other streets of the city as the corporation should from time to time permit, subject to such prudential rules as might be prescribed by the corporation, in addition to those directed by the act itself, it was held that such act contemplated the extension of the road from time to time, and when the corporation should give permission, leaving it to that body to regulate 1 L.R.A.(N.S.)

1 Wood, Nuisances, 3d ed. § 2, p. 3; Brady v. Weeks, 3 Barb. 157; Peck v. Elder, 3 Sandf. 126; Walter v. Selfe, 4 DeG. & S. 323; Bamford v. Turnley, 3 Best & S. 62; Tipping v. St. Helen's Smelting Co. 4 Best & S. 62; Barnes v. Hathorn, 54 Me. 124; Addison, Torts, 74; Dargan v. Waddill, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Wier's Appeal, 74 Pa. 230.

All that can be required of the railroads is to use ordinary care and judgment in selecting the place for terminal yards, having regard to the comfort of adjoining proprietors, and the convenience of the public, and its own convenience.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Georgia R. & Bkg. Co.

the time when the extension should commence and be completed in any particular street, without reference to the time allowed for completing the original road; and if by the consent of the corporation the railroad company constructs its road through a street, with a proper rail laid upon the level of the surface of the pavement, leaving the whole street perfectly free for the passage of carts and carriages of every kind for the whole of the width thereof, except at the moment when the railroad cars are passing upon the track in the center of the street, such construction and operation of the road in the street will not be enjoined at the suit of one claiming to have been injured. Hamilton v. New York & H. R. Co. 9 Paige, 171.

A railroad company, having obtained full legislative authority, proposed to lay two tracks in the bed of a city avenue, with poles, and wires to supply electricity to operate the road. The avenue was 40 feet wide, and in places there would not be room enough for vehicles to pass or stand in the space between the tracks and the line of the street; but the street would not thereby be destroyed or seriously impaired for the ordinary use of the public as carriages and other vehicles could always pass unless the railway company blocked the street by permitting two of its cars, on different tracks, to remain stationary and side by side, which would not be permitted for an unreasonable length of time. It was held that such an occupancy of the street would give no right of action to an abutting landowner. Poole v. Falls Road Electric R. Co. 88 Md. 533, 41 Atl. 1069.

Where a grant of power by the legislature to the mayor and city council was ample to justify an ordinance designating the route of the railroad, and also to prescribe the mode, terms, and conditions of its construction, this certainly embraced the power to authorize by ordinance the making of any part of the road (which was to be constructed by tunneling under the city) by open cuts, if found to be proper and necessary in the construction of the road on the route

v. Maddox, 116 Ga. 64, 42 S. E. 318; London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45; Hill v. Metropolitan Asylum District, L. R. 4 Q. B. Div. 433; Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 362, 95 N. W. 385; Anderson v. Chicago, M. & St. P. R. Co. 85 Minn. 337, 88 N. W. 1001; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 435; Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669; Robb v. Carnegie Bros. 145 Pa. 324, 14 L. R. A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; Heerman v. Beef Slough Mfg. Boom. L. D. & Transp. Co. 8 Biss. 334, 1 Fed. 145; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164,

52 N. J. L. 221, 20 Atl. 169; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Romer v. St. Paul City R. Co. 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co. 17 N. J. L. 314; Carroll v. Wisconsin Cent. R. Co. 40 Minn. 168, 41 N. W. 661; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705.

Mr. Walter Stokes, for appellee:

In actions for nuisance, the owner, or tenant, must be the plaintiff. John T. Lelleytt owns the property as trustee. was in possession and using the same as a home for himself and family.

designated. And where such open cut on one side of a street was constructed as authorized by the mayor and city council, as provided in the act, an abutting owner on the opposite side of the street cannot complain that he will be deprived of the full use of the street as it existed before the open cut, and that his property will be depreciated in value by the construction of the road, as, if it be so, it is but an injury to whatever extent it may be suffered, of an incidental or consequential nature, and, the construction of the railroad being authorized by competent authority, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the Constitution of the state. O'Brien v. Baltimore Belt R. Co. 74 Md. 369, 13 L. R. A. 126, 22 Atl. 141.

Where a street surface railway owning the fee of its roadbed, lying between the two sections of one of the principal avenues of a large city, erected upon its own land a structure in the nature of an incline commencing at grade and rising gradually to a point where there was a curve in the track passing over said avenue, and there connecting with the tracks of an elevated railroad; and thereafter operated passenger trains over the structure in connection with the elevated railroad; the height of such structure where it passed the plaintiff's premises being from 9 to 10 feet; and the running of cars on the incline and the curve was at times accompanied with unusual and disturbing noises, and by unusual smoke and casting of soot and cinders over and beyond that before caused by operating the surface road,—it was held that this did not constitute such a nuisance that the court would enjoin the maintaining of it. Bennett v. Long Island R. Co. 89 App. Div. 379, 85 N. Y. Supp. 938, Affirmed in 181 N. Y. 431, 74 N. E. 418.

Both the appellate division of the supreme court and the court of appeals seem to lay stress upon the fact that when the avenue was laid out a railroad was in actual operation upon the land acquired for that purpose. L.R.A. (N.S.)

pose, and of which it was the owner in fee, and which railroad led to the laying out of a double street, one section on either side of the railroad strip; and the appellate division particularly distinguished its decision in the Eldert Case, because in the latter the incline was designed to connect a street surface railroad with the elevated road, and it was built upon a public highway, and such a structure imposed an additional burden upon the highway, not contemplated by the original consent of the property owners to the construction of the street surface railroad, and the highway commissioners had no power to authorize its erection; but in the present case the structure was upon the defendant's own property, and, being made solely for the purposes of its corporate existence, could not be regarded in itself as an invasion of any of the plaintiff's property rights, independently of the question of the legality of the union between the two roads: and the character of the defendant's road was not changed at all by the erection of the incline complained of in the action: and it was still a steam surface railroad, with the grade changed to the maximum height of 10 feet in front of the plaintiff's property, and whatever injury resulted from the change was to be regarded, under the authorities, as *damnum absque injuria*.

In Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871, it appeared that the railroad company had used and operated a viaduct, in connection with its other tracks, as a continuous line of railroad for the transportation of passengers and freight to and from its terminal passenger and freight station, and as a yard for shifting and making up trains; and that in consequence of the noise, disturbance, smoke, sparks, and noisome and unhealthy vapors occasioned and emitted by the defendant's cars and locomotives, great injury had been done to the plaintiff's property. It was not alleged that any injury had resulted from the erection of this elevated roadway, and the court said that it could not be truthfully so alleged, for the erection was on the company's own ground,

2 Wood, Nuisances, 1256; Kavanagh v. Barber, 131 N. Y. 211, 15 L. R. A. 689, 30 N. E. 235; 14 Enc. Pl. & Pr. p. 1107; 21 Am. & Eng. Enc. Law, pp. 721, 722; 1 Perry, Tr. § 328; 1 Wood, Nuisances, 33; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 521, 27 L. R. A. 236, 29 S. W. 104; Pierce v. Wagner, 29 Minn. 355, 13 N. W. 170; Story v. Hammond, 4 Ohio, 376; Kearney v. Farrell, 28 Conn. 317, 73 Am. Dec. 677; Ellis v. Kansas City, St. J. & C. B. R. Co. 63 Mo. 131, 21 Am. Rep. 436; Brown v. Chicago & A. R. Co. 80 Mo. 457; Downs v. High Point, 115 N. C. 182, 20 S. E. 385; Lockett v. Ft. Worth & R. G. R. Co. 78 Tex. 211, 14 S. W. 564.

The law does not allow anyone, whatever his circumstances or condition may be,

to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity.

Reichert v. Geers, 98 Ind. 73, 49 Am. Rep. 736; Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10; Rounsaville v. Kohlheim, 68 Ga. 668, 45 Am. Rep. 505; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463; Dicktown Sulphur, Copper, & I. Co. v. Barnes (Tenn.) 60 S. W. 603; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 534; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6,

or on the other side of the street from the plaintiff's property, the street being 51 feet wide, so that no part of the plaintiff's property, or any right of way or other appurtenances belonging to it, had been taken or used in the erection or construction of the viaduct. The court, after deciding to reverse a judgment for the plaintiff, for the reason that an improper rule of damages had been submitted by the trial court to the jury, said, further, that if the defendant had been guilty of a nuisance, if in the use of its road it made more smoke and dust than was lawfully allowable in the working of its machinery, and the plaintiffs were thereby injured, they had their remedy, but not for anything short of this, as any other rule would lead to this remarkable result, that the plaintiffs would be entitled to damages without having suffered any injury,—that is, for anticipated damages,—and for which a natural person could not be held liable. The case really hinged upon a provision of article 16, § 8, of the Constitution of 1874, which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." Two of the justices dissented without opinion.

Thereafter the case of Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690, arose, in which the rule laid down in the Lippincott Case was followed; and it was held that the railroad company was not liable to the plaintiff for constructing an elevated railroad in front of his premises, the passing of the cars on which created noise and burning cinders, smoke, dust, dirt, and jarring incident to the operation and use of the road so constructed, which injured him in the possession, use, and enjoyment of his premises and property, and rendered the same inconvenient, unfit, and of little or no use and value to him, and

deprived him of the enjoyment of his business as a painter, and depreciated the value of the premises, and deprived him of the free use of the street as a highway, as the same was *damnum absque injuria*; and in doing so the majority of the court, through the judge delivering the opinion, said: "The language of the Constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers of the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the Constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner and without negligence and without malice. Such injuries have never been actionable since the foundation of the world." One of the judges who had dissented in the Lippincott Case wrote an elaborate opinion in favor of the maintenance of the action, and in doing so used this language: "The injury to private property, no part of which is actually taken, resulting from carrying out, with reasonable and proper care, the public purposes for which a corporation is created and invested with the right of eminent domain, is regarded in the nature of a servitude fastened on the injured property by the *locum tenens* of the commonwealth for the public benefit, for which compensation is to be made in advance and once for all. The Constitution places such claims for compensation on precisely the same footing as claims for damages resulting to private property from an actual taking of a part thereof for public use." And he closed his exhaustive opinion by saying that the departure in the Lippincott Case and others was a mistake that ought to be promptly corrected. If he

note, 8 N. E. 537; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 741, 61 L. R. A. 188, 72 S. W. 954; 2 Wood, Nuisances, 1003.

The nuisance produced by the roundhouse was a recurrent one, which could be abated; and, therefore, no damage to the fee could be recovered.

Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 739, 61 L. R. A. 188, 72 S. W. 954.

It is no defense to this action to say that the terminal yard and the appurtenances are located in a convenient place, or that the same were operated with due care and caution.

1 Wood, Nuisances, 4-6; 2 Jaggard, Torts, 744; *Dolan v. Chicago, M. & St. P. R. Co.*

118 Wis. 362, 95 N. W. 385; *Austin v. Augusta Terminal R. Co.* 108 Ga. 671, 47 L. R. A. 755, 34 S. E. 852; *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315; *London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 50; *Madison v. Ducktown Sulphur, Copper, & I. Co.* 113 Tenn. 331, 83 S. W. 658; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Chicago, G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85.

No man's property shall be taken or applied to public use without consent of his representatives, or without just compensation being made therefor.

Tenn. Const. art. 1, § 21; *Naashville v. Nichol*, 3 Baxt. 340; *Gray v. Knox*

was right, and his argument would seem to have been a good one, as a reading of the opinion will exhibit, it would seem that, while the people by the provisions of their Constitution may perhaps control their general assembly, they cannot always control their courts, to whom is given, or who assume, the right to construe what they have said, in a manner different from the plain, express words of the organic law.

Where in an action against a railroad company the complaint alleged damages from the smoke of the locomotive, on the ground that it was prejudicial to the health and comfort of the plaintiff and his family, and alleged that the establishment as conducted was a "nuisance of the most flagrant character," and that the lives of the plaintiff's family, tenants, and inmates were endangered, it was held that the general charge that it was a flagrant nuisance could not be taken into consideration any further than it might be supported by the facts; that the smoke must undoubtedly be annoying to some extent, but was not more disagreeable or prejudicial than what might proceed from many lawful establishments in the place where the plaintiff's premises were situate; and that the evil of which the plaintiff complained was by no means peculiar to himself, but was the necessary concomitant of this species of locomotion, whether in the city or the country, which could not be prevented without an entire suspension of one of the greatest improvements of modern times. *Hentz v. Long Island R. Co.* 13 Barb. 646.

The result of the decisions of the Elevated Railroad Cases is such as completely to refute what was proclaimed in *Hentz v. Long Island R. Co.* 13 Barb. 646; and the circumstance that those roads, after settling with and paying the owners of property in a closely built city—the metropolis of the Continent—throughout their whole extent are to-day in the most prosperous condition and their stock prized highly by the best financiers, is proof of the fact. But this is not the only case in which the judge delivering the opinion has, without reference to

the point under consideration, talked grandiloquently about the sad times into which the country would fall if railroads and other corporations clothed partially with public authority were made to pay for the direct results of their injurious acts performed in their private capacity. Such instances frequently occur among the decisions.

A railroad company whose tracks are along one side of a river is not liable to the owner of land on the opposite side of the river for raising its tracks by an embankment to avoid high waters in times of freshet, where there is no allegation or proof that it was unskillfully or improperly done, and it does not appear how much damage to the plaintiff's land was caused thereby. *Moyer v. New York C. & H. R. R. Co.* 88 N. Y. 351.

Where by an act of the legislature the right is conceded to domestic corporations, legally created, to erect poles, abutments, and other works necessary for the operating and maintaining of their lines for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system, along all state, parish, or public roads and waters, and also along the streets of any city, with the consent of the council or trustees thereof; and the erection of a pole by a telephone company is accomplished with anterior proper authority, after compliance with all conditions precedent imposed by the state and city, and with as little inconvenience as possible to the owner and occupant of property in front of which the pole is erected and to the public,—it was held in *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63, that, if such construction and use of the pole were an actual nuisance at all, it was such as did not materially interfere with the comfortable enjoyment of the plaintiff's property, had caused little or no harm or injury to anyone, was easily bearable and must be endured in view of the great public service which the use of it rendered, and that there was nothing to show that the defendant had transgressed the authority granted, or ill-used, or misused, or

ville, 85 Tenn. 99, 1 S. W. 622; Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486.

The nuisance produced by the yard and its appurtenances amounts to a taking of the plaintiff's property.

Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104; Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 135 N. Y. 393, 17 L. R. A. 674, 31 Am. St. Rep. 838, 32 N. E. 148; Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L. R. A. 188, 72 S. W. 954.

The Fifth Baptist Church Case has been followed and cited in—

Methodist Episcopal Church v. Pennsylvania R. Co. 48 N. J. Eq. 455, 22 Atl. 184; Willis v. Kentucky & I. Bridge Co. 104 Ky. 186, 46 S. W. 489; Adams v. Chicago, B. &

N. R. Co. 39 Minn. 291, 1 L. R. A. 493, 12 Am. St. Rep. 644, 39 N. W. 632; Root v. Butte, A. & P. R. Co. 20 Mont. 358, 51 Pac. 156; Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 295, 10 N. E. 535; Smith v. East End Street R. Co. 87 Tenn. 636, 11 S. W. 712; Gainsville, H. & W. R. Co. v. Hall, 78 Tex. 173, 9 L. R. A. 300, 22 Am. St. Rep. 45, 14 S. W. 260; Stanford v. San Francisco, 111 Cal. 204, 43 Pac. 607; Bacon v. Boston, 154 Mass. 102, 28 N. E. 10; Edmonds v. Mob-erly, 98 Mo. 526, 11 S. W. 991; Snell v. Buresh, 123 Ill. 157, 13 N. E. 857; Haggart v. Stehlin, 137 Ind. 55, 22 L. R. A. 586, 35 N. E. 1001; Churchill v. Burlington Water Co. 94 Iowa, 92, 62 N. W. 647; Blanc v. Murray, 36 La. Ann. 165, 51 Am. Rep. 9; Larson v. Ring, 43 Minn. 90, 44 N.

abused the same so as to justify any plausible complaint; and a judgment dismissing the action brought for the removal of the poles was affirmed.

III. The English rule.

Not infrequently American courts have cited English cases as authority for the position, not only that the legislature has authorized a nuisance, but also that it has the power to do so. But when it is considered that the power of Parliament is absolute, and that it is in no way trammelled or restrained by inhibitions such as are contained in both Federal and state Constitutions in this country, the English decisions which hold that, because of the authority of the act of Parliament, the injuries which one sustains by reason of the carrying out of the provisions of the act with due care and without negligence or want of skill are *damnum absque injuria*, are not applicable in this country, where constitutional provisions prevail prohibiting the taking or (as provided in the Constitution of some of the states) injuring, causing damage to or destroying, private property rights, as well as the granting of special privileges and immunities. This truth is well stated by Smith J., in *Goodall v. Milwaukee*, 5 Wis. 38, as follows: "There is no doubt that the constitutional inhibitions upon the legislative power in this country, in favor of the protection and security of the individual citizen or person in his rights of property, however consonant with natural justice, constitute a peculiar feature of American legislation and jurisprudence. In England, the Parliament is said to be supreme, omnipotent, and to its mandates the highest, as well as the lowest, in all their rights and acquisitions, must yield. Not so here, all departments of government derive their powers from the prescribed consent of the people who are governed. In all of the states of the Union, as well as in the fundamental Federal compact, limits are fixed to each department of the government, and especial (L.R.A. (N.S.))

care is taken to protect and secure the individual citizen against the rapacity, corruption, or heedlessness of public functionaries, in all of the spheres wherein they may be called to act. Here, in this country, the legislature is not omnipotent, but is hedged about by those constitutional inhibitions which the executive and judiciary are bound to regard and enforce should the former become unmindful of their operative power upon the contemplated enactment. In this country we are not compelled to look to the purview of a statute to ascertain whether or not provision is made for compensation for private property taken or authorized to be taken for public use, but every citizen is assured by the fundamental law that his property is safe from aggression unless compensation is provided for in the act which authorizes its seizure, or that the act in that respect is null and void. Therefore, the question here is not whether an act of the legislature which authorizes the taking of private property for public use has provided compensation for the property so taken, in order to determine the right of the person whose property is taken, to compensation, because the fundamental law secures him against all such enactments, and renders them void or inoperative unless compensation be provided for, and can afford no immunity to the person or persons, artificial or natural, municipal or private, acting in conformity therewith."

And in *Sadler v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, the court said that the misunderstanding which had caused the diversity of decision upon the subject under consideration arose from the inadvertent citation of certain English decisions, which, by reason of the superior and unrestrained power of Parliament, could really have no application with us, and then proceeded to say: "The law in England undoubtedly is that if Parliament authorizes the actual taking of private property, or the construction and use by an individual or corporation of anything which is necessarily a private nuisance, or injures the property of individ-

W. 1079; *Costigan v. Pennsylvania R. Co.* 54 N. J. L. 240, 23 Atl. 812; *Ridge v. Pennsylvania R. Co.* 58 N. J. Eq. 172, 43 Atl. 276; *Evans v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 605, 39 Am. St. Rep. 911, 57 N. W. 356; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 25, 56 Am. Rep. 6, note, 8 N. E. 543; *Garvey v. Long Island R. Co.* 159 N. Y. 331, 70 Am. St. Rep. 554, 54 N. E. 59; *Frost v. Berkeley Phosphate Co.* 42 S. C. 413, 26 L. R. A. 697, 46 Am. St. Rep. 741, 20 S. E. 284; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 319, 25 L. R. A. 169, 24 S. W. 597.

The law will not, as a general rule, either in civil or criminal suits for nuisances, balance conveniences; and, when the violation of the public or private right is clear, it

will be no defense to show that the thing occasioning the nuisance may be of benefit to the public.

21 Am. & Eng. Enc. Law, pp. 689, 690; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 167; *Chicago, G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 492, 42 C. C. A. 178, 102 Fed. 85; *Illinois C. R. Co. v. Grabill*, 50 Ill. 244; *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 232, 35 N. E. 750; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 272, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 292; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 318, 56 Am. Rep. 1, 7 Atl. 432; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 518, 27 L. R. A. 236, 29 S. W. 104.

Mr. George A. Frazer also for appellee.

uals, and provides no compensation therefor, the courts can give no redress for the injury."

But there is still another reason why English decisions to the effect that an act of Parliament is a complete justification for what would otherwise be held to be the commission of a nuisance are inapplicable in this country; and that is, that so far as corporations, municipal and otherwise, are concerned, they are interpretations of the special act or charter of the corporation whose rights and liabilities are being considered, and generally, in connection therewith, of one of the acts there termed the "clauses acts," and more particularly what is known as the "land clauses consolidation act," "the railway clauses consolidation act," the "waterworks clauses act," and the "gas works clauses act." And therefore the cases of *British Cast Plate Mfrs. v. Meredith*, 4 T. T. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Biddulph v. Parish of St. George*, 3 De. G. J. & S. 493; *King v. Pease*, 4 Barn. & Ad. 30 (which was a case of a public nuisance, but which has been frequently cited for the proposition that what Parliament has authorized cannot be an actionable wrong); *Vaughan v. Taff Vale R. Co.* 5 Hurlst. & N. 679; *Hammersmith & City R. Co. v. Brand*, L. R. 4 H. L. 171; *Lea Conservancy Board v. Hertford*, 1 Cab. & El. 299; *London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 45; *National Teleph. Co. v. Baker* [1893] 2 Ch. 186; *Abraham v. Great Northern R. Co.* 16 Q. B. 586; *Boulton v. Crowther*, 2 Barn. & C. 703; *Cracknell v. Thetford*, L. R. 4 C. P. 629; *Stainton v. Woolrych*, 23 Beav. 225; *Harrison v. Southwark & V. Water Co.* [1891] 2 Ch. 409; and *Canadian P. R. Co. v. Roy* [1902] 12 A. C. 220,—all of which hold that the defendant in each was protected from liability by the act of Parliament, are of no practical value, because of the absolute power of Parliament to authorize the taking of private property, even to the extent of confiscation.

But even in England, while it is not in every case of nuisance that a court of equity will interfere by injunction,—as, where the 1 L.R.A. (N.S.)

injury is merely temporary and trifling,—it ought to do so in cases in which the injury is permanent and serious; and wherever the effect of a nuisance upon the value of the estate and the prospect of dealing with it to advantage will be affected by the continuance of a nuisance, the injunction should be granted. *Goldsmid v. Tunbridge Wells Improv. Comrs.* L. R., 1 Ch. 349.

The decisions of the Canada courts upon the question being considered are subject to the same qualification as the English decisions, except that perhaps it may be said that, where an act of the English Parliament enters into the discussion there, it operates in a somewhat similar manner, as a provision of organic law, as would a constitutional provision, so far as the Canadian Dominion Parliament, or any provincial parliaments, or the courts, are concerned.

In *Bennett v. Grand Trunk R. Co.* 2 Ont. L. Rep. 425, it was held that a railroad company, being authorized to carry goods, was not liable to the owner of a house because the air was polluted with a noxious smell from the animals loaded into cars near such house.

IV. Charter confers no immunity.

a. In general.

The question as to the effect of a legislative charter has arisen most frequently in cases of railroads, and therefore, to get the problem well in mind, the situation with respect to them will be examined. An individual may run a railroad on his own property without being liable for a nuisance to his neighbors, so long as, under all the circumstances, it constitutes a reasonable use of the property and comes within the maxim, *Sic utere tuo ut alienum non laedas*. If, however, the enterprise is too large for him to handle alone, and he decides to organize a corporation for that purpose, it is necessary for him to receive the sanction of the state by means of a charter, in order to secure the advantages which incorporation confers. But so far as

Wilkes, J., delivered the opinion of the court.

This is an appeal in the nature of a writ of error from a judgment against the Louisville & Nashville Railroad Company, the Nashville, Chattanooga, & St. Louis Railway, and the Louisville & Nashville Terminal Company for \$4,000 for alleged injuries from smoke, soot, dust, and noise claimed to be due to the operation of the railroad and terminal yards, roundhouses, etc., at Nashville, Tennessee.

The cause was tried before the Honorable J. A. Cartwright, circuit judge, and a jury. A motion for a new trial was duly made and overruled. A motion in arrest of judgment was then made and overruled. Due and proper exception was taken to the action

of the court, and an appeal was prayed to this court.

The writ was issued on August 25, 1902, and required the defendants "to answer John T. Lellyett, trustee, and next friend of Mary R., Mary Frances, and Catherine Lellyett in an action for damages in the sum of \$10,000."

The declaration contains six counts.

The first count alleges that, when "he [the plaintiff] became the owner of said property, and up to the time of the location of the terminal station and occupation thereof by defendants, said property was exceedingly valuable; the neighborhood was quiet, free from noise, smoke, and soot, and unpleasant gases, and in every way a desirable place to reside; that, owing to its loca-

the running of the railroad is concerned he is in precisely the same situation that he was in before. He now has authority to become an artificial being, and that being has authority to run a railroad, but it must still do it with full regard to the rights of other property holders. If, in addition, he desires to extend his road onto another's property or along a public street, he can secure the right of eminent domain by undertaking to become a public servant; but the authority so given him does not change his relations to his fellow citizens, except so far as he can compel them to surrender their property to him for due compensation, and to submit to whatever nuisance he chooses to create, also for due compensation. In other words, his charter and right of eminent domain have merely guaranteed the right to prosecute the enterprise, but have not relieved him of the duties as to making compensation which would rest upon him in their absence.

Interference with public rights without proper authority would make the enterprise a public nuisance.

Thus, where the charter of a railroad company gave them a right to construct their railroad across a watercourse, only on condition that the same should be restored to its former state, or in such manner as not to impair its usefulness, which condition was not fulfilled in building the bridge, the latter is both a public and a private nuisance, as much as though it had been erected without original license or authority, as the charter is a sufficient warrant for the erection and maintenance of a bridge, only when the bridge is erected in accordance with its terms and conditions. *Healy v. Joliet & C. R. Co.* 2 Ill. App. 435.

So, the erection and maintenance, by a street surface railway, of a wall of masonry and an iron structure to connect its railway track with an elevated railroad, extending 200 feet in a public highway or avenue, by a gradual slope, to a maximum height of about 10 feet above the grade of the avenue, in front of the property of an abutting owner on the avenue, without the consent

of the necessary number of abutting owners, as required by its charter, is a public nuisance; and where one of such abutting owners suffers special damage on account of the same, the maintaining of such nuisance will be enjoined at his suit. *Eldert v. Long Island Electric R. Co.* 28 App. Div. 451, 51 N. Y. Supp. 186, Affirmed in 165 N. Y. 651, 59 N. E. 1122.

So, a territorial legislature forbidden by an act of Congress to grant private charters or special privileges cannot confer the right to do so upon a city council, as such council could not, after the passage of the congressional act, exercise a greater power in this respect than the legislature which created it; and so acts of a railroad company under an ordinance of the city council, which if authorized by law might have been justified, no matter how much inconvenience to the public they might have occasioned, being without right, no matter how little inconvenience the permanent appropriation of a part of the street may occasion, cannot be defended from the charge of nuisance. *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 673.

The charter authority prevents the enterprise from being a public nuisance, but has no hearing on the question of presence or absence of nuisance which is strictly private.

Thus, when a railroad company obtains its charter from the legislature, there is an implied duty imposed that the company shall not in its exercise deprive others of their rights, or even incommode them, without becoming liable to respond in damages. *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263.

So, where a legislative grant authorized a railroad company to enter upon, take, and appropriate to their own use, on making a just compensation therefor, such lands as they might require for the use of their said railroads, and to cross all intervening waters and streams, this was as far as the legislative grant could go, so far as it affected private rights. The effect of the grant was to exempt the railroad company

tion aforesaid, and its freedom at the time from noise, dust, soot, smoke, and noxious gases, plaintiff had beautified said place with shrubbery, trees grass and flowers, which would enhance the value of aforesaid property intended for residence purposes."

The declaration then proceeds to state that the terminal company was chartered and authorized to erect a terminal station in Nashville, and did erect the same; that afterwards, under some arrangement with the defendant companies, they have been in the use, operation, and occupation of the same; that the terminal yards or grounds lie in close proximity to the plaintiff's property, and defendants have constructed large numbers of tracks thereon, and operate a large number of engines and cars over

them; that the noise from the engines and cars is unreasonable and constant day and night; that the defendant companies use a cheap and low grade of soft coal in their engines which emit volumes of black, dirty smoke, defiling everything with which it comes in contact, which is due to the negligence of defendants in the operation of their engines; that the engines emit poisonous and noxious gases, which often lie over plaintiff's property like a pall; that defendant's negligently erected, in close proximity to plaintiff's property, large coal bins or chutes, upon which thousands of cars of coal are dumped from a high elevation, causing dust and dirt to arise therefrom, which pass over and settle on plaintiff's property; that defendants have erected

from all liability as respects the public, to indictment for nuisance, or otherwise; but it left all rights of property unaffected. It gave merely a franchise and the title and rights of a private corporation. It conferred, and could confer, no exemption upon the defendants for wrongs to the rights of private property. *Robinson v. New York & E. R. Co.* 27 Barb. 512.

And so, where the railroad company had, in the construction of its road, crossed a stream, and, in doing so, had excavated and removed the banks of the stream in such a way as to alter and change the same to the injury of the plaintiff's lot, it was liable for the damages sustained by him, and was not protected by the act of the legislature constituting its charter. *Ibid.*

And this, notwithstanding it appeared, and was not controverted, that the means provided by the railroad company for disposing of the water of the stream were sufficient to pass all the water in the highest flood that had ever been known; and that the flood which did the damage to the plaintiff's premises was much the highest flood that had ever been known in the stream. Speaking of the effect of the legislative act under which the railroad company was incorporated, the judge writing the opinion of the general term of the supreme court said: "But I do not see that this act relieves the defendants from their liability in this action. The right of the defendants to construct their railroad across this creek is not denied, and is undeniable. But this act of the legislature merely gave authority to the defendants to cross this creek. It did not, and could not, give any authority to them to invade any private right without just compensation. The force of a legislative grant of this kind is well declared in the case of *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, recently reaffirmed in *Brown v. Cayuga & S. R. Co.* 12 N. Y. 487."

This would seem to be a succinct but comprehensive statement of the doctrine of the courts and judges who hold that a legislative act which confers upon a corporation the right to exercise eminent domain does

not, of necessity, justify it in committing a private nuisance, or a public nuisance from which a private individual specially suffers, with impunity, and without compensation.

So, a charter of a street railway company authorized it to lay down and maintain its railway in the streets of a city, subject to such restrictions as might be imposed by the common council. The city authorities afterwards adopted an ordinance authorizing the company to lay a single track with turnouts, which was done under the personal direction of the city engineer. In doing so the track of the railroad was so built as to cause a permanent obstruction to the passage of water in a gutter which had theretofore existed in the street, and in consequence the water was cast back upon the plaintiff's premises, and caused damage to his garden, vegetables, flowers, and shrubbery. The court, in *Alton & U. A. Horse R. & Carrying Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509, said that, where an incorporated company of this character accept their charter and construct a railway, it is an implied condition that they will not injure others by its construction or maintenance, and that when they adopted the conditions imposed by the city and the plans prescribed by its engineer they made them their own, and having accepted them they were responsible for the damages resulting to others by the construction of the road, to the same extent and precisely as though the plan had been suggested and carried out by an engineer of their own; and it appearing that a culvert constructed under such plans and directions was not sufficient to discharge the water as it had formerly run through the gutter, but threw it over upon the plaintiff's land, garden, etc., to his damage, the defendants were liable therefor.

b. Railroad charters.

1. In general.

In any consideration of this question, the fact must be kept constantly in mind that a railroad as it is ordinarily operated is not a nuisance, and if it has proper legislative

a large roundhouse, with a number of pipes or smokestacks, where they fire up and cool off engines, some of which are permitted to remain in said house an unreasonable length of time, and from the smokestacks of which roundhouse the smoke passes over to and settles on the plaintiff's property; that plaintiff's property is not worth near as much as it was before the erection of said depot and terminal station, and said decrease has been owing to the wrongful acts of defendants; that said smoke, soot, creosote, cinders, dust, and gases have permanently reduced and injured the value of plaintiff's realty, and have destroyed plaintiff's shrubbery, trees, grass, and flowers; and that plaintiff has been damaged the sum of \$10,000.

authority it cannot be treated as a public nuisance, even if it is located in a public street. In order to give a private right of action, therefore, the fact that a nuisance has been created in the particular instance must be shown.

Thus, in *Hayes v. Waverly & P. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648, in considering another question the chancellor said that a railroad existing under authority of law was not a nuisance.

So, in considering another question, in *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460, the court said, among other things, that a railroad track laid upon a street of a city by authority of law, properly constructed and operated in a skilful and careful manner, is not, in law, a nuisance.

So, in *Baxter v. Spuyten D. & P. M. R. Co.* 61 Barb. 433, it was held that it was lawful for a railroad company to cross a highway at grade, and that doing so was not a nuisance or a trespass which a court of equity had power to restrain, when done in the ordinary construction of the railway under an act of the legislature authorizing its construction.

So, where the fee in the streets of a city is in the public, or in the municipality in trust for the public use, the doctrine is settled that the legislature may authorize such streets to be used by a railroad company without compensation to adjoining owners or to the municipality, and without the consent and even against the wishes of either. And where a railroad company has been so authorized to construct and operate its road in a public street, although there may at times be a temporary obstruction and delay and inconvenience to vehicles other than the railway carriages, these are inconveniences to which individuals may be temporarily subjected, and to which the public interests are entitled; and where a street was, after the construction of a railroad, sufficiently wide for its use, and while the trains were passing or stopping along the street ordinary vehicles were somewhat restricted in their movements and passage, 1 L.R.A. (N.S.)

The second count is substantially the same as the first, except that it alleges damage to "his household furniture, ornaments, silver, and such articles," and that the smoke settles upon plaintiff's house and injures his personal property.

The third count alleges the same as the first count, but the damage claimed is for injury to the health of his family.

The fourth count alleges the same facts, and the damages claimed are for permanent injury to the property.

The fifth count alleges the same facts, and avers damage as follows: "Thereby damaging and injuring the furniture, hangings, fixtures, carpets, and property of the plaintiff and his family, ruining and de-

this was not such unreasonable delay and obstruction as would justify a court in enjoining the railway company from the enjoyment of the right which had been granted. *Harrison v. New Orleans P. R. Co.* 34 La. Ann. 462, 44 Am. Rep. 438, Approved and followed in *Tilton v. New Orleans City R. Co.* 35 La. Ann. 1062.

So, in an action brought by the owner of a lot upon a street in a city, upon which was a church, a schoolhouse, and a dwelling house, all of which had been erected long before the existence of any railway, and the church had been used continuously for public worship and religious ceremonies, and many children had continuously attended the school, and the dwelling house had been continuously occupied, the plaintiff sought to recover damages for the occupation of the street by the defendant railway company. The answer alleged that the railroad company, duly authorized by statute, had placed their track in such street as authorized by an ordinance of the city; and alleged that the only obstruction to the entrance upon and exit from the plaintiff's property was temporarily by passing trains operated in the usual, ordinary, systematic, and necessary conduct of the business of the company; and denied that the plaintiff had any easement in that part of the street occupied by the track, or, if he had any special easement, that any damage had been done thereto. A demurrer to the answer was overruled, and such judgment was approved on appeal, the court holding that the laying out and operating of a railway upon a street is not necessarily an unreasonable obstruction of its free use, but rather a new and improved method of using the same, germane to its principal object, and that for such consequences thereof as appear in this case there is no remedy, public or private. *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153.

So, in *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497, it is said that neither the constituted authorities of a city nor the legislature of the state could either license a private nuisance, or take or

stroying its use by the plaintiff and his family to his damage \$10,000."

The sixth count alleges similar facts, and claims damages as follows: "And that their result is to destroy the health, peace, comfort, and happiness of his family, and that their peace, health, comfort, and happiness have been injured and destroyed by said reckless, careless, negligent, and wilful conduct, to the extent of \$10,000."

The defendants demurred on three grounds:

First. Because of misjoinder of parties and misjoinder of causes of action, in that the suit was for damages for permanent reduction of the value of the property and for damage to the household furniture, and that the smoke and soot had been carried

into the systems of the plaintiff and his family, whereby their health was greatly injured; that the plaintiff, as trustee and next friend, cannot sue for injury to the real estate in the same action in which he sues for injury to the health of the parties for whom he is trustee and next friend; that the plaintiff's ownership of the property is joint, and the injury to the health of the plaintiffs is several.

Second. That the declaration is insufficient in law, because it is uncertain, indefinite, and ambiguous.

Third. For misjoinder in causes of action in suing for permanent decrease in the value of real estate, and also for injury to personal property, household furniture, and for loss of personal comfort and health.

encroach on private property without the owner's consent or the payment to him of adequate damages, or appropriate any street in the city to any use to which it was not originally dedicated, unless the consent of all those immediately interested in such street should be given, or just compensation should be first made to them. But, even though some persons owning property on the railroad street may be subjected to some inconvenience, and even loss, by the construction and use of the road, yet, if the use made of the road be consistent with the purpose for which the street was established, and also consistent with the just rights of all, such persons have no right either to damages or to an injunction, because they purchased their property and must hold it—as all others purchase and must hold town lots—subject to any consequences that may result, whether advantageously or disadvantageously, from any public and authorized use of the street, in any mode promotive of, and consistent with, the purpose of establishing them as common highways in town, and compatible with the reasonable enjoyment of them by all others entitled thereto. As the legislature and the local authorities of the city authorized the construction of the railroad through the city, and also authorized the company to employ upon it cars and steam power,—and the more especially as such improvements in the means of transportation must be useful to the traveling and commercial public, and, in many respects, obviously advantageous to the local public of the city itself,—*prima facie*, the ordinary and careful use of the road, as thus authorized and prescribed, should not be deemed a nuisance, public or private.

Parts of the foregoing have been cited in support of both the affirmative and the negative of the question under consideration, but in reality the effect of the long-drawn-out opinion in this case was to simply decide that a decree of the chancellor and his opinion upon which it was founded, that a railroad should be enjoined from running through the streets of a city, notwithstanding it had the authority of the legis-

lature and the license of the municipal government, because thereafter it might absorb the whole street, should be reversed.

So, it has been held that an adjoining proprietor can never be entitled to recover from a railroad company organized under the general railroad law of the state for the depreciation in the rental or sale value of the premises because of the location of the track in the street, except upon the assumption that the location is of itself unlawful. Such location is unlawful as to him if he owns the soil in the street; but if he does not, and the placing of the track there is permitted by competent authority, the incidental injuries he may suffer from the location of the track and from the proper and reasonable conduct of the business of the railroad company upon it can afford no ground of action unless the statute gives one, as in that particular he is on the same footing with all the rest of the community. He may have the incidental benefits without compensation, and he must submit to the incidental losses without redress. A railroad is not a public nuisance, and no right of action can arise against the company until, by negligence or improper management, it does or suffers to be done something injurious to the abutting proprietor which the permission to occupy the street did not justify. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

And so, a railroad constructed on the streets of a city, under the authority of the general statute permitting the same, and with the license or consent of the city authorities, if it be constructed and operated in a lawful and proper manner is not a nuisance of which an abutting owner may complain. *Milburn v. Cedar Rapids*, 12 Iowa, 246.

So, it has been said that where a railroad company had authority to make their road where it was, with its terminus at a particular street, they were entitled to the ordinary and necessary uses and advantages of their position, and would not be responsible for any unavoidable annoyance or

Identical demurrers were filed by all the defendants. The court sustained the demurrers as to the claim for damages to the plaintiff, John T. Lellyett, individually. In all other respects the demurrers were overruled, to which due exception was taken.

The defendants filed pleas raising the same questions. The defendants' first plea was the general issue,—not guilty.

The second plea was a special plea in which the defendant companies' charters were averred. The plea then further alleged that when the company's road was first built, Nashville was a village with few inhabitants; that the property on which plaintiff's residence is now situated was vacant; that defendants' shops and terminal facilities were located at the extreme west-

ern edge of the town, and that the only feasible location for them was there; that they continued to operate said shops and terminal facilities at such point until the town increased in size, and there was an absolute necessity for larger shops, depots, bigger grounds and terminal facilities, and for new depots for passengers and freight; that, pursuant to this demand, the city of Nashville, a number of years ago, authorized the closing up of certain streets and alleys, and later on the raising of certain streets and the building of certain overhead bridges; that the city itself spent large sums of money in making these improvements; that, in order to furnish a suitable depot and terminal facilities, the railroads entering Nashville co-operated; that the

disturbance such uses might cause, where it did not appear that they created any more noise and confusion than was usual or customary under similar circumstances, and that to permit and encourage them to construct their road at a heavy expense, and then to deny them the privilege of using it for the ordinary and necessary purposes of such a work, would be inconsistent with every principle of justice and common sense. *Bell v. Ohio & P. R. Co.* 25 Pa. 161, 64 Am. Dec. 687.

Where, in an action against a railroad company, the petition proceeded upon the theory that the defendant had constructed its track on the street of a city without any lawful authority, and the action was for a nuisance created by malfeasance, and not for a nuisance resulting from misfeasance, and it was stated by the plaintiff's counsel at the argument of the cause that for the purposes of the appeal the right of the defendant to construct and operate its road on the street might be assumed by the court, it was held that this admission disposed of the case; that, it being conceded that the defendant had authority to construct and operate its road on a street, it could not be chargeable with thereby levying a nuisance, unless it had either constructed or operated its road in an unlawful manner, as a railroad track laid upon the street of a city by authority of law, properly constructed and operated in a skilful and careful manner, is not, in law, a nuisance. *Randle v. Pacific R. Co.* 65 Mo. 325.

So, where a railroad company duly incorporated by an act of the legislature has been granted the privilege of constructing a tunnel through a public street in a city, by the corporation, a court of equity has no jurisdiction to restrain the construction of the work, or the use of it when completed. *Hodgkinson v. Long Island R. Co.* 4 Edw. Ch. 411.

So, where an act of the legislature authorizes the construction of an elevated railway in a particular manner, and the railway company is proceeding to construct it in the manner directed in the act, a court cannot

by injunction interfere with such construction on the ground that it is a nuisance. *Currier v. West Side Elev. Patent R. Co.* 6 Blatchf. 487, Fed. Cas. No. 3,493.

Therefore the question whether the owner of a lot abutting upon a street may maintain a common-law action, where the structure in the street imposes no new burden on the soil owned by him, depends upon whether or not the occupation of the street with such structure results in damage to his property, peculiar and different in kind from that which is suffered by the community in general; and by "community in general" is meant those who reside in the immediate vicinity of the railroad owned by the company erecting such structure, and are subject to the inconvenience incident to such a structure. The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as the community in general. And injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road; and for such injuries there can be no recovery in the absence of a statute entitling the owner to maintain such action. *Decker v. Evansville Suburban & N. R. Co.* 133 Ind. 493, 33 N. E. 349.

The fact that one has recovered judgment against a railroad company for damage to his lands as the result of the erection of their road, which did not touch his lands, and which was carefully and skilfully erected in accordance with authority duly conferred by statute, which judgment the railroad company has never paid, does not entitle such an one to maintain an action to have the erection declared a nuisance and to have the same abated. *New Albany & S. R. Co. v. Higman*, 18 Ind. 77.

2. Injuries from location and construction of road.

The general rule is that in the location

public business increased, and thus increased the operations in the terminal yards; that the erections complained of were built pursuant to lawful powers, and that the damages complained of are such as are suffered by all persons who live in a city which grows and expands, and who happen to reside near any coal-burning concern that cannot move from place to place; that the location was determined by public necessity and convenience and the demands of commerce, as well as by charter rights; and that the original road was built long before plaintiff's residence was erected, and the proximity of its depots and yards to plaintiff's house has come about by reason of necessary expansion in serving the public.

The third plea was that the topography

of the city of Nashville rendered any other location impracticable.

The fourth plea was based upon the public convenience and public necessity for locating the terminal facilities within reasonable reach of the public.

The fifth plea recited the charter of the Nashville & Chattanooga Railroad, and the original location of its road where the present tracks are situated; the original charter of the Louisville & Nashville Railroad Company; the construction of its railroad in Tennessee; its extension from its original depot, on the west bank of the Cumberland river, through the territory now occupied and past plaintiff's residence; the original charter of the Tennessee & Alabama Railroad, the Nashville & Northwestern Rail

and construction of its road a railroad company is in precisely the same situation as any private property owner. If it creates a nuisance to adjoining property, it must answer therefor.

Thus, a railroad company cannot be justified in an injury to private property any more than a private individual, unless the act causing the injury was done as the agent or in behalf of the government and to effect an object of public interest. In the construction and use of their railroad they are not acting in the capacity of public agents, but as an incorporation pursuing their own interest in the mode warranted by their charter; and if in the lawful exercise of this power they inflict an injury upon the private rights of others they must respond in damages for such injury; but such an injury, however, must be the natural and direct result of the act itself, and not a consequence which results from the fears, prejudices, passions, or caprices of the public. *Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314.

An act of the legislature which gives a railroad company which it incorporates the right to build a road between certain localities gives the company no more absolute right to build the road in question than the common law gives every man to build upon his own ground; and the act becomes unlawful in the one case precisely upon the same principle and to the same extent as in the other. And in *Tinsman v. Belvidere D. R. Co.* 26 N. J. L. 148, 69 Am. Dec. 565, it was held that, because the charter of the railroad authorized its construction over such a route as made it necessary to cross a stream, that gave the defendant no right to erect a dam or embankment so as to injure the plaintiff's right of navigation; the embankment in this case being declared a private nuisance.

So, a railroad company is liable for the diversion of surface water by ditches along its right of way, where an individual would be liable therefor, although the legislature has authorized the construction of the road, 1 L.R.A. (N.S.)

and the work which caused the diversion is necessary, and is skillfully and carefully performed. *Staton v. Norfolk & C. R. Co.* 11 N. C. 278, 17 L. R. A. 838, 16 S. E. 181.

In that case it was held that the lack of any constitutional provision against taking property for public use without just compensation does not prevent a railroad company from becoming liable for consequential damages to property incidentally injured by the construction of its road under legislative authority, as in the case of diversion of surface water to the injury of a neighboring proprietor. The court in answer to the claim of the defendant that, inasmuch as the legislature had authorized the defendant to construct its road, it was not liable to an adjacent proprietor for any damage incident to such construction, provided the work was necessary and was skillfully and carefully performed, said that it was true that some of the cases from other states go to the extraordinary length of sustaining that proposition; but that they were not in accord with the more recent and better authorities, and were rapidly being submerged by the steady and increasing current of judicial decision; and said that Mr. Lewis, in his excellent work on Eminent Domain (§ 566), referring to cases of a similar character, remarks that the underlying such decisions "is an erroneous assumption as to the rights acquired by the purchase or condemnation of property for public use. This assumption is that there is acquired, not only all the ordinary proprietary rights in the property taken, but also certain proprietary rights which pertain to the property not taken. . . . There is no warrant for this assumption either in reason or authority outside of the particular cases referred to. There is no reason why a railroad, in purchasing or condemning property for its use, should be held to acquire anything more than would be acquired by a private individual purchasing the same property for the same use."

A private corporation stands on the same ground as individuals not clothed with corporate privileges, in respect to responsibility

and the Nashville & Decatur Railroad, and other lines extending into Nashville, and their ultimate connections through Nashville and along the tracks now used for criminal purposes near plaintiff's residence; the charter of the Louisville & Nashville Terminal Company, and its construction of the terminal facilities, and its lease to the two railroads. The plea further averred that the present terminal facilities were built in order to serve the public and to meet a public demand, and that they are operated solely by the railroad companies, and not by the terminal company; that in said operations said companies used machinery and engines manned by suitable, competent, and skilled employees, and burn the same coal which has been used by railroads in

this section since long before the plaintiff became the owner of the property which he claims is injured; the soft coal is the only practicable fuel in the south, and that defendants make no more smoke, noise, dust, ashes, etc., than arise from a reasonably skilful and careful operation of their business; that plaintiff acquired the same property, for the alleged injury of which damages are claimed, when defendants were already operating many engines and trains, and doing a large amount of switching upon their own premises in the necessary transaction of their business, and that the additional smoke, etc., is due to the increased traffic rendered necessary by service to the public; that the location of the yards and terminal facilities was the most reasonable

lies for injuries for which its charter allows no remedy; and a railroad company which crossed bottom lands, and which, in building their railroad across such bottom land, and a bayou which drained them, raised a heavy embankment across the bayou and a portion of the bottom, thereby greatly increasing the force and current of the stream at its high stages, and forcing the waters onto the plaintiff's land, is liable to the latter for the damage thus caused. Evansville & C. R. Co. v. Dick, 9 Ind. 433.

And statutory authority which confers upon a railroad company, or its grantor, the right to construct a bridge and embankment across the stream gives it no right to obstruct the flow of the water in the stream, and cause the same to flow back upon the lands of a private individual; and hence a complaint which charges a railroad company with such obstruction of the flow of the water of the stream by its bridge and embankment sets forth a wrongful and unauthorized act on the part of the railroad company and its grantors,—the creating of a nuisance. Orris v. Elmira, C. & N. R. Co. 17 App. Div. 187, 45 N. Y. Supp. 367.

In an action against a railroad company the complaint alleged and the evidence warranted a finding of an obstruction by the company of the natural course of the water of a stream, and of the insufficiency of a culvert to pass water at all times, by reason of which water was thrown upon the plaintiff's property to his injury. It was held that the maintenance of a nuisance by the railroad company was thereby established, and that the plaintiff was not required to base his action on negligence simply, the statutory authority to construct the railroad being no defense. Mundy v. New York, L. E. & W. R. Co. 75 Hun, 479, 27 N. Y. Supp. 469.

So, if the legislature authorizes a public work to be constructed, and, as the Constitution does impliedly in every case, couples with its authorization the declaration that the person or company to whom the authority is given shall not take, damage, or destroy the private property of the citizen in L.R.A. (N.S.)

order to accomplish the contemplated purpose, unless compensation therefor is first made, then the authority must be received and exercised with the limitation with which it is given; and if not so exercised, and that be taken, damaged, or destroyed which can only be taken, damaged, or destroyed for a public purpose after just compensation, then, in so far as the unauthorized act affects private rights, it gives cause for private action, and the act stands as though no legislative permission was ever given, in so far as the right of the injured person to recover damages is concerned. Gulf. C. & S. F. R. Co. v. Fuller, 63 Tex. 467; Citing, approving, and following Gulf. C. & S. F. R. Co. v. Eddins, 60 Tex. 656, and approved and followed in Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

So, in Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810, the declaration charged that the defendants wrongfully, etc., dumped and filled into and upon the natural surface of lands near to the plaintiffs' lot and dwelling houses a vast quantity of earth, gravel, stones, and other filling, and raised embankments upon said lands to a height of 30 feet, and thereby forced and pressed large quantities of the said earth, etc., into and upon the lot of the plaintiffs, beneath the surface of the same, and thereby upheaved and greatly disturbed the surface and soil of his lot, and forced and carried the dwelling houses out of their proper position upon said lot and upon the lands of others, and caused the foundation thereof to fall away, crack, and crumble, and the walls to become broken and to topple and lean over, etc. The defendants by a special plea justified as lessees of another railroad company organized under the general railroad law and authorized to lay out, construct, and maintain and operate a railroad between certain designated points, and averred a survey and location of a railroad by the company, duly made and filed, and that the company had acquired title to lands required for the construction of its railroad, and that the defendants as such

and practicable location to be found, considering the necessities of the public as well as the railroad companies; that defendants rely upon their charter rights for locating and operating their depots, roundhouses, shops, and other terminal facilities, and for operating and running trains in said yards.

The defendants also filed pleas of the statute of limitations of one and three years.

They also filed a plea known in this record as the "John Doe plea," which is that this property and the plaintiff's property were originally owned by one John Doe, who, for a consideration, conveyed the property now owned by the railroad companies, and over which these operations are had, to the railroad companies, etc. But no proof was introduced under this plea, and it was stricken out.

lessees, in order to carry into effect the object of the incorporation of the company, proceeded to construct the road upon said lands with reasonable prudence and care, doing no unnecessary damage to private or other property, and did, in the prosecution of the said work, necessarily, with reasonable prudence and care, doing no unnecessary damage to private or other property, dump and fill into and upon the natural surface of their own lands so acquired a quantity of earth and other filling, and raise and bank up upon said last-mentioned lands embankments of great height, as they lawfully might do for the causes aforesaid, which were the supposed trespasses or grievances of which the plaintiffs complained. The court said that the merits of the controversy arose upon consideration of the pleas filed by way of justification, and that the doctrine of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, and *Thompson v. Pennsylvania R. Co.* 51 N. J. L. 42, 15 Atl. 833, was not applicable to acts done under legislative sanction, which were essentially private wrongs and a direct invasion upon private property, and that for such injuries the company's charter afforded no justification, and that the plaintiffs were entitled to judgment on the plea.

So, in Tennessee the rule that lands lying at a lower level are burdened with the servitude of receiving all waters which naturally flow down to them from lands adjoining and upon a higher level has been adopted and applied not only to living streams, springs, etc., but also to surface water and waters falling as rain or snow upon such higher lands. *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 25 Am. St. Rep. 670, 16 S. W. 64. And so it has been held that it is the duty of a railway company to provide culverts or other means for the safe passage of accumulated surface water, and that they are liable for damages resulting from injuries to adjacent land by waters backed upon such land for want of proper provision for the escape of such water through the railway embankment. *Ibid.* 1 L.R.A. (N.S.)

Plaintiff joined issue on all the pleas except the last named.

The evidence on behalf of the plaintiff tended to show that, at the time he acquired this property, Gowdy street was a quiet street, suited for residence purposes; that there was no unusual noise, and no unusual amount of dust, dirt, and cinders; and that it was a comfortable place to live. The coal chutes complained of are used for dumping coal from cars into bins, to be used in firing engines; that the cars are hauled up on an inclined trestle, from which the dumping is done. That the roundhouse has some 10 or 12 stacks running up about 4 feet into the air.

That there is a sand or dry house in the yards; that in the terminal operations trains are made up in the yards, and that

As against a municipal government in the careful exercise of its right to grade, change, and improve streets there can be no cause of action for any unavoidable injury done; but as against a private corporation such as a railroad company, in no wise connected with the municipal government obtaining authority to use the streets in an extraordinary manner, for its own private purposes and profit, the case is quite different. As against such a party the owner of a plot of ground, with a building thereon bounding on a street, is entitled to the natural support which the bed of the street may afford to the foundation of his house, and notwithstanding authority may have been obtained both from the city and the state legislature to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power the party producing it must be held liable; and this, though due care be exercised, if the injury is the natural or inevitable result or consequence of the doing of the act authorized to be done; and in such cases the party doing the act and producing the injury must indemnify the sufferer; and it is no answer to the claim for such indemnity, that there was no negligence or want of care in doing the work. *Baltimore & P. R. Co. v. Reaney*. 42 Md. 11.

Obstructing egress from property at highway.

Where a railroad is located in a street in such a way as to obstruct the passage of and from abutting property, it has taken an easement of the property owner, and has therefore, taken property, within the meaning of the constitutional provision requiring compensation. But many such cases, instead of being decided on that ground, have been placed on the ground that a nuisance was created.

In *Jeffersonville, M. & I. R. Co. v. Esterl* 13 Bush, 667, it is said that, notwithstanding a railroad company which enters upon

switching and operations of engines and cars are practically constant; that coal is dumped day and night and on Sunday. That the switch engines move forward and backward continually, and frequently stop opposite plaintiff's house, and the noise and smoke from them come directly to his house. That the first discomfort he experienced on account of the smoke, noise, etc., was after the terminal yard opened. That his family consists of his wife and three children, and they suffer from these discomforts proceeding from the terminal yards. That as many as 12 or 15 engines can be seen in the yards at one time, and, when the smoke from these comes over his premises, he can smell it. Sometimes it is impregnated with gas, and causes coughing.

the occupation of a street by its road with the approval and express consent of the city authorities has the right, so far as the general public is concerned, to keep and maintain its railway tracks and to pass its trains over them, if the tracks have been so located as unreasonably to obstruct the ingress to and egress from a lot abutting on the street, by its owner, such lot owner is entitled to recover for the damages directly resulting therefrom.

The owner of a lot abutting on a street may maintain an action against a railroad company maintaining tracks in the street so as to cut off his access to and from his property, and so as to injure his building by casting soot, smoke, and fire into and against the same. *Maysville & B. S. R. Co. v. Ingram*, 16 Ky. L. Rep. 853, 30 S. W. 8.

So, in *Smith v. Southern P. R. Co.* 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 1, in which a railroad located in a public street contended that since it had not changed the grade of the street, but had merely interfered with the convenient use of the street by the abutting lot owner, the liability was adjudged. The court says it is no answer to say that it was necessary to build the road in the way it was built. "Whatever appellant's necessities were in the premises, if what it actually did caused special and peculiar damage to respondent, it is liable for such damage."

An early New York case held that a statute which authorizes a railroad company to enter upon and occupy a public highway in laying the track of their road relates only to the public property in the road, to the public use and enjoyment of it, without intending to interfere with any private or individual interests that may be concerned. Such a statute effectually protects the company if they comply with the conditions, from an indictment, or against any interference with their works as a public nuisance, on account of their occupation of the highway, but not against claims for private damages arising from consequential injuries to adjacent owners. In this case no provision for such injuries was made, be-
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In the summer time the front windows of his house cannot be opened for any length of time without experiencing trouble from cinders, soot, and smoke. The furnishings in the house belong to his wife, and he holds the house as trustee for his wife and children, under a deed to him from his mother. He valued the entire property at \$7,000 and furniture at \$1,500.

There was evidence tending to show that the grass, trees, shrubbery, and flowers in the vicinity died, and that the smoke, soot, and noises were unpleasant, and they disturbed the sleep of himself and family, and damaged both the house and its furniture and furnishings; that there was considerable noise from the ringing of engine bells, but the whistle was seldom blown. That

cause no authority was conferred to commit them. The company had a right to occupy the road, but they must occupy it, at their peril, in a way not to prejudice private rights. And so where in using the said road, the railroad company erected an embankment which obstructed the passage of an adjacent landowner to and from his premises, and by reason of such embankment his premises were frequently inundated with water, and injured and damaged thereby and greatly depreciated in value, the railroad company was liable to him in an action therefor. *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462.

It was said in *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, that this case stood upon somewhat questionable ground. Alluding to such statement, the judge who delivered the opinion in *Bellinger v. New York C. R. Co.* 23 N. Y. 42, intimated that it had been overruled by the *Radcliff* Case, and in *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536, and *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 113, 6 N. E. 663, it is stated positively that it was overruled by both the *Radcliff* and the *Bellinger* Case. But as the doctrine asserted in the *Fletcher* Case has been repeatedly approbated by courts of the highest authority in England and in this country,—including New York—loose statements to the effect that it is "questionable ground," or that the case has been overruled, would not seem entitled to a great deal of weight.

The first count of a declaration set out that the defendants, a railroad company, had carelessly, negligently, and unskillfully caused to be constructed an embankment in front of and near to the dwelling house of the plaintiff, by reason whereof he did not have and enjoy passage into and upon his lands and to and from the dwelling house, and was deprived of the use of his office, and that because of the embankment his dwelling house was frequently inundated with water, so that he was deprived of the use of his cellar and basement; to which the defendants pleaded that they were incorporated by an act of the legislature, and

the plaintiff had been in the habit of taking his family to the country in the summer, leaving the city the 1st of June, and remaining away until in September. That the noises from the terminal yards had a tendency to disturb the nervous system, and were disturbing to visitors, but one would get accustomed to it, though at the expense of nervous force.

The defendants introduced in evidence the charters of the several railroads composing the lines using these yards for terminal purposes, and also the charter of the Louisville & Nashville Terminal Company, which constructed the yards and leased them to the two railroad companies, together with the lease itself, the ordinance of the city of Nashville, and the contract between the city

and the terminal company for the construction and operation of the yards. It is not necessary to refer to these charters, lease consolidations, and connections more in detail.

Owing to the immense growth in travel and traffic, it was deemed advisable and necessary, for the benefit and convenience of the public, to provide new and enlarge terminal facilities at Nashville; and a lot was selected, centrally and conveniently located on Broad street and embracing something like 100 acres, upon which was erected a passenger station house and roundhouse, and coal chutes and bins, as a sand house, and a large number of tracks used for switching and other purposes. This was in 1900.

by such act they were authorized, on paying a turnpike company a certain sum, to take and possess all the rights, privileges, property, and estate of the company, and use and enjoy the same; and that they had done so; and that in laying their track upon and over the lands before used and occupied by the turnpike company they were required to erect and make and construct an embankment for the grade of their railroad along and upon the road so purchased by them; and that they laid their railroad upon such embankment without doing unnecessary damage to the plaintiff. A demurrer to the plea was sustained, the court saying that the purchase of the turnpike company under the act of incorporation only conferred upon the defendants authority to use the road as a public highway, the same as before used and enjoyed by the turnpike company, and vested them with no greater powers than were possessed by that company, which were to occupy and maintain the line of the road as a public highway or turnpike; that the charter of the defendants, upon which they must depend for their justification, empowered them to make the erections in question; and being the owners of the turnpike, they had no damages to pay to the turnpike company, which otherwise they would have been bound to pay; but that this did not excuse them from answering for such consequential damages as might arise to the adjacent owners by reason of such erections upon former public thoroughfares. *Mahon v. Utica & S. R. Co.* Hill & D. Supp. 156.

The reasoning applicable to change of grades and improvement of streets for municipal purposes does not apply to a grant of power to change the grade of and occupy the street with steam railroad tracks, by a railroad company having no connection with the municipal government. In such case a different principle applies, and the rights of individual property owners are in no respect subordinated to the rights of the railroad company. *O'Brien v. Baltimore Belt R. Co.* 74 Md. 369, 13 L. R. A. 126, 22 Atl. 141.
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And so, while the right of the state to grant the power to a railroad company to occupy the street is unquestionable, by virtue of its power to control all the public highways of the state, the adjoining lot owners are not without redress for any substantial injury to their property rights by reason of the construction or operation of the railroad in the street. *Ibid.*

This is undoubtedly the true doctrine and is a perfect refutation of the statement of Denio, J., in *Bellinger v. New York C. R. Co.* 23 N. Y. 42, that the doctrine that where persons are authorized by the legislature to perform acts in which the public are interested, such as grading, leveling and improving streets and highways, and the like, and they act with proper care and prudence, they are not answerable for the consequential damages which may be sustained by those who own land bounded by the street or highway,—is equally applicable to the construction of a railroad by a private corporation; and also of a similar statement of Beasley, Ch. J., in *Beaman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, to the effect that the attitude of a railroad company, so far as relates to the applicability of legal principles, is not dissimilar to the case of altering the grade of a city street which the legislature may authorize.

A railroad company which is the successor of another railroad company, which latter company had constructed a side track on a street under a license given by a statute "to construct its road over the street," and an ordinance of the city authorizing it to do so, is liable to an abutting owner of a foundry for maintaining an embankment of such height as prevents and seriously interferes with access to his premises, such embankment having been erected by the original railroad company; as the license, under the statute and the consent of the city authorities, to use the street for railroad purposes in no wise touches the question of damages to private property on the line of the street; and a right to a just compensation for the injuries thus inflicted is in no wise affected by the question

Engines and cars have been operated since 1851 within 225 feet of the front of Mr. Lellyett's house, upon tracks that still are used and are a part of the terminal facilities. None of the tracks or houses erected under the terminal station plant are nearer to Mr. Lellyett's house than these original tracks; the new and additional tracks being to the west of the original tracks and further removed from Mr. Lellyett's location.

On the west side of Gowdy street, opposite Mr. Lellyett's house, and between it and the terminal yards, are a number of houses, almost every lot being built upon, so that the smoke, dust, cinders, and noise must pass over these before reaching him. From Mr. Lellyett's house to the nearest point of

the roundhouse is 750 feet; to the center of the roundhouse, 950 feet; and to the most distant wall of the roundhouse is 1,100 feet. From Mr. Lellyett's house to the nearest point of the coal chutes on Kayne avenue was 700 feet, and the further end of the coal chutes 800 feet. From his house to the coal bins on Gleaves street, at the nearest point, was 1,150 feet, while the farthestmost point was over 1,200. From his house to the sand house was between 1,100 and 1,200.

The yard space between his house and these sand houses and coal chutes is occupied by tracks used for incoming and outgoing trains, and for switching and yard purposes.

Defendant's evidence also showed that

whether such consent had been or had not been given. *Coats v. Atchison, T. & S. F. R. Co.* (Cal. App.) 82 Pac. 640.

One may recover damages against a railroad company for erecting an embankment in a street in front of his dwelling house, whereby he is deprived of access to and from the street, although the road is authorized by law and is otherwise lawfully operated. *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624.

In *Yazoo & M. Valley R. Co. v. Lefoldt (Misa.)* 39 So. 459, the supreme court of Mississippi decided that a city had no power which it could transfer to a railroad company to raise the grade of a street to the injury of the property of an abutting owner and that an action could be maintained by the latter against the railroad company for his damages sustained by reason of such change in the grade.

In an action against a railroad company for damages occasioned by a building on an alley which ran through from street to street in the rear of plaintiff's premises, which so obstructed the alley (which was not wide enough for a team to turn about in) that the plaintiff could not have access with teams and vehicles, as formerly, to the rear of his premises, it was held that the obstruction was sufficiently immediate, and the interference sufficiently peculiar to the plaintiff, to constitute special damage to him. *Kaje v. Chicago, St. P. M. & O. R. Co.* 57 Minn. 422, 47 Am. St. Rep. 627, 59 N. W. 493.

The owner of a lot fronting upon a street which does not extend beyond the west side of the lot may maintain an action against a railroad company, where the latter, in the construction of its road, has made an excavation 7½ feet deep and 35 feet wide at the top, diagonally across the street, at a distance of 35 feet at the nearest point from the line of the lot, and not intruding upon the soil thereof, where such excavation cuts off all convenient access to the lot, and renders it practically inaccessible except over private property. *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, 11 N. W. 1 L.R.A. (N.S.)

124. The court said that, although the manner of the defendant's incorporation did not appear in the record, it was safe to assume, what was well known, that it was created by special charter, and that such charter contained the usual provisions authorizing the company to construct its railroad across public streets and highways in a proper manner: and, this being so, the fact of the construction of the railroad across the street was not the ground of the injury, and the plaintiff had no right to complain of it, but the real cause of the injury was the improper manner of construction.

3. Yards and terminals.

The location of yards, terminals, shops, coaling stations, etc., is a matter which admits of a wide latitude in choice of sites, and therefore the courts are less inclined to relieve railroad companies from the results of nuisances committed in and about them than from those arising in the operation of the road proper.

Probably the most important case on the subject under consideration, and one that has been most frequently cited in favor of the doctrine that legislative grants of privileges or powers to corporate bodies, like those to a railroad company to bring its tracks and construct its works within a city, confer no license to use them in disregard of the private rights of others and with immunity for their invasion, is *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. The plaintiff was a religious corporation created under the general incorporation act of Congress in force in the District of Columbia. The defendant was a railway corporation created under the laws of Maryland, and was authorized by act of Congress to lay its track within the limits of the city, and construct other works necessary and expedient to the proper completion and maintenance of its road. The act provided that the road which the company was authorized to construct should enter the city at such place and pass along such pub-

there were operated in the terminal yards 17 engines in the daytime, and 10 of these engines at night. Only 3 or 4 of these engines however, operated continually in that part of the yard opposite Gowdy street, the balance of them, being assigned to different locations,—some working in South Nashville, some in West Nashville or New Town, some in East Nashville, and others north of the Broad Street Viaduct,—would only come into the terminal yards for a little while at a time, and at perhaps long intervals. These three or four engines which worked opposite Gowdy street, and consequently opposite Mr. Lellyett's house, were engaged mostly in hauling passenger trains. They used about 400 to 500 bushels of coal, in all, in 24 hours.

He street or alley to such terminus as might be allowed by Congress, upon the presentation of a survey and map of its proposed location. Subsequently Congress allowed the company to enter the city with its railroad by one of two routes, as it might select. It selected one by which the road was brought along an avenue in front of the church of the plaintiff. It appeared that the church had owned its premises for ten years before the passage of the act, and in the year of such passage the present building was begun, and since a year or two after the passage of the act the church had been continuously occupied as a house of worship; that thereafter the railroad company erected upon a parcel of ground immediately adjoining the church premises, and when completed occupied the same and maintained, an engine house and machine shop, where large numbers of locomotives and steam engines were housed and their fires made, and to and from which the engines were propelled, and in which they were coaled, watered, repaired, and otherwise used; that when the ground was first broken for the erection of these works the plaintiff advised the company that if put there they would prove to be a nuisance and ruinous to the plaintiff's interests, and protested against their erection; that the company, however, proceeded to erect the works upon the building line of its own premises, within 5½ feet from the church edifice, and constructed upon the engine house sixteen smoke stacks lower in height than the windows of the main room of the church; that the nearest of the smoke stacks was less than 60 feet from the windows, and the others were in a semi-circular curve, at gradually increasing distances; and that during the time of the occupation by the company of said building and until the commencement of the suit the services of the church and Sunday School were disturbed by the noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam, which noises were so great as to prevent the members of the congrega-

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The evidence showed that the terminal yards began operations in January or February, 1900. This suit was brought August 25, 1902, about thirty-two months after the terminals began operations. During this time, according to Mr. Lellyett's evidence, he had been absent from the city, with his family, from the middle of June to about the middle of September each summer. Deducting these periods of time he was away it would appear that he and his family were in their residence about twenty-four months.

The case was submitted to the jury under a charge of the court, and a verdict was rendered against the defendants for \$4,000. Under this charge, no damages were awarded for injuries to the fee, and all damages

tion from hearing what was said, sometimes the blowing off of steam compelling the pastor of the church to suspend his remarks from five to fifteen minutes, and that this habitually occurred day and night, and on Sundays as well; that in the summer time, when the windows of the church were open for air, smoke, cinders and dust were blown from the smoke stacks through the windows of the church, settling upon the pews and furniture, and soiling the clothes of the occupants, accompanied by an offensive odor which greatly annoyed the congregation; and that locomotives were allowed to stand on the sidewalks, impeding the passage of church members to and from the church. The main reliance of the railroad company to defeat the action was the authority conferred upon it by the act of Congress to exercise the same powers, rights, and privileges in the construction of a road in the District of Columbia, the line of which was afterwards designated, while it could exercise under its charter in the construction of a road in Maryland, by which charter it was empowered to make and construct all works whatever which might be necessary and expedient to the proper completion and maintenance of the road. The jury, under instructions given to it by the trial court, having found for the plaintiff, and a judgment entered thereon having been affirmed by the supreme court of the District to review that judgment the defendant brought the case to the Supreme Court of the United States on a writ of error. The opinion of the court was delivered by Mr. Justice Field, who stated that the matters proved were unquestionably a nuisance, and that for such annoyance and discomfort as was shown in this case the courts of law will afford redress by giving damages against the wrongdoer, and that, when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. The court held that the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to

to the furniture were, at plaintiff's request, withdrawn. Hence this verdict must be taken as damage to the value of the use of the property, and other elements alleged in the declaration.

The defendants have appealed to this court, and assigned errors,—29 in number.

The first error assigned is that there is no evidence to support the verdict.

Under this assignment it is insisted that the suit is brought in the name of John T. Lellyett, trustee and next friend for Mary R., Mary Frances, and Catherine Lellyett; while there is nothing in the several counts and allegations to indicate that the suit is brought for the use and benefit of anyone, except John T. Lellyett, individually, and that the word, "trustee," annexed to his

name, is merely *descriptio personæ*; while the proof shows that the title to the property is in John T. Lellyett, trustee, for the use and benefit of his wife and two children, the parties named in the summons; and hence, there is a variance between the allegations and proof of title, which is fatal to the action. We think this objection not well taken, and that it sufficiently appears that Mr. Lellyett was trustee for his wife and children, and the suit was brought for damages to the use of their property, health, and comfort.

The second assignment of error is that there is a misjoinder of parties and causes of action. The insistence is that there are five distinct and separate causes of action stated in the declaration, to wit: First,

place them wherever it might think proper in the city, without reference to the property and rights of others. That whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to interfere unreasonably with and disturb the peaceful and comfortable enjoyment of others in their property. That grants of privileges or powers to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. That undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, might be authorized by Congress, and if when used with reasonable care it produced only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one could complain that he was incommoded, as what-ever consequential annoyance might necessarily follow from the running of cars on the road with reasonable care was *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But that this case was not of that nature. It was a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship, and that the authority granted by Congress would not justify an invasion of other's property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts creating a physical discomfort and annoyance to others in the use and enjoyment of their property to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes without causing such discomfort and annoyance. That the acts that a legislature

may authorize, which without such authorization would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. After referring to the various other clauses of the complaint which would justify designating the defendant's acts as a nuisance, the court further said that the fact that the smoke stacks of the engine house were as high as the city regulations for chimneys required was no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. That in requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. That it is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house, and that if any adjudication was wanted for a rule so obvious it would be found in the cases of *Sampson v. Smith*, 8 Sim. 272, and *Whitney v. Bartholomew*, 21 Conn. 213; and the judgment in favor of the plaintiff was affirmed.

Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, is a prominent authority and one that has been frequently cited in favor of the doctrine that legislative authority, while it will render a railroad company immune from liability for damages which are incidental or consequential to the necessary construction and operation of the railroad, such construction and operation being done and accompanied with ordinary prudence, skill, and care, does not release it from liability to persons who sustain damage because their property is diminished in value by the establishment, construction, and operation of its terminals, workshops, en-

a joint cause of action for damages to the real estate. Second, a separate cause of action to John T. Lellyett for damages to his furniture. Third, fourth, and fifth, separate causes of action in favor of the wife and two children for injury to their health.

In regard to this assignment, it is only necessary to say that all claim for damages to personal property of John T. Lellyett was abandoned, and the jury was so instructed, and this was not embraced as one of the elements of damages in the charge of the trial judge.

As to what are styled the third, fourth, and fifth causes of action, we think the assignment and criticism made is not well founded. There is no claim for damages for sickness, doctor's bill, etc. The allegation of impairment to health of the family is

gine houses, or loading stations, or by reason of smoke, soot, cinders, and coal dust, or noise and vibration, or by the use of the road in such a way as to create a private nuisance, or a public nuisance especially injurious to private parties. In this case the court said that in many cases it was difficult to draw the line, and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy. In this case also the trial court had found—and the court of appeals said justly so—that the defendant railroad company had built an engine house, and in it stored, repaired, and fired its locomotives, and so used its coal bins as necessarily to cause damage to the plaintiff's dwelling house, the coal bins being unprovided with sufficient cover to prevent the dust of the coal from time to time stored therein and removed therefrom from passing into and upon the plaintiff's land and dwelling house; and that at all times since the erection there had been emitted from the engine house and smoke stacks, and from the defendant's engines in the engine house, hurtful and offensive gases, smoke, soot, cinders, and coal dust from the coal bins, and that the same poured down upon and were borne by the winds into and upon the plaintiff's dwelling house and premises, filling the house with smoke, soot, and cinders, injuring the furniture and clothing therein, rendering the air offensive and unwholesome, and the house uncomfortable and unhealthy as a habitation, and greatly reducing the rental value of the premises. The court said that it was scarcely necessary to cite authorities to show that the engine house as used was, within every definition, a nuisance for which, as between individuals, an action would lie for damages, and for which a court of equity would afford a remedy by injunction. The trial court had given judgment in favor of the defendant, and such judgment had been affirmed by the general term of the superior court, from which the appeal in this case

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merely a specification of the damage done the place as a home or place of residence, just as is the destruction of the grass, trees, shrubbery, etc., and the presence of smoke, cinders, etc. In other words, the averment is directed to the damage to the use of the property, and this damage consists in its being rendered unhealthy, uncomfortable, and unsuitable for residence purposes.

In the charge of the court the jury were not instructed to give any damages for sickness or impairment of health of any of the family, but it was omitted, and the jury could not have given any damages for sickness or impairment of health, separate and apart from the damage done the property as a comfortable, healthy, and suitable place of residence.

The damages for which recovery was di-

was taken (16 Jones & S. 31). The court further said that the principle upon which the court below proceeded was that what the legislature had authorized the defendant to do could be neither a public nor a private wrong; in other words, the legislature had authorized the maintenance of this nuisance by the defendant, and the plaintiff must bear the consequences; that the court below, in denying any relief to the plaintiff, of course assumed that the legislative authority and the act of the defendant thereunder, resulting in flooding the plaintiff's premises with soot, smoke, and noxious gases, was not a taking of the plaintiff's property within the Constitution. And the court then said that it placed the present judgment in this case on the ground that the legislature had not authorized the wrong of which the plaintiff complained, and it was, therefore, unnecessary to determine whether the legislature could have authorized it consistently with the principles of the Constitution for the security of private rights, without providing for compensation. The court further said that in *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, the court had declared it had never been considered that consequential damage to private property, resulting from opening and improving streets or highways, or other work of a public nature, could be recovered. That the case had been frequently followed and its authority completely established by repeated decisions. That it was an application of a principle well settled, that private interests must yield to the public welfare, but that the case carried to the utmost limits the right of the legislature, for public reasons, to interfere with private property to the injury of the owner, without making compensation; and in speaking of the case of *Bellinger v. New York C. R. Co.* 23 N. Y. 42, the court said that it was perhaps the strongest case to be found in the reports of the state, of the application of the doctrine that a statutory authority justifies acts which otherwise would give a right of action; but said that that case was

rected to be given by the charge were "to the use, comfort, peace, quiet, and enjoyment of the house and lot," and health and sickness are not referred to in that part of the charge relating to the measure of damages. We think, therefore, that there was no separate cause of action recovered upon for sickness or impairment of health.

We think it well to analyze the pleadings, and see what issues are properly before us, and see whether there were issues submitted to the jury which were not warranted under the pleadings.

The first count in the declaration sues for permanent injury and impairment to the value of the premises of complainant. So, with the fourth count, the damage claimed is to the permanent injury to the property. Now, the court charged the jury,

to be distinguished by the fact that it was one where the line of the road was fixed by the charter, and it was necessary, in constructing the road on that line, to cross the creek on the bridge, and the lowlands upon an embankment, which was the damage complained of. The case was regarded as being nearly, if not exactly, upon all fours with *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. The judge delivering the opinion of the court saying in conclusion that that case fully supported the conclusion reached in this, and that the able opinion of Mr. Justice Field in that case vindicated the rights of private property to protection against substantial invasion under color of corporate franchises.

In *Spring v. Delaware, L. & W. R. Co.* 88 Hun, 385, 34 N. Y. Supp. 810, it was found that a structure containing coal bins or pockets was of the largest kind in use, and was constantly used by the defendant for storing coal and coaling its engines therefrom to the number of sixty or seventy a day, and was within 300 or 350 feet of a closely populated section of a city which had been laid out into city streets, blocks, and building lots suitable for dwelling houses; and that for the purpose of supplying the coal bins with coal, locomotive engines using soft coal drew cars heavily loaded with coal up a steep incline leading from the railroad tracks into the bins, into which the contents of the cars were thrown, and emitted hurtful and offensive gases, sparks, smoke, soot, and cinders, and from the coal dust and dirt, all of which, borne by the wind, settled down upon the dwelling house of the plaintiff, injuring furniture and clothing therein, thus rendering the same unwholesome, uncomfortable, and unsuitable as a habitation, and reducing the rental and actual value of the property. And the referee before whom the action was tried found that the structure, as described, was a private nuisance to the plaintiff, and that the defendant should be enjoined from depositing in and taking from said structure

at plaintiff's request, that the plaintiff could not recover for the injury done the fee of the premises, and any proof adduced as to the value of the premises, if such there be, must be considered only in determining the question as to whether or not the comfortable use and enjoyment of the premises had been impaired or destroyed. This instruction by the trial judge was made at the request of the plaintiff, but really it is immaterial whether the charge was given at plaintiff's request or on motion of the court. This instruction eliminates the first and fourth counts, since they claim for permanent, and not recurrent, damages. These two counts must be eliminated, therefore, from our consideration, as not presenting the issues upon which the case was tried and damages found.

coal in such manner as to set afloat in the air and cast or deposit upon or into the premises of the plaintiff, smoke, soot, cinders, sparks, dust, or dirt. A judgment in accordance with the finding was affirmed by the general term, the court stating that the contention of the defendant that the right to erect and use this structure in coaling its engines was necessarily and materially incident to the operation of its railroad, and therefore was embraced within its franchise, and that such use was not a nuisance although it might operate as such, and that the plaintiff had no remedy, was opposed to the doctrine laid down in the *Cogswell Case*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, which seemed to be somewhat in point against such a proposition. After stating the decision in that case the court said that no special legislative sanction was shown for the structure in question, and that the defendant or its lessor had other lands where the new structure might have been placed, although not so conveniently. The case was afterwards affirmed in the court of appeals on the opinion of the general term. 157 N. Y. 692, 51 N. E. 1094.

In *Garvey v. Long Island R. Co.* 9 App. Div. 254, 41 N. Y. Supp. 397, the trial court found that the defendant so conducted its business and managed a turntable situate upon its premises as to constitute the same a nuisance as to the plaintiff and his premises. The evidence tended to establish that the defendant so conducted its business as unnecessarily to cause a vibration of its turntable, which was communicated to plaintiff's premises and caused great annoyance and damage and that this condition was greatly aggravated by casting thereon smoke, cinders, and ashes, accompanied by irritating and harassing noises. The defendant sought a reversal of a judgment in favor of the plaintiff in the court below, claiming that it had authority for what it did, in the statute authorizing its creation and operation, and hence that no liability attached thereto for its acts. It was not

The second and fifth counts are for damages to the furniture and fixtures in the house, and these are eliminated because all claim for damages on this account was withdrawn by the plaintiff.

This leaves only the third and sixth counts not eliminated, and these counts claim damages for injury to the use and enjoyment of the premises as a home. The third count states the wrongful act to be that the plaintiff's place has been changed from a quiet, restful home into an unhealthy, noisy, dirty, filthy place, which has greatly injured the health of plaintiff's family; and the sixth count states the wrongful act to be the injury and destruction of the health, peace, comfort, and happiness of the family; and upon these counts the verdict must be sustained, if at all.

contended that the statute conferred express power authorizing it to maintain and operate the particular turntable and yard as it was operated, or that it was within the clearly expressed intention of the legislature derived from the statute. The appellate division of the supreme court affirmed the judgment of the lower court. This judgment of the appellate division was afterwards affirmed in the court of appeals (159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57), the court quoting with approval what was said in *Hill v. New York*, 139 N. Y. 505, 34 N. E. 1090: "Obviously, the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated sometimes by construing the harm inflicted into a taking of private property for which compensation must be made, and sometimes by a rigid construction of the authority claimed. Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation."

In an action for erecting a coal shed and for throwing coal into an iron hopper by means of an iron scraper operated by steam power, which coal was then received into an iron conveyor run by steam and lifted a number of feet and emptied into a chute plated with iron, and conveyed through the same, and dumped upon the floor through openings in the chute; in which way twenty-three cars would be unloaded in one day; which process caused the coal to break and grind by coming in contact with the iron conveyor, and produced deafening noises and clouds of coal dust in a thickly settled portion of the city,—the defense was that the coal shed was erected and the machinery in it operated upon the property of a railway company and under a license from the company, and that it was a lawful railroad use of the right of way, and that the company had a right to license the defendant to do what it could itself thus do. There were other defenses, but upon the one under 1 L.R.A. (N.S.)

The question before us is, therefore, whether the use and enjoyment of the property of plaintiff has been materially impaired by the acts of defendants, and, if so, are the defendants liable therefor? There can be no question but that some detriment has been done to the use and enjoyment of the property. The evidence in the record leaves no ground for doubt as to this feature, but to what extent, we will consider more at length. Defendants do not seriously contend that they are not the parties who have caused this damage, but the contention is that they are not liable for the same. The argument is that the defendants have authority, under their charters, to locate the terminal yards, roundhouse, etc., where they have placed them, and, while the exact location of these things is not prescribed by

consideration the court said that, although railroads are a public necessity and a public benefit, and many inconveniences and annoyances grow out of their operation which must be borne by the public, as the passage of a train of cars upon the street of a city, which is necessarily attended with noise, the emission of smoke, detention at crossings, etc., and that no recovery can be had for injuries suffered from such causes, yet, that the company has the power to do certain things, which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers; but its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon might not produce any such injury, and the selection of a locality for such purpose where damages are inflicted, in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road. *Wylie v. Elwood*, 134 Ill. 281, 9 L. R. A. 726, 23 Am. St. Rep. 673, 25 N. E. 570.

In *Austin v. Augusta Terminal R. Co.* 108 Ga. 687, 47 L. R. A. 755, 34 S. E. 852, the court distinguished *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, saying that in the case before it the company had no round house, machine shop, or structure at the point complained of, but only freight yards immediately adjoining its depot, where the public was served by it as a carrier, and that the evidence did not show any unlawful, improper, or unusual noise, smoke, or movement of cars, and therefore it could not have been a nuisance, and that in fact the petition did not allege that it was a nuisance; and approved the concession made by Justice Field, in the case alluded to, that whatever consequential annoyance may necessarily follow from the running of cars on the railroad with reasonable care is *damnum absque injuria*, as the

the charter, the defendants had the legislative discretion to locate them where it would be most convenient to them and the traveling public. Concede, for the sake of argument, that this is true (and within certain limitations it is), still the question remains, If such location result in material damage to adjacent or contiguous owners, are the defendants liable? And this proposition presents the real controversy so far as the merits are concerned.

While there are many criticisms of the charge so far as it relates to this question, they are crystalized in the exception to the following part of the charge: "I instruct you that it is no defense to this action to prove that the yards where the business of defendants is carried on is at a suitable locality, or that the business is a lawful

business and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business. Where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment of another of his property, or which occasions material injury to the property itself, it amounts to a wrong to the neighbor, and one for which an action will lie."

This portion of the charge is taken from the opinion of the court of chancery appeals in the case of Ducktown Sulphur, Copper, & I. Co. v. Barnes, 60 S. W. 600, which was, as to its result, approved by this court, and to some extent followed in the case of Swain v. Tennessee Copper Co. 111 Tenn. 437, 78 S. W. 93.

private inconvenience in such case must be suffered for the public accommodation; and said, in addition, that if in this case the company would not be liable for operating its cars in the usual and ordinary manner in the street it surely would not be liable for the same sort of operation when it moved the cars out of the street and upon its private property. There was a strong dissent by the presiding justice and another, in which it was said that the logical result of the conclusions reached by a majority of the court would necessarily lead to a denial of any relief to an owner of private property, even though he and his family might be actually driven from their home by noises so deafening, volumes of smoke and cinders so vast, and noxious and offensive gases and odors so baleful and injurious to the health, as to render the premises uninhabitable and absolutely worthless for any purpose; that unquestionably, as had been seen, the common law would have afforded relief against any such wanton invasion of private rights; and they, the dissenting judges, had no reason to believe that the framers of the present Constitution even remotely contemplated that such rights should be ignored in any case where the power of eminent domain might be exercised, either by the city itself, or by any corporation under legislative authority, in the taking or damaging of private property for the public welfare.

And in *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315, where a terminal yard of railroad companies, the operation of which was sought to be enjoined by owners of property in its locality, was located under and its construction authorized by statutory powers, the court said that the general rule, supported by an almost unbroken line of authorities, is that a work so located and constructed, if constructed and operated in a proper manner, cannot be adjudged a nuisance; and this applies with special force to works thus authorized to facilitate transportation on railroads, which are of a quasi public nature. From this rule it fol-

lows that injuries and inconveniences to persons residing near such works, from noises of locomotives, rumbling of cars, vibrations produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are necessary concomitants of the franchises granted. The court held, however, that the use of switches by the railroad trains at the terminal station did not come within the exception usually made in favor of works of necessity on Sundays, and that such use by the defendant railroad company was a nuisance which should be enjoined.

The court said that these rules were based upon the soundest reason, and that this case was clearly distinguishable from cases like that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, where railroads erected engine houses, coaling stations, or workshops on their rights of way, from which the emission of ordinary noises, smoke, soot, and cinders may be a nuisance to owners and residents of abutting property. Like other cases of lawful business not partaking of a public nature, and not having legislative sanction. The court said, further, that the contention of the plaintiffs that this terminal yard of stations and side tracks was a nuisance because dwellings were erected there before the construction of the yard, and that it could have been located at another point, where there were no residences, without being a nuisance to anyone, is without modern legal precedent to sustain it, and is unsound for at least two reasons. That in the first place the terminal yard was located at the terminus of one railroad, on an existing right of way of another railroad, and under statutory power. In the second place it is obvious that, if a terminal yard is a nuisance because located near dwellings, it would clearly be a nuisance wherever it might be put, even in the woods or fields, as soon as the owners of adjacent lands build houses on

As further bearing directly upon the question of liability, and meeting the criticism of defendants' counsel, the court charged: "I charge you, gentlemen, that, under the charter of the defendants and the contract with the city of Nashville, the state has not authorized the wrong complained of. In locating the yards and the various structures thereon so that injury necessarily resulted to adjacent landowners, the defendants acted at their peril. In locating the terminal yards the defendants stood on the footing of an individual, and were entitled to no superior rights of immunity by legislative authority. The authority to construct the yards did not authorize defendants to place them wherever they might think proper in the city, without reference to the property

rights of others. Defendants have no right to use the yards in disregard of the rights of others, and with immunity for their invasion. If you find from the evidence that the terminal yards are located in or adjacent to a residence neighborhood, and that in their operation the defendants make noises which, because of their volume, character, proximity, or unreasonableness, cause plaintiff material distress, discomfort, or injury, then, in that case, the defendants are liable. It is no defense that such noises are necessary to the operation of defendants' business, its location, manner in which it is conducted, the hours of its operation, character and volume of the noises, reasonableness or unreasonableness of the hours during which such noises are made, and

their land; for the old rule maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded. *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315.

The attempt to distinguish this case from the case in 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, would appear to be a lame effort, for in the latter case Justice Field, who delivered the opinion, said that it admitted of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from liability to suit for damages or compensation to which individuals acting without such authority would be subject under like circumstances. If this is true as to the power of Congress, why not of a state legislature? If the decision in the case here attempted to be distinguished was correct, that in the case under consideration was wrong, as the cases are identical. What was done in each case was the same thing which was declared by the Supreme Court of the United States, in the one case, to be a private nuisance, from liability for committing which an act of Congress was no protection, and declared by the Georgia supreme court, in the other, to be a case in which the sufferers from what the Federal court declared a private nuisance were remediless. It would seem as though the injunction in the Georgia case should have been continued upon one of two grounds: First, that the legislative act was no authority for doing that which but for it would be an actionable nuisance; or second, if it assumed to confer such an authority, it was unconstitutional; and in either event was no protection to the defendant.

A statute requiring railroad companies to furnish proper facilities for the reception and shipment of stock was held in *Anderson v. Chicago, M. & St. P. R. Co.* 85 Minn. 337, 88 N. W. 1001, not to justify a railroad I.L.R.A. (N.S.)

company in erecting stock yards in such a situation that it was impossible to secure proper drainage therefrom, and in maintaining them in such a condition as to interfere with the comfort, enjoyment and health of adjacent property owners, the court says: "We have no hesitation in holding that this statute does not authorize the erection and maintenance of a nuisance. We cannot conceive that a railroad company in the conduct of its business may create malodorous and noxious conditions on its own property so near the private dwelling of citizens as unnecessarily to interfere with the health of the inmates; for, if it be admitted that the business so carried on was a nuisance *per se*, it would then be our duty, notwithstanding the statute referred to, to say that it was a question of fact on the evidence whether its act, in that respect, did not subject it to damages."

Of the correctness of the doctrine contained in the foregoing quotation there cannot be the slightest doubt. The real reason for holding the railroad company liable in this case and discharging it from such liability in *Carroll v. Wisconsin Central Co.* 40 Minn. 168, 41 N. W. 661, is not apparent. It certainly cannot be said that the danger to health alone makes the company liable in one case and frees it from liability in the other, for if that were so, the case of *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493, 12 Am. St. Rep. 644, 39 N. W. 629, must have been wrongly decided, for it was there held that the same things which failed to create a cause of action in the *Carroll Case* created a liability in the *Adams Case*, the only distinction being that in the former it was on the railroad company's land that the obnoxious elements originated, and in the *Adams Case* they had their origin in the street, in which the court held that the plaintiff had an interest which amounted to a property right.

4. Use of street as yard.

Cleveland, C. C. & St. L. R. Co. v. Pattison, 67 Ill. App. 351, was an action against a railroad company for maintaining a

all other attendant circumstances. I further charge you, and instruct you, gentlemen, that neither is it any defense that when the nuisance was established it was in a convenient place, and that the public had come to the nuisance either by the extension of the town or the operating of highways and streets. The fact that the business was originally established in a convenient place, but that the public has come to it, is no defense."

The legislature may authorize public corporations and quasi-public corporations to take private property for public use. Thus, it may authorize a railroad to take private property for its right of way, for its depots and station houses. It may also authorize terminal companies to take private prop-

erty for its station houses, roundhouses, coal chutes and other necessary conveniences; but it cannot authorize such public corporations in locating such works, to seriously impair or destroy property not so taken, but which becomes impaired, or is destroyed, by the use of that which is taken. There is no authority for the commission of a nuisance, or the doing of a hurtful act, to adjacent or contiguous property, in order to operate that which it lawfully has. This question, we think, has already been decided in this state in a number of cases. In *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 741, 61 L. R. A. 188, 72 S. W. 957, which involved the location and construction of a roundhouse by this same terminal company, it is said: "To a claim for switch in front of and near the plaintiff's dwelling house, and suffering cars loaded with hogs and cattle, and others in which they had been transported, to stand and be upon such switch for a long time, whereby noxious, offensive, and unwholesome smells and odors arising from the animals and from filthy and offensive matters in the cars and the decaying bodies of dead animals therein entered and permeated plaintiff's dwelling house and rendered his home unhealthy, unwholesome, and unfit for habitation; and for permitting its locomotive engines to stand and remain upon such switch, creating noisome, noxious, and offensive vapors, fumes, smoke, smell, dust, cinders, etc., which rendered his dwelling unhealthy and unfit for habitation; and the plaintiff had a verdict and judgment. On appeal therefrom the court said that a legislative grant authorizing a railroad company to construct and operate its road has no effect to relieve it from liability to answer in damages for nuisances, unless such nuisances arise as a necessary and natural result of the proper operation of the road.

The plaintiff in an action against a railroad company alleged that defendant laid down a railroad track in a street, and a side track between the main track and the sidewalk and on the side of the street adjacent to her property, without her consent and without compensation; that the defendant used this side track for standing cars and loading and unloading coal at all hours of the day and night, converting that portion of the street into a coal yard. A count in the answer pleaded that the railway company entered upon the street and constructed and, up to the time of the appointment of the defendant as its receiver, used the main track under the authority of an ordinance of the city, and that it afterwards, under like authority, constructed the side track. This count was separately demurred to, and it was held that the demurrer should be sustained. The court said that the right to use a street for the running of trains gives no right to establish a repair shop thereon, but a railroad company may be liable (L.R.A. (N.S.)

ble to damages if it obstructs the street by unreasonably and improperly leaving its cars standing thereon, as it cannot abuse the right given to it to another's damage; that whatever use is reasonable and proper it may enjoy without liability, but when it goes beyond that it is liable, as any other wrongdoer; that what use is reasonable and proper will, of course, vary with the circumstances, and cannot be absolutely determined in ignorance of the surroundings. *Frankle v. Jackson*, 30 Fed. 398.

If a railroad be constructed on a street in pursuance of its charter and permission of local authorities empowered to license such use, and the street is graded under the direction of such local government, it is not a nuisance and cannot be abated as such; but, notwithstanding such grant of occupation, it is liable to the abutting owners for the new burden imposed upon the fee of the street if they own it, or for any substantial destruction of the easement in the highway appurtenant to their property resulting from an abuse of railroad privileges; and all uses of such street in excess of what is necessary for the ordinary and proper operation of the road, such as running trains faster than permitted by law, making dangerous switches, parking cars, using it as a switch yard, keeping engines and trains standing unnecessarily long (if such uses substantially destroy the easement in the highway and the right of ingress and egress),—are unlawful. *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614, 11 S. W. 703. To the same effect is *Smith v. East End Street R. Co.* 87 Tenn. 626, 11 S. W. 709.

5. Ordinary operation of road.

There is no doubt that the ordinary operation of a railroad in a prudent and careful manner does not constitute a nuisance except in rare instances. But a little carelessness may render the road a nuisance to all in the community; and the relation between the road and particular parcels of property may be such as to constitute a nuisance.

exemption from liability rested on a charter right, the answer may be properly made that the state has not authorized the wrong complained of, and, in locating its round-house so that the injury necessarily resulted to the adjacent landowner, it did so at its peril."

It appears to be the English doctrine that Parliament may authorize the construction of such a work at a specified place where its use would constitute a nuisance at common law, and no compensation could be claimed in respect to an injury to private rights, apart from a negligent use. But, even under the English system, no such immunity could be claimed, unless there was sanction to do so, either expressed or implied.

As is said in *Hill v. Metropolitan Asylum*

sance for which compensation should be made.

If a railroad is built and operated by authority of law, its operation, of course, cannot be held to be in law a nuisance; but, while that is so, damages resulting to adjacent property from its operation are not in any degree affected by that circumstance. And if the noise, confusion, and disturbance caused by the railroad company's engines and cars are such as would, in the absence of legislative authority, have constituted an actionable nuisance, the existence of such authority in no way relieves them of their damaging effect, so as to take away from property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*. *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750, that was an action for laying tracks in close proximity to the plaintiff's premises, which before that time were free from noxious vapors, smoke, unhealthy, and injurious substances; and for keeping upon such tracks locomotives which emitted large quantities of smoke, cinders, dust, soot, ashes, sparks of fire, and other noxious and injurious substances; and for operating a railway so near to and opposite the plaintiff's property, causing the soil of the plaintiff's premises to be greatly shaken, disturbed, vibrated, and damaged; and the proofs showed that such facts existed, and the jury rendered a verdict in favor of the plaintiff for a substantial amount in damages, for which judgment was entered. The court on appeal from such judgment affirmed the same, and said, further, that some of the decisions seemed to hold that the employment of locomotive engines, the running of trains, and the noise and confusion thus caused, are the necessary and lawful incidents of the operation of railways, and therefore the damages to lands abutting upon or near the railway were *damnum absque injuria*, and therefore incapable of affording any ground for the recovery of damages, but that the court in this case was not prepared to coincide with that view.

1 L.R.A. (N.S.)

District, L. R. 4 Q. B. Div. 433 [L. R. 6 App. Cas. 213]: "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose."

This court, approving this doctrine, said, in addition, in *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 743, 61 L. R. A. 188, 72 S. W. 957: "But over and beyond this, we think this corporation, in selecting a

And a similar ruling was made in *First Baptist Church v. Schenectady & T. R. Co.* 5 Barb. 79.

Where a contractor, doing public work under authority of law, in disposing of excavated material used cars drawn by steam engines which were heavily loaded and run with considerable speed and frequency from morning till night, the route adopted being the most feasible one, but not the only one by which the contractor could have removed the excavated material, the running of which cars greatly annoyed the plaintiff and injured his property, causing the building to vibrate, being attended with noise, and smoke and cinders being blown upon his premises to such an extent that the court found the same a nuisance.—it was held that the public character of the work did not exempt the contractor from liability, as, to make the rights of the plaintiff subservient to the public, it would be necessary to hold that the legislature intended that this particular route should be used for the purpose of carrying away the excavated material; and that no such contention could be sustained, neither could it be contended that the legislature intended to subordinate private interests along any route which might be selected by the contractor for such purposes. The court said that consequential damages were withheld only in cases where it appeared that the legislature expressly or by clear implication sanctioned the doing of the very act complained of, and that none of the cases go further. *Bohnsack v. McDonald*, 26 Misc. 493, 56 N. Y. Supp. 347.

In *King v. Morris & E. R. Co.* 18 N. J. Eq. 397, it was held that the defendants must be restrained from running any coal engines on their road, if the consequences were necessarily such as were shown by the proofs in the case, and that the position taken by their counsel, that the privilege of running locomotives upon their road having been granted by the legislature the residents and owners of property in the vicinity must suffer the consequences without relief, was not tenable, as the legislature never intended to grant, and never did

place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use. This is the view taken in *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 167. It is there said: 'A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity. Such location is a matter of indifference to the public. Consequently, with respect to such act, the corporation stood on the footing of an individual, and was entitled to no superior rights of immunity. . . . The authority to construct such works did not authorize it to place them wherever it might think proper in the city, without reference to the property rights of others. Grants of power to corporate bodies like these can have no li-

cense to use them in disregard of the rights of others, and with immunity for their invasion.' To the like effect is the leading case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 56 Am. Rep. 6, note, 8 N. E. 537."

The Fifth Baptist Church Case, which is a leading case upon this question, has been cited and approved in a large number of cases, and by all the text-books and compilations, since it was delivered in 1883. It is said that it is weakened in the case of *London, B. & S. C. R. Co. v. Truman*, L. R. 11 App. Cas. 50, but we do not find this to be so; but that case, by the opinion of the court itself, is differentiated from the

grant, to them the right to scatter fire and desolation along their line to a width over which an engine could be contrived or constructed to throw burning coals; that their right to use locomotives was granted only on the condition imposed by law upon the use of all privileges and property, that is, that they should be so used as to do no unnecessary damage to others; and that, if coal burners could not be used without such increase of danger as was shown in this case, it would be the duty of the company to abandon them and return to wood burners.

Although *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 331, 25 L. R. A. 169, 24 S. W. 597, has some bearing, it can hardly be said to be a positive authority, on the subject under consideration. The real question in that case was whether a statute making a railroad company liable for damages caused by fire from a locomotive without regard to the negligence of the company was unconstitutional as impairing the obligation of its charter, or denying it the equal protection of the laws, or contravening a natural right; and it was held the law was constitutional. But in answer to an argument of counsel for the railroad company, that no law could be sustained as a police regulation which imposed a penalty or conferred an action for doing that which had never been declared unlawful, and which, on the contrary, was made legal, the court said: that the counsel had gone too far in his assumption and in his argument that the law of the state constituting the charter of the road and permitting it to use steam in the operation of its trains was a protection from liability for fire set out by engines, providing it was guilty of no negligence, and in invoking the principle that that which the law authorizes could not be a nuisance, although it might result in damages to individual rights or property. The court further said that the rule is now established that the statutory authority which would justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be ex-

press, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.

Railroad in street.

When a railroad is constructed along a residence street in a city, the conditions are ripe for the existence of a nuisance to every householder, unless extreme care is exercised in the operation of its road.

While a railroad company which occupies a street by its road, with the approval and express consent of the city authorities, have a right, so far as the general public is concerned, to keep and maintain their railway tracks and to pass their trains over them, notwithstanding this license, if the houses of lot owners have been injured by having smoke, sparks, or cinders thrown or blown into or upon them, or if their walls have been cracked by the rapid movements of heavy trains of cars, such lot owners are entitled to recover for the damages directly resulting therefrom. *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 667.

In Kentucky the right of an abutting owner to recover damages from a railroad company for throwing soot, cinders, etc., upon his property, does not arise from his interest in the street. Such damage does not result because the railroad track is located upon a street, except in so far as the running of trains on it is in such proximity to the property as to produce the injury; and if it had been located on an adjoining lot which had been purchased from another person, and the effect of the operation of the road had been the same as the operation of the road in the street, a cause of action would have existed. *Willis v. Kentucky & I. Bridge Co.* 104 Ky. 186, 46 S. W. 488.

Therefore when a railroad is constructed through a city by legislative authority, and it occupies the streets by municipal license, it is in the lawful exercise of a right; and it is in the exercise of such a right when it so enters a city, and acquires the right to and

Hill Case and the Church Case, the Truman Case resting upon the English railway acts, which were assumed to establish the proposition that a railway might be made and used, whether it was a nuisance or not.

The Truman Case is contrary to the other cases, because it is based upon the authority of the English railway acts, which authorize the construction and operation of the railway, even though it be a nuisance. No such legislation has ever been attempted in the United States, and it is so utterly repugnant to our Constitution and system of government, by which the rights of every individual are protected, that it will never be attempted or upheld.

In the Fifth Baptist Church Case, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, it

does locate its road on private property. In either case, if, in the operation of the road, soot, cinders, etc., are thrown upon the property which abuts on the street, or upon property which abuts upon the private property acquired as indicated, and the owner is thus injured, he may maintain an action. *Ibid.*

In *Sone v. Fairbury*, P. & N. W. R. Co. 68 Bl. 394, 18 Am. Rep. 556, it was said that it must be conceded that an incorporated town or city owns the fee-simple title to the public streets, and has the exclusive power to control and regulate the same, and in the exercise of that power may rightfully authorize and permits a railroad company to occupy and use a public street with its railroad track; yet, under the organic law of the state, the railroad company must be held responsible to property owners upon the street for such direct or physical damage as shall result from the construction of the road or the operation of the same after its completion; and that, while it must necessarily happen that the streets will be used for various legitimate purposes, which will, to a greater or less extent, discommode persons residing or doing business upon them, and just to that extent damage their property, still such damage is incident to all city property, and for it a party can claim no remedy: but that a demurrer to a declaration which averred that smoke and cinders were thrown from the engines of the defendant on the property of the plaintiff, by means whereof his property was greatly damaged, should be overruled, as, if such averments were true, the plaintiff had sustained a direct and physical injury to his property for which he was entitled to recover.

In an action for damages against a railroad company it appeared that the defendant, under authority of the common council of the city—which authority the city charter empowered the council to give—had constructed and was operating the main line of its railroad,—an ordinary and commercial railroad, running to and through the city and passing in front of plaintiff's lot. Safe and sufficient ingress and egress to and

is said: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient, that they are skilfully constructed, that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

"In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the

from the lot were not materially impaired. The injurious consequences to the lot were not due to any improper construction or operation of the road, but were such as result from constructing and operating a railroad through a street in an ordinary and prudent manner, and arose from the engines and trains passing day and night, and throwing steam, smoke, dust, and cinders upon the plaintiff's premises and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate, causing physical discomforts and annoyance to plaintiff and his family, whereby the rental value of his premises was diminished: and it was held that whenever, without the consent of the owner of a lot abutting on a public street in a city, such a railroad is laid and operated along a portion of the street in front of his lot, so as upon that part of the street to cause the particular annoyance set out in the above statement, the lot owner may recover whatever damages to his lot are thus caused by so laying and operating the railroad. *Adams v. Chicago*, B. & N. R. Co. 39 Minn. 286, 1 L. R. A. 493, 12 Am. St. Rep. 644, 39 N. W. 629.

The rule laid down by the supreme court of Minnesota in *Brakken v. Minneapolis* & St. L. R. Co. 29 Minn. 41, 11 N. W. 124, that the owner of lots abutting on a public street, whether he owns the soil to the center of the street or not, has a special interest in the street different from that of the general public, and such an one as will enable him to maintain an action against any person or corporation who interferes with the street in such manner as to cause appreciable injury to his property, to recover damages for such injury, would seem to be founded on reason and good sense. And what was held in *Adams v. Chicago*, B. & N. R. Co. 39 Minn. 286, 1 L. R. A. 493, 12 Am. St. Rep. 644, 39 N. W. 629,—*viz.*, that where plaintiff's property was injured by the operation of trains throwing steam, smoke, dust, and cinders upon his premises

completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification: That the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others of their property. Grants of privi-

leges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." 108 U. S. 329-332, 27 L. ed. 744, 2 Sup. Ct. Rep. 727.

And again, page 332 of 108 U. S., page 745 of 27 L. ed., page 729 of 2 Sup. Ct. Rep.: "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest.

and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate, causing physical discomfort and annoyance to him and his family whereby the rental value of the premises was diminished, an action was maintainable against the railroad company by him therefore—is a natural sequence to the rule laid down.

While the grant of a right by the legislature prevents the act done from being regarded as a nuisance, it is not a logical or legal consequence of such grant that it may not inflict injury or damage. *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

And so, when the state grants a right, the use of which works an injury to another, and the law provides no mode of assessing compensation for such an injury, the right of suit for damages, if any can be proved, is not taken away by such law. *Ibid.* In this case the court said it was not satisfied that the use of a public street in a city by steam power was within the legitimate use of such street. That there was no doubt that the streets might be used and tracks laid upon them, and cars drawn over them by horses; but there was something in a locomotive power, in throwing smoke into the houses along the street, its tremendous weight shaking the houses and breaking plastering and walls; and in the noise and screeching of whistles, which, in the machinery employed, might make it the subject-matter of injury, which the horse cars slowly driving along would not occasion. The damage from the running of a steam railroad over the streets of a city must be such as the law recognizes as actually something tangible and determinable; and to arrive at this the occupation of the parties by which losses in scholars, or in trade, or the like, have been occasioned would not be legitimate; but the actual depreciation of the value of property would be proper, and this depreciation, not only from questions of access upon the street, but the

noise, smoke, shaking of walls, or plastering, and the like, which can be traced as effect to cause. In cases of this kind damages are not given for feelings of parties, or the fact that carriages might be injured by runaway horses, or that visitors are prevented from coming to the house, but must rest upon some solid, tangible injury.

In an action brought against a railroad company by one claiming that certain real estate belonging to him had been permanently injured and depreciated in value in consequence of defendant's having constructed its roadbed along a street adjacent to the property, and occupying and using the street as its right of way, operating trains thereon, emitting sparks of fire, smoke, and cinders, from its locomotives, endangering any building that might be erected on the block, and making harassing noises by ringing bells, blowing whistles, and the rumbling and jarring of passing trains; to which complaint the defendant answered by a general denial, and specially that it constructed this railroad along and upon the mentioned street under an ordinance of the city authorizing it to do so, and with care so as to injure abutting property as little as possible,—it was held that the plaintiff was entitled to recover for any depreciation in the value of the property which the jury believed was occasioned by the probable fact that the defendant in operating and using its road would make unusual and loud noises, as was alleged by the plaintiff. *Ft. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281, 12 S. W. 864.

6. Cases absolving company.

The extreme difficulty of maintaining a clear view of the principles under discussion is clearly demonstrated by the following decisions. In some instances the same court which, as shown above, has held that authority to operate a railroad does not absolve the company from liability for private nuisance has, upon a similar state of facts, reached an opposite conclusion by the application of a different principle which was equally well established, but which had no

and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

And again, page 334 of 108 U. S., page 745 of 27 L. ed., page 730 of 2 Sup. Ct. Rep.: "If, as asserted by the defendant, the noise, smoke, and odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if

that be possible, the nuisance complained of and, if that be not possible, they should be removed to some other place, where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

To the same effect is the case of *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85, Citing *Stevens v. New York Elev. R. Co.* 25 Jones & S. 416, 8 N. Y. Supp. 313; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Kane v. New York Elev. R. Co.* 125 N. Y. 186, 11 L. R. A. 640, 26 N. E. 278; *Druck*

proper application to the case to be decided. The two principles most frequently applied are that what the legislature authorizes cannot be wrongful, and that there is no liability for consequential damages. The first principle is not applicable, because it is limited to lawful authorization by the legislature, and the legislature has no power to destroy private property by authorizing the erection of a private nuisance in its vicinity. The second principle is not applicable, because the destruction of property values by the maintenance of a nuisance is not a consequential, but a direct, injury, and results in direct damage. These propositions seem self-evident when stated, but failure to keep them in mind has caused the courts great difficulty.

Thus, in *Bellinger v. New York C. R. Co.* 23 N. Y. 42, the railroad company which was the predecessor of the defendant, and to whose rights and liabilities the latter had succeeded, was authorized by law to construct its railroad on the course on which it was afterwards located; and in making such construction it crossed a creek, and ran on an embankment over the whole of the land between the creek and a village, about 150 rods. The bridge on which the track ran over the creek was nearly 500 feet long, and there was a space of 82 feet in the embankment for water to pass in the time of flood. The embankment, except this space, was from 4 to 12 feet high, and near its west end there was a culvert 4 or 5 feet high. It was shown that the railroad company had acquired title to the land occupied by the track of its road, and that the plaintiff had received payment for the value of his portion of that land, and for his damages in consequence of the road having been laid out through it. The action was to recover damages against the defendant for "negligently, wrongfully, and improperly" constructing its road across the creek and across the lowlands forming the valley thereof, by means of which plaintiff's lands in the valley on the east side of the creek were repeatedly overflowed, the soil, fences, and manure washed away, and large quantities of rub-

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bish left upon the ground, etc. The case is one that has been largely cited to uphold the doctrine that a legislative grant to construct and operate a railroad will protect the company from liability for consequential or inferential damages caused by the proper and prudent construction and operation of a road without unskillfulness or negligence on the part of the company; and while the reasoning of the judge who delivered the opinion of the court is largely to that effect, yet a careful consideration of the case leads one to the belief that the case is not so satisfactory an authority for the doctrine mentioned as has been so often claimed for it. The question upon which the case turned was whether a question addressed to an expert engineer of the defendant as follows: "Were the embankment and the bridge carefully and skillfully constructed, with reference to this creek?" which was objected to by the plaintiff as incompetent and excluded by the trial judge, should have been permitted to be answered; and the judge who wrote the opinion, after holding that all the other questions in the case must be decided against the defendant and in favor of affirming a judgment for the plaintiff, then said: "If one chooses of his own authority to interfere with a watercourse even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above or below. But the rule is different where one acts under the authority of law. There he has the sanction of the state for what he does, and unless he commits a fault in the manner of doing it, he is completely justified."—and concluded by saying that the judgment should be reversed on account of the erroneous ruling upon the question of evidence. The language last quoted would appear to be in direct opposition to that of the judge who delivered the opinion in *Brown v. Cayuga & S. R. Co.* 12 N. Y. 487, and yet the judge who delivered the opinion in this case was the same who in that case made the remark that the correct principles in regard to consequential damages were laid down in *Fletcher v. Auburn & S. R. Co.* 25 Went.

er v. Manhattan R. Co. 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568; Duyckinck v. New York Elev. R. Co. 125 N. Y. 710, 26 N. E. 755; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6, note, 8 N. E. 537; Peyser v. Metropolitan Elev. R. Co. 13 Daly, 122; Smith v. New York Elev. R. Co. 44 N. Y. S. R. 875, 18 N. Y. Supp. 132; Bohm v. Metropolitan Elev. R. Co. 129 N. Y. 576, 14 L. R. A. 344, 29 N. E. 802. The same doctrine is laid down in Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L. R. A. 256, 29 S. W. 104. In that case this court quoted approvingly the case of Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 135 N. Y. 393, 17 L. R. A. 674, 31 Am. St. Rep. 838, 32 N. E. 148, which said: "We are

not prepared to hold that a person, even in the prosecution of a lawful trade or business upon its own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury."

Again, on pages 520, 521, of 93 Tenn., page 243, 27 L. R. A., page 111 of 29 S. W.: "The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of jus-

462, and in reference to these two cases, in the conclusion of his opinion in the present case, he said: "There are two other cases mentioned in the opinion of the general term, namely, *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, and *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486. The first of these cases is substantially overruled in the one referred to in 4 N. Y. 195, 53 Am. Dec. 357, (the *Radcliff Case*). In the other case the only question presented was whether a party continuing a nuisance was liable if he had not had notice to remove it. The concluding sentence in the last opinion given in that case was written when the writer had not in his mind the case in which *Fletcher v. Auburn & S. R. Co.* was reconsidered; but no part of that opinion was adopted by the court. The case itself raised no question material to the present inquiry; and it cannot, therefore, be considered a precedent in the case under consideration." As a matter of fact an inspection of the report of the *Brown Case* shows that all the judges were in favor of affirmance for the reasons stated in the opinion of the judge, who held that the railroad company was liable for consequential and indirect damages the same as an individual would be, and that the court did not pass upon the question whether the defendant was liable without notice to remove the obstruction and restore the bank of the stream; and the attempt by the learned judge who wrote the opinion in the *Bellinger Case*, to impair the value of the *Brown Case* as an authority in favor of the doctrine asserted by it in its prevailing opinion, which, as before stated, was concurred in by all the judges, would appear to be without foundation.

There is a statement in the case "that the railroad company had acquired title to the land occupied by the track of its road, and that the plaintiff had received payment for the value of his portion of that land, and for his damages in consequence of the road having been laid out through it." That fact furnishes abundant ground for the result arrived at in this case, and for a great deal better reason than that given by the 1 L.R.A. (N.S.)

judge who wrote the opinion, namely, that when the plaintiff's land was acquired by the railroad company, whether in condemnation proceedings or by agreement and purchase from him when he was paid for it, it must be presumed that the authorities making the award or the parties to the grant themselves, whichever it was, had in contemplation, among other things, that a proper construction of the road would nevertheless cause the damage for which the plaintiff suffered and for which he sought to recover in the action, and therefore he could not so recover without showing negligence or unskillfulness on the part of the railroad company. A very careful and correct review of this case may be found in 3 Farnham, Waters, 2650, § 904.

The opinion in the case of *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, was written by Samuel Nelson, chief judge of the supreme court of New York, and for twenty-five years associate justice of the Supreme Court of the United States, and was concurred in by all the members of the New York supreme court. The case has been cited with approval in many cases decided both before and since the *Bellinger Case*, and in the New York court of appeals under its present organization; although judges delivering the opinion in two cases in that court have let fall the loose statement that it had been overruled in the *Radcliff Case* and the *Bellinger Case*. So far from being "substantially overruled" in the *Radcliff Case*, all the reference to it there was that the judge who wrote the opinion, after deciding the only question in the case, namely, the right of a city to change the grade of one of its streets, without being liable to an abutting owner for injuries sustained by him by reason of the change, and after then saying "this short view is enough, perhaps, to dispose of the case,"—proceeded to devote nine of the ten pages of his opinion to questions other than the one actually decided, and in his long dissertation said in passing: "The case of *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, stands on the somewhat questionable ground that the leg-

tice that the public, not the individual citizen, should bear the burdens imposed upon private property for the public benefit. That defendant's act may have been authorized and lawful can make no difference. The legislature has not the power (except, perhaps, as to corporate franchises) to authorize, and in this case it has not undertaken to authorize, the taking of private property for a public use without compensation."

In *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 272, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 593, it is said: "But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with it immunity

from liability in executing the work for consequential damages to private property to the same extent as pertains to the sovereign in executing public works" (*Bellinger v. New York C. R. Co.* 23 N. Y. 42), it is now the settled doctrine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to the private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual (*Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 56 Am. Rep. 6 note, 8 N. Y. 537). This doctrine accords with reason as with the presumed intention of the legislature. The franchises of a railroad com-

mission did nothing more than to shield the railroad company from an indictment for the wrong which would otherwise have been done to the public by occupying the highway with their road, without giving the company any authority whatever, so far as related to the rights or property of individuals." An examination of the *Fletcher Case* discloses the fact that the foregoing is not an exact statement of what was there decided. And the statement that the principle laid down in the *Fletcher Case* is "questionable ground" would seem, from the cases on the subject, to be opposed to some of the highest authorities, both in this country and in England.

In *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.* 3 Hun, 523, the court approving and following *Bellinger v. New York C. R. Co.* 23 N. Y. 42, said that in that case, as in this, evidence was given tending to show that the lands in the neighborhood had been at times of freshet overflowed prior to the erection of the structures of the defendant; and that the principle laid down in the case was that where one has the sanction of the state for what he does, unless he commits a fault in the manner of doing it he is completely justified.

Friedman v. New York & H. R. Co. 89 App. Div. 38, 85 N. Y. Supp. 404, was an action to recover damages and for an injunction for the abatement of a nuisance maintained by the defendants in operating their railroad train yards, the plaintiff alleging that her premises, some 150 feet from the railroad tracks, were injured by the smoke and dirt discharged upon them from the defendant's engines, and that her property had decreased in value, owing to the noise and inconvenience created by the defendants in the maintenance of their railroads and yard. The answer denied that a nuisance existed, alleged that the defendants were operating their trains, switches, roundhouses, etc., as duly authorized and directed by law, and that the operation was necessarily attended with noise and the emission of smoke, steam, vapors, and dust. There was testimony given by the plaintiff to sustain the

allegations of the complaint; the defendant offered no evidence to offset that of the plaintiff, but rested upon putting in evidence the various acts and laws by virtue of which they operated their trains and yards. Upon an appeal from a finding that the injury suffered was the result of the lawful operation of the road, for which no damage could be recovered, and a judgment entered thereon dismissing the complaint, it was held, citing and following *Uline v. New York C. & H. R. Co.* 101 N. Y. 107, 53 Am. Rep. 123 note, 4 N. E. 536, that as the plaintiff had neither alleged nor proved that the railroads were operated negligently nor improperly; and as it was not claimed that the injuries suffered were other than those caused by the regular operation of the roads—that the case was controlled and governed by the *Uline Case* rather than by *Garvey v. Long Island R. Co.* 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. 57, which the court together with the *Cogswell Case* and *Sadler v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, endeavored to distinguish. One of the judges dissented, saying that in principle he thought the facts shown upon the trial brought the case within the doctrine announced in the *Garvey Case*, that the evidence fairly established that in the use which was made by the defendants of their yard a nuisance was created, from which the plaintiff suffered special injury, and that the legislative authority to maintain and operate a railroad does not justify, and did not justify in this case, the creation of such a nuisance, and that the method by which the nuisance was created was not of consequence, if it existed.

The case was appealed to the court of appeals, and it would seem as though this would have been an excellent opportunity for that tribunal to make an endeavor to lay down the true rule, once for all; but for some reason it refrained from doing so, and affirmed the decision of the appellate division without opinion. 180 N. Y. 550, 73 N. E. 1123.

In *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313, in the general term of the

poration are conferred in consideration of supposed public benefits which will result from the construction of its road. The projects of such an enterprise are moved by considerations of personal advantage. To acquire corporate charter and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that, in executing its corporate powers, the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. See also *Long Island R. Co. v. Garvey*, 159 N. Y. 334, 54 N. E. 60.

In *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 331, 83 S. W. 658, noxious fumes and smoke were found to be sufficient to constitute a nuisance. With refer-

ence to location and operation, the court (pages 342, 343 of 113 Tenn., page 660 of 83 S. W.) said: "The court of chancery appeals finds that the defendants are conducting, and have been conducting, their business in a lawful way, without any purpose or desire to injure any of the complainants; that they have been and are pursuing the only known method by which these plants can be operated and their business successfully carried on; that the open-air roast heat is the only method known to the business or to science by means of which copper ore of the character mined by the defendants can be reduced; that the defendants have made every effort to get rid of the smoke and noxious vapors, one of the defendants having spent \$200,000 in experi-

supreme court of New York in the fourth district, the judge delivering the opinion upon the argument of a demurrer to the declaration said that the fair construction to be given to the declaration was that the church or society occupying the church edifice owned by the plaintiffs had been disturbed during divine worship on the Sabbath by the noise made by the defendants in the use of their road, by which the property had very much depreciated in value for use as a church, which acts were alleged to be unlawful, not from their being done unnecessarily, wantonly, and maliciously, but because their road was used on the Sabbath. It was held that the demurrer was well taken for several reasons, and that, although the abuses alleged might amount to a public nuisance as to the plaintiffs as owners of the building, the consequences were too remote. The court said that no case had been cited, and was of the opinion that none could be found, where a suit had been maintained for injury done to real estate by mere noise, although many nuisances removable in their nature might be an injury, even to the reversion. The judge delivering the opinion said that perhaps it was not necessary to decide the question raised in this case, whether the facts stated in the declaration amounted to a common nuisance, but that if it were, he should doubt the position very much; that while unquestionably the noise might amount to a nuisance, and also be actionable, that which is authorized by an act of the legislature cannot be a nuisance, and that the reason a private action will not lie for a common nuisance unless there be special or particular damage is not only because of multiplicity of suits, but because the King is entrusted with the remedy. The court then cited *King v. Pease*, 4 Barn. & Ad. 30, and American cases holding that if in the construction and maintenance of a railroad under authority by statute to follow a given line, and in the running of the road, horses of travelers were frightened by the trains, this interference with the rights of the public must be taken to have been sanctioned

and contemplated by the legislature. While it was held that the declaration could not be sustained, for the further reason that the proper persons actually molested by the alleged nuisance were not the plaintiffs, but the persons attending the church, still the general trend of the decision must be said to have been on the theory that the acts of the defendant which were alleged, while they did disturb the congregation and people worshipping in the church, were not actionable, for the reason that they were contemplated and justified by the act of incorporation.

Thereafter, in the same year, the First Baptist Church of Schenectady, being the same church the trustees of which had brought the action in the preceding case, brought an action against the Schenectady & Troy Railroad Company for the same cause of action; wherein the defendant, among other things, set up the acts of the legislature incorporating it as a railroad company, and alleged that, if the things averred in the complaint had taken place and occurred as therein stated, the same had necessarily and unavoidably happened in the lawful use of its railroad, as it was authorized and empowered to use the same by virtue of the acts of the legislature aforesaid; and insisted upon the trial that no action for a nuisance could be maintained by the plaintiffs in their corporate capacity against the defendant for any acts done in the ordinary use of the road in pursuance of and by the authority of the legislature. Defendant also set up substantially the same defense that the defendant took by demurrer in the *Utica & Schenectady Case*. All these propositions were overruled by the circuit judge, who directed a verdict for the plaintiffs for nominal damages. On a motion for a new trial the general term of the supreme court in the third district denied the motion on the theory that, as far as the question under consideration is concerned, the plaintiffs had shown a right to bring the action, and that the use of the road in the manner alleged in the complaint was a private nuisance for which the plaintiffs were entitled to recover.

ments to this end, but without result. It is to be inferred from the description of the locality that there is no place more remote to which the operations referred to could be transferred."

And again (page 358 of 113 Tenn., page 664 of 83 S. W.): "A judgment for damages in this class of cases is a matter of absolute right, where injury is shown."

In view of these and many other authorities, we are of opinion that there was no error in the charge of the court, as claimed by the defendants, except as hereinafter indicated. It remains to apply the principles laid down as determining liability to the facts of this case, with such criticisms and modifications as we think are proper under the facts.

On this subject the court said that the defendant was indeed authorized to make the railroad, and to acquire the land necessary for that purpose. That it was also authorized to use the road for the transportation of passengers and freight. But that in the exercise of this authority it was only to be exempt from liability for injuries to others to the same extent as if the railroad had been constructed and used by individuals owning the land, without legislative sanction. That if, either in the construction or use of the road, it committed an act for which an individual, under the same circumstances, would be liable, it too must be held answerable for the consequences. That every corporation takes its powers subject to this implied restriction, and any other doctrine would lead to unimaginable mischiefs. An that where, as in this country, corporations are so multiplied and so extensively engaged in the various departments of business, to hold that they may, with impunity, do any act for which an individual would be amenable to justice, would result in the most pernicious consequences. 5 Barb. 79.

These two cases would seem to militate against each other, but that was not the end of the seeming inconsistency of things, for in *Chapman v. Albany & S. R. Co.* 10 Barb. 360, the same judge who wrote the opinion of the general term in the third district, in the *First Baptist Church v. Schenectady & T. R. Co.* wrote the opinion of the general term reversing a case which had been tried before the same justice who delivered the opinion of the general term in the fourth district in *First Baptist Church v. Utica & S. R. Co.* and based his opinion upon that case as his authority for doing so (p. 367), stating: "The law of such a case is clearly stated by the same learned judge whose decision is the subject of this review, in the *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 313." In this case the defendant railroad company, in pursuance of authority granted by the legislature, and with the consent of the common council of the city, constructed its railroad across a street of the

As before stated, tracks were laid in front of the property in controversy, and about 225 feet from it, as early as 1851 or 1852: and the entire traffic and travel of the Nashville, Chattanooga, & St. Louis Railway and Louisville & Nashville Railroad to and from the south passed over these tracks. With the increase of travel and traffic, the cars have been caused to pass more frequently than when the roads first commenced operations; and other tracks have been laid entering into the terminal station, and passing through it, in order to accommodate the increase. When the first tracks were laid, the property now in controversy, as well as that contiguous, was vacant. With the growth of the city this space has been occupied, and residences have been erected.

city, entering that street upon the easterly side at a point nearly opposite to the premises of the plaintiff, on the westerly side, and crossing the street diagonally to a point north of the plaintiff's premises. The grade of the railroad where it was made to cross the street was 2 feet above the former grade of the street, and the common council passed an ordinance directing that the grade of the street at this intersection with the railroad be altered so as to form on the north side of the railroad a plane from the level of the railroad regularly descending to another street, and on the south side of said road a plane descending in like manner to or near a point in the street thus crossed. The result being the raising of the grade of the street 2 feet opposite the plaintiff's north line and not quite so much opposite his south line. There was some evidence tending to show that the plaintiff's property had been somewhat injured in the change of the grade. The trial court had charged the jury, among other things, that, whether the soil of the street belonged to the plaintiff or not, he could recover for any particular damage sustained by him in consequence of the defendant's raising the street or the sidewalk opposite his premises, if that damage was special and peculiar to himself. This trial judge, it will be recollected, was the same who had written the opinion of the general term of the fourth district, in *First Baptist Church v. Utica & S. R. Co.* On a review of the case by the general term of the third district a new trial was ordered for error in that charge, the opinion being written by the same judge who held the railroad company in *First Baptist Church v. Schenectady & T. R. Co.* liable for the damages caused the church corporation by the noise of its road, and, as before stated, quoted the decision of the judge in *First Baptist Church v. Utica & S. R. Co.* as his authority.

In constructing an open tunnel or cut through land which had been the property of the plaintiff, but which seems to have been regularly condemned by a railroad company, such company, in order to extend the

Thus, both the travel and traffic of the roads, as well as the growth of the locality, have gone hand in hand. We are of opinion that, in so far as the growth and increase of travel and traffic into and through the station has brought discomfort to plaintiff, he is without remedy. In other words, the roads have the right to accommodate their increasing traffic and travel without liability, so long as their trains are operated without negligent disregard of the comfort and usable value of the plaintiff's property, and, for this purpose, to lay such additional tracks, side tracks, and switches into and through the station as may be required to accommodate such travel and traffic, both passenger and freight; and it is only for the additional conveniences of roundhouses,

sand houses, coal bins, coal chutes, and the switch yards and tracks necessary to operate such additional conveniences, which might be located elsewhere, though not so advantageously, perhaps, that the plaintiff can complain, if they materially damage the plaintiff's property.

There has been no effort made to distinguish between the damage caused by the entrance of trains and passing of trains and exit of trains from the station and switching trains in operating the road, and the operation of the switch tracks, the coal bins, coal chutes, roundhouse, sand house, and other facilities introduced and operated as part of the terminal facilities. It is only for the latter that plaintiff has a right of action, and proof should have been con-

come to a sufficient depth, found it necessary to remove a rocky formation, and to accomplish this it was necessary to blast such rock with gunpowder; and in *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592, it was held that the railroad company was not liable to the owner of the adjacent property which had not been taken for railroad purposes for vibrations of his residence thereon, caused by the blasting for the purposes aforesaid on the property so condemned and taken, the same having been transacted with due care and diligence, without any negligence on the part of the company. The court said that the immediate act was confined to the company's own land, but the blasts by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house; that the lot of the defendant could not be used for its roadbed until it was excavated and graded, and the blasting was necessary and was carefully done, and the injury was consequential, but there was no technical trespass, and that under these circumstances the plaintiff had no legal ground of complaint; that while the protection of property is doubtless one of the great reasons for government, it is equal protection to all, which the law seeks to secure; and that the rule governing rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live; and that to exclude the railroad company from blasting to adapt its lot to a contemplated use, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of one for the benefit of the other; and that the law would not, in a case like this, protect the plaintiff's house by depriving the defendant of its right to adapt its property to a lawful use, through the means necessary, usual, and generally harmless.

While that case seems to be devoid of justice, it must be remembered that for the 1 L.R.A. (N.S.)

strip of land taken plaintiff had received compensation, which, in the theory of the law, included the injuries which would result to his remaining property from a careful and proper construction of the road; and, if blasting was necessary, the damages which would result therefrom had presumably been paid, and plaintiff was not entitled to a second recovery.

In *Briesen v. Long Island R. Co.* 31 Hun, 112, it was found as a fact that the defendant's use of its lot interfered with the beneficial use of the plaintiff's premises, and was a disturbance and injury thereto, but that such use was confined entirely to the ordinary operation and maintenance of a depot for passengers and freight, and a yard for the accommodation of incoming and outgoing passenger and freight trains, and to such drilling operations as were absolutely necessary to the proper transaction of such business, and to no other use or purpose whatever. The court said that, as a general rule of law in New York, what is done by sanction of the state under legislative authority is completely justified when done without negligence or fraud, and, citing *Radcliff v. Brooklyn*, 4 N. Y. 196, 53 Am. Dec. 357, said that it was decided in that case that where persons are authorized by the legislature to do certain things they are not responsible for consequential damages where they act with prudence and care. The judge delivering the opinion of the court admitted that in the case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719 (erroneously cited here as *Bellemont & O. Co. v. Fifth Baptist Church*), the Supreme Court of the United States laid down a different rule of law, but said that they had stated here the law as they understood it to be settled by the courts of New York, and felt bound to follow their own rule until the highest appellate court of the state should declare a different rule. It would seem as though the highest court of the state, as in the *Cogswell Case*, and in three other cases which have followed it, laid down an entirely different rule; and this case would hardly

fined to that feature of the situation, and not to the general discomfort and damage caused by the entering and departure of trains from the station, as well as the operation of the other facilities.

Again, it is not every inconvenience or discomfort that will entitle a property holder to damages, even though it be material or considerable, and especially as against a public or quasi-public enterprise. The noise of paved streets and of street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material discomfort and annoyance to persons living near by; but these are discomforts and annoyances that the individual must bear in deference to the convenience and

comfort of the public. The noise of trains passing through the country districts and the dust of vehicles passing along the public highways may be a great annoyance to residents along the line of such roads; and the rumbling of carriages of belated revelers and of early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but it is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceeds to such an extent as to injure the usable and rental or permanent value of the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary

seem to be good authority on the subject, since those decisions.

This case seems to have received the approval of the judge delivering the opinion in *Re New York Elev. R. Co.* 36 Hun, 427.

In an action of trespass on the case against a railroad company, the ground of the complaint was that the defendants made excavations so near the plaintiff's land that, by the action of the elements and the frost, portions of the soil from time to time caved in from the top of the slope, until after a number of years it reached the plaintiff's land, and, since he owned it, portions of his soil had broken off at the summit of said slope, and slid and washed down the side of said slope towards the bank wall at the bottom. It was not charged that the defendants were negligent, but it was admitted that the excavations were necessary for the purpose of the road, and that the road was built under and according to their charter. This charter, granted by the legislature of the state, gave to the defendants express license to make all excavations necessary to the construction of their road; and for parties injured thereby a remedy was provided in the charter or in the general statutes of the state; or, if the damage was so remote or consequential as not to be included in the remedies thus provided, then it was *damnum absque injuria* and the parties were without remedy. In general, railroad companies are responsible in damages, in an action of tort, for doing what their charter does not authorize, or for improperly doing what it does authorize; but when they have done no more than is authorized by their charter, and that has been done in a skilful and careful manner, for such acts an action of tort cannot be maintained against them. The principle of the common law, that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil and render it liable to break away and slide down of its own weight, does not apply to excavations made in pursuance of a license; and a license from the legislature, if within its constitutional limits, affords as ample

protection as a license from the injured party. It was held that the action could not be maintained. *Boothby v. Androscoggin & K. R. Co.* 51 Me. 318.

The court fails to explain how it is within the constitutional limits of legislative power to grant to the railroad company an immunity from liability which under the same circumstances would rest on other individuals and corporations.

In Kansas the title to the streets is in the county, but the legislature has given to the city government the power of full control, and it has been held that an abutting lot owner has no greater right to the use of a public street than a railroad company that has been authorized to construct its line along it, as each must respect the use of the other, and nothing short of a practical obstruction of the use by one will be a cause of action to the other. A railroad is not an unreasonable obstruction to the free use of a street, but rather a new and improved method of using the same, and germane to its principal object as a passageway, like the electric, steam motor, and horse car lines; and so, if the location and construction of the line of railroad are authorized by the city council, and its location in the street is such as to give the lot owner ingress to and egress from his lot, such use of the street by the railroad company does not interfere with the use of the lot owner, and consequently he cannot recover for the remote and indirect inconvenience arising from smoke, noise, offensive vapors, sparks, fires, shaking ground, and other annoyances. *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1052.

This case was not referred to in *ARCHERSON, T. & S. F. R. Co. v. ARMSTRONG*, but is in line with, and with it illustrates the Kansas rule.

Atchison & N. R. Co. v. Garside, 10 Kan. 552; and *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L. R. A. 59, 19 Pac. 661, held that where a railroad company has a legal right to construct and operate its road over certain grounds it cannot be

or permanent, and depriving the owner thereof. See *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 706; *Demarest v. Hardham*, 34 N. J. Eq. 469.

This distinction will, we think, tend to harmonize to a large extent cases which appear to be, and are, no doubt, somewhat in conflict with the case we have cited. In other words, there are cases, some of them cited by counsel, which seem to hold that damages will not be awarded when they arise from the careful operation of lawful enterprises; but these cases, when carefully analyzed, do not present such a strong state of facts as shows a material injury to the property, amounting to a taking of it, in part or in whole; but they present cases where the inconvenience and damage do not

amount to a nuisance, and, hence, being done in the prosecution of a legal, public business, they do not present a case for damages.

The liability of defendants is, we think, to be determined by the principles we have laid down; and it remains to consider the question of damages, if there is liability.

One assignment of error is that the damages are so excessive as to indicate passion, prejudice, or caprice. In our opinion, there are two theories upon which damages might be estimated or based, if there is liability. One is the theory that the defendants are carelessly and negligently operating their property so as to make it an unnecessary and unwarrantable and hurtful nuisance, while at the same time they have it in their

held liable for damages of any kind, where it constructs and operates its road in a legal and proper manner; and where a city, having by the laws of the state control over a levee or levee street, has given complete and ample power for the time being to a railroad company to construct and operate its road over such levee, that is all that is necessary; and if the company constructs and operates its road in a legal and proper manner it is not liable to abutting owners on such levee for any damage they may sustain by reason of such construction and operation.

The Ohio court has held that a railroad company which has constructed and is operating its road in a street, as authorized by law, is not liable to an abutting owner for causing to be made sounds and noises by its engines, locomotives, cars, and trains, and for jarring and shaking the dwelling house and premises, and generating and emitting large quantities of noxious and offensive vapors, smoke, and filth. For discomforts arising from the ordinary use of the railroad by the company such lot owner has no more right to recover than any citizen who resided or might have occasion to pass so near the street as to be subjected to like discomforts. *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624.

But in *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69, the court, after referring to and citing what was decided in *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624, stated that the decision was made previous to the adoption of a section of the Ohio Code, and that the provision then in force created no remedy for landowners, such as was being considered in the present case. A section of a statute which had been adopted since the decision in that case provided that "every company which lays a track upon any such street, alley, road, or ground shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two

years from the completion of such track;" and under that provision, in estimating such injury it was held proper and competent to take into consideration evidence of substantial injury and loss to the property, which was special to the plaintiff and not common to others, caused by smoke, noise, and sparks of fire occasioned by the running of locomotives and cars along the track in front of the property. *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69.

In *Fleishman v. Cleveland, C. C. & St. L. R. Co.* 11 Ohio Dec. Reprint, 543, the court, after reiterating the general proposition so frequently indulged in by courts anxious to decide a case in favor of the rights of a railroad company, that an adjacent landowner cannot maintain an action at law for consequential damages from the operation of its cars unless he can show a negligent exercise by the railway company of its legal rights, and after stating the *dictum* of Judge Field in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, as authority, and then ignoring the real decision in that case, as is often done by the courts endeavoring to screen the railroad,—decided in effect that the rule laid down in *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69, was not the true one. The court distinguished *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, and approved the case of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164.

In *Cleveland & P. R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84, it was held that the power granted the company by its act of incorporation, to run its road to a city and to locate and construct it on the street of the city, being established, carried with it the authority to make and maintain on the street the switches which were the direct subject of the action; that by the express words of the charter the power was conferred of making as many sets of tracks as were deemed necessary; and the court further held that if these were not expressed it was clearly to be inferred from

power to correct the evils and obviate the trouble by adopting other means, and being more careful in the manner of operating the yards; and, coupled with this, is the presumption that the nuisance will be only temporary, and the evil will be remedied. In that aspect of the case recurrent damages to the use and enjoyment of the property may be recovered from time to time until the nuisance is abated. In such case the measure of damages will be the injury to the value of the use and enjoyment, which may be measured, to a large extent, by the rental value of the property, and to what extent that rental value is diminished.

The other theory is that the yards, etc., are carefully and properly operated, so much so as can be done considering the use of the

property; but the location of the yards, etc., and their proper operation, nevertheless causes an actionable injury to the plaintiff's property. In such case it is not contemplated that any change in operation will be made, and the damage will continue so long as the yards are continued, which will be permanently. In such case the proper measure of damages will be the injury to the fee or permanent value of the property by the continued and permanent operation of the yards. To the extent that such permanent injury is inflicted, the property is, in a sense, taken or appropriated.

The doctrine of successive suits rests upon the following principles: (1) That the act complained of is a nuisance. (2) That it may be abated or discontinued, and, until

the general powers conferred and the essential purposes of the grant, as a power to build side tracks is essential to the purpose and use of the road; and that a power to build a road of a single track, without the means of passing trains or of leaving the track for the shifting of cars, or of repairs at the shops and yards, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory. The action was for damages to the plaintiff's house on the corner of the street through which the railroad passed, by reason of two switches, whereby the street and sidewalk were encroached upon and constantly blockaded with cars, producing great noise and throwing off great volumes of smoke, and kept on the switches for a long time, whereby noxious and offensive smells from cattle and large volumes of smoke penetrated his house, rendering it unwholesome, etc., and it was held that the action could not be sustained.

A coal railroad terminating on a navigable river must, in the course of thirty-five years, necessarily increase its wharf accommodation far beyond its original wants, and this must necessarily increase the number of tracks or branches leading from the main stem to its various wharves, where the coal is shipped to all parts of the United States. This was the language used by the court in *Black v. Philadelphia & R. R. Co.* 58 Pa. 249. In this case the court further said that "the word 'railroad' *ex vi termini* includes sidings," and must of necessity include the present track or branch which is complained of by the plaintiffs, and that the fact that the tonnage had increased to 4,400,000 tons in twenty-two years shows the propriety of giving such a fair and liberal construction to the chartered powers of the company," which, with a slight change of the language, would seem to amount to saying the same thing as was said by the court in *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* 36 Pa. 99.

In *Struthers v. Dunkirk, W. & P. R. Co.* 1 L.R.A. (N.S.)

87 Pa. 282, it appeared that the defendant corporation was authorized by its charter to construct a railroad from the northern boundary of the county to any point in a borough of the county, and that with the consent of the borough authorities the defendants laid and constructed their railroad along the center of a street in the borough, directly in front of plaintiff's premises. At the time the road was being constructed the plaintiff had erected and nearly completed, at considerable expense, a handsome dwelling house on his premises, and he brought an action of trespass on the case to recover damages for the inconvenience and annoyance occasioned by the building and operating of the railroad immediately in front of his residence. The court said that the pleadings were not given, but it gathered from the charge of the court that the annoyance caused by the passage of trains, the cinders and smoke, and the hindrance to the passage of carriages, were the chief matters of complaint; and held that, however considerable these annoyances might be, they did not constitute a cause of action, and that there was no principle of law better settled in Pennsylvania than that a common-law action did not lie against a corporation for consequential injuries occasioned by the construction and operation of its works. In this case the court made use of the following language: "It was admitted by the learned counsel for the plaintiff, that the current of authority was against his view of the case, and we were urged to review the previous decisions of this court, and recast them in harmony with the state of public opinion at the present day. We see no reason why the law should change to suit the barometer of public opinion. On the contrary, we see many reasons why it should not. And especially are we not disposed, for such reason, to overturn a long line of cases, solemnly decided, which have, to some extent, become rules of property, and upon the faith of which investments have been made and rights have grown up. It is our duty to apply the maxim *stare decisis*."

that is done, damages may be recovered from time to time. This assumes that the nuisance will be abated, and that the cause of the injury is not permanent, nor intended to be so.

On the other hand, when the operation of the yards is lawful and reasonable, and the injury results from the location and necessary operation, and it is not contemplated to be removed or capable of being removed, then the damages are permanent, and they should be estimated on the permanent injury to the property in the depreciation of its value in the market.

Now, upon this feature, the measure of damages in the record is in a very unsatisfactory condition. The declaration in its different counts claims damages upon each

theory; that is, some of the counts for damages for use and occupation, and others for damages to the value of the property. There were other counts alleging damages to the furniture.

Much proof was taken showing damages in a general way,—that is, injury to the property, both real and personal; but there is very little, if any, estimate of salable value, and none of rental value or rental depreciation. It is not shown how much the rental or usable value has been diminished. It is not shown, in definite estimates, how much the permanent value of the property has been depreciated. The case was presented to the jury upon all the counts; that is, permanent damages to the property, temporary damages to the use, and

The Pennsylvania cases illustrate to the full the Pennsylvania rule that the statutes which give the right to the railroad corporation generally to construct and operate the railroad are to be construed favorably to the railroad corporation, and all implications are to be in its favor, in express opposition to the rule laid down by the courts in other jurisdictions.

In an action against a railroad company for erecting an embankment across bottom lands, and using the same as the approach to a bridge built across a creek running through such bottom lands owned by the plaintiff, whereby the plaintiff's crops and fences were washed away and destroyed, it was held that the jury ought to have been plainly charged, so far as the injury for overflowing the lands of the plaintiff by the construction of the embankment and abutments were concerned, that if they found, from the evidence, that the embankment and abutments were necessary to the safety of passengers and property passing over said road, and that it was built, constructed, and erected with care, skill, and prudence, not only as to safety of persons and property passing over the road, but also for the protection and safety of the property holder, then the finding on that issue should be for the defendant. *Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274.

The owners of property in the vicinity of a railroad necessarily suffer inconvenience, such as detention by trains upon the track, the noise of passing trains, the smoke emitted from engines, and the like, for which they cannot recover in a suit for damages. *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456. This doctrine was approved by the court in reversing a judgment for the plaintiff based upon the claim that the plaintiff's dwelling house, which was 93 feet from a coal chute of the defendant, and did not abut on the defendant's right of way, was injured, when the wind was in the west and the coal chute was being operated, by coal dust and smoke from engines blown over and upon and around such dwelling house, and that the

supplying of coal to the engines was attended with considerable noise.

The Colorado court has held that an action cannot be maintained against a railway company duly chartered by the legislative assembly of the state and authorized to construct its road in a particular city, where the title in fee of the streets is in the city and under the entire control of the city authorities, for injuries sustained by an abutting owner due to trains of cars passing over the track upon the street, which have jarred, shaken, cracked, and injured the plastering and walls of his building, and to the emission of smoke, cinders, and ashes from the engines upon and against the building, and whereby ingress and egress to and from the premises have been impeded, by reason of all of which the value of the premises has been lessened, where an ordinance of the city was in force at and prior to the date of the construction of the road, by which the city council was empowered "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve or keep in repair streets, avenues, lanes, alleys, sidewalks, drains, and sewers of said city, . . . to direct and control the location of railroad tracks, . . . and to regulate the rates of speed of all railroad trains;" and another ordinance granted permission to the railway company to construct and operate its railroad through the city in question. *Colorado C. R. Co. v. Mollandin*, 4 Colo. 154.

In *Hill v. Chicago, St. L. & N. O. R. Co.* 38 La. Ann. 599, the court stated that it had recently very considerably determined that "the legislature has the power to authorize the building of a railroad on a street of a city, and may directly exercise this power, or devolve it upon the local or municipal authorities," in the cases of *Harrison v. New Orleans P. R. Co.* 34 La. Ann. 462, 44 Am. Rep. 438; *Werges v. St. Louis, C. & N. O. R. Co.* 35 La. Ann. 641; and *Tilton v. New Orleans City R. Co.* 35 La. Ann. 1062; and that if the defendant railroad company had lawful authority derived, directly or indirectly, from the legislature, to construct

damages to the furniture. But, when the court came to charge the jury, all claims for damages to furniture were withdrawn; all claims for damages to the fee or permanent injury were, at plaintiff's request, withdrawn; and the case went to the jury alone upon the question of damages to the use and occupation; that is, to the rental or usable value of the real estate. It must have been confusing to the jury to have the matter submitted to them in this way, requiring them to eliminate from their minds the damage to the personal property, and the permanent damage to the realty, and to consider only the injury to the rental value. There is almost, if not an entire, absence of any basis for an estimate of the depreciation of the property in the rental

or usable value. It was shown in the proof over protest, that the value of the real estate was \$7,000. This was for the purpose of furnishing a basis for its rental or usable value, and was so confined; the argument being that the injury to the rental or usable value of \$7,000 would be more than that of a \$2,000, or less than that of a \$20,000. In this condition of the record, it is not improbable that the jury were misled into believing they could look to the injury to the personal property and the permanent injury to the property, whereas they could only look, as the case was finally submitted to them, to the damage to the use and enjoyment of the real property during the time the terminal property was being operated: that is, from January, 1900, to the bringing

and operate the road complained of, an injunction applied for by the plaintiff—a property holder on a street of the city upon which the defendant company was operating its road—would not be granted to restrain the road from running its locomotives and cars because the same pollutes the atmosphere with smoke, soot, and dust, and shakes and cracks the walls and ceilings of the plaintiff's houses, injuring the same and impairing the value of his property; the evidence being deficient of proof that the defendant was guilty of any fault in the construction or operation of its road, or in the machinery used, or that it occasioned any injury which could be avoided, or which was not necessarily incident to the prudent exercise of its right. The court said, further, that while it could not be questioned that some inconvenience was occasioned to plaintiff by the noise of the trains and by the smoke and soot of the engines and by the jarring of the houses, and that it might be possible that the price of property on the street might have been somewhat impaired by the establishment of a railroad thereon, these were merely consequential injuries, for which defendant, who was merely doing a lawful act in a lawful manner, could not be held responsible.

Where a person or a corporation is vested with authority by the legislature to do an act, they will be perfectly protected from all responsibility, and will be liable to no suit, either at law or in equity, provided that what they are authorized to do is done carefully and skilfully, though without such authority it would have been a nuisance; but if done carelessly and unskilfully, and damages result from such carelessness and want of skill, they will be responsible. *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 427. Approved, followed, and decided in connection with this case are *Campbell v. Point Pleasant & O. River R. Co.* 23 W. Va. 448, and *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 451.

The decision was undoubtedly correct so far as the result was concerned, but a better

reason could have been given for it, namely, that when the plaintiff's land was taken by the railroad company in condemnation proceeding it must be presumed that the authorities making the award took into consideration, among other things, that blasting would be necessary, and also what damage to the plaintiff's remaining land was liable to occur by reason of the facts and circumstances on which the action was founded. As said elsewhere, negligence and nuisance are entirely different causes of action, and where the former is present there is no necessity of considering the latter. But this axiomatic distinction is one which many of the other courts of last resort, as well as that of West Virginia, have failed to recognize or observe.

In *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39, 10 S. E. 29, the court, after approving the rule laid down in the *Spencer Case*, before stated, said further: This rule holds them responsible for want of skill, carelessness, and negligence. When the legislature grants a charter or privilege to perform a work, it is always with the understanding that it is to be exercised in such manner, where possible, as not to injure others. An action will not lie for injury from the execution of powers given by act of the legislature, those powers being exercised with judgment and caution; if the statutory powers are exceeded, or are not strictly pursued, or are carelessly, or negligently exercised, an action is maintainable.

In *Watson v. Fairmont & Suburban R. Co.* 49 W. Va. 528, 39 S. E. 193, the doctrine laid down in the *Spencer Case* and approved in *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14, and in the *Taylor Case*, was followed.

In *Dolan v. Chicago, M. & St. P. R. Co.* 118 Wis. 362, 95 N. W. 385, where the alleged nuisance consisted of stock yards maintained by the defendant upon its grounds in a village, from which offensive and injurious odors and noises were said to proceed, to the great discomfort of the plaintiff and his family, the court said that the evidence was entirely sufficient to sus-

of the suit in 1902. This was a period of about thirty-two months, during about six of which the plaintiff did not occupy the premises, but was away voluntarily for the summer.

The damage found was \$4,000. This, for the use of a property worth \$7,000, for only thirty-two months, would be grossly unreasonable for rental or usable value, even if the property was rendered uninhabitable. It would be at the rate of \$2,000 per year for a property which, from its value, would, perhaps, rent for not more than \$500 per annum. So that, if the plaintiff had lost the entire rent or use of his property, the amount found as damages therefor was grossly excessive, even taking into consideration, in addition to the rental, the de-

struction of the trees, flowers, shrubbery, etc. Treating the case, as we must, upon the record, that only temporary damages were awarded, they are so excessive as to indicate either misapprehension by the jury, or showing passion, prejudice, or caprice on their part, which must vitiate their verdict.

We have not been able to find in the record any evidence of the rental or usable value of the property. There is no evidence to show what the property would have rented for before the terminal plant commenced operation, nor how much, if any, that rental value had been diminished.

Nor is there any evidence or estimates in figures of the permanent injury to the property, if that was to be considered. Evi-

tain the findings of the jury, and that the questions presented were purely questions of law. The court further said that the railroad company was bound by positive requirement of law to receive and transport freight tendered to it for shipment, and to provide suitable facilities for receiving and handling the same at any of its stations. That it was also required to maintain a station at every village through which it passed which had a postoffice and a population of 200 people or more. That it must receive for carriage all live stock offered it from February 1 to September 30, inclusive, and properly transport the same over its road. That, in order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. That, inasmuch as it could not have a train ready at all times to receive and immediately transport the stock offered, it must necessarily have yards or inclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards when in use is matter of common knowledge. That the skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided, and that it must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. That impossibilities cannot be required, and that duties cannot be imposed, and punishments inflicted simply because the duties have been performed; and so, if injury results to others, it must in such case be *damnum absque injuria*. The court assumed to distinguish *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, saying that the construction of the roundhouse and machine shop next to the church, the noise from which seriously disturbed the religious 1 L.R.A. (N.S.)

exercises, was held to be an actionable nuisance because the fact plainly appeared that the location was unreasonable, and that there were many other places in the city where the shop could have been placed and answer all railroad purposes fully as well; but that the case went no further, and, when rightly understood, it did not antagonize the propositions laid down in this opinion. The court also distinguished *Anderson v. Chicago, M. & St. P. R. Co.* 85 Minn. 337, 88 N. W. 1001, on the ground that the evidence in that case established the fact that the yards were kept in an absolutely filthy condition, to the extent that dead animals were allowed to remain in them and become putrid, and that it was in view of these facts that the opinion in that case must be read; but the court said that the stock yards must be adjacent to the railroad line, the location of which is fixed, and that they must be at or in convenient proximity to a station, and it would not do to say that the company must go into unsettled districts in the country for its stock yards; for this is to say that, as soon as people begin to reside in the vicinity, the yards must be again removed to some more secluded spot, and so on *ad infinitum*. A grave and subtle reason indeed, for refusing to compel a railroad company to compensate a private individual for the destruction of his home. Suppose a soap boiling factory or a slaughter house had located in what was a secluded spot, and a city had extended its limits to the vicinity, would this court hold that they might continue their operations as before? And, if not, why should a railroad company go scot free in committing the same nuisance?

In *Carroll v. Wisconsin Central Co.* 40 Minn. 168, 41 N. W. 661, it was held that an action could not be maintained against a railroad company by a lot owner on the street of a city for damage caused to his premises by the noise, smoke, and vibration of the ground, all of which arose from the lawful, proper, and prudent operation of the railroad by the company, either upon

dence was introduced to show that smoke, soot, cinders, dust, and noise were caused by other industries than those of the terminal company. In regard to the several assignments on this feature of the case, we are of opinion that it was competent to show that the property in controversy was injuriously and prejudicially affected by smoke, dust, cinders, etc., from other sources, but not to show the effect of same on property near by, or contiguous to, the plaintiff's property.

Neither is it competent to show how other property contiguous to, or near by, that of plaintiff has been affected by the installation of and operation of the terminal plant, but the proof should be confined to the premises of plaintiff.

Nor is it competent to compare the noise existing at plaintiff's residence with that prevailing in other portions of the city; nor to show that Nashville, generally, is a dirty, smoky, noisy place or city.

Other minor errors are assigned, which it is not necessary to pass on specifically.

For the reasons we have indicated, the

judgment of the court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

Upon this new trial plaintiff should elect whether he will claim for temporary recurrent damages to his property in its use and rental value, or whether for permanent injury, and proof should be confined accordingly. So, also, all evidence as to damages to furniture should be eliminated, and not put before the jury. So, also, should the proof be limited to the damage caused by the operation of the roundhouse, sand house, coal chutes and bins, and the tracks used in operating the same, excluding such inconvenience and damage as arises from the operation of incoming or outgoing passenger and freight trains into the station, and the operation of such switches as are required to handle the same in entering or leaving the station. All other matters should be excluded from the jury as tending to confuse them.

In the present state of the record, we cannot say whether defendants are liable for any amount.

its own lands or upon land in which the plaintiff had no interest.

It is proper to say in connection with that case and the Minnesota decisions cited *supra*, IV. b, 5, that the distinction between the rule which is generally applied in condemning property taken by a corporation for a public use, and that applied in actions against a corporation for maintaining a nuisance, should be carefully noted and preserved. To illustrate: Where a railroad passes along a street in which the public has only an easement and the abutting owner still owns the fee, the interest and property of such owner in the portion of the street so owned by him must be condemned by the exercise of the right of eminent domain; and in such case the rule in ordinary cases of condemnation of land, that the owner of the land is not only entitled to the value of the land actually and physically taken, but is also entitled to damages for the injury which he may sustain from any cause whatever, which has been held to include noise, vibration, and the throwing of steam, smoke, noxious vapors, etc., upon the remaining land, prevails. Where, however, the fee of the street is in the municipal corporation, and the abutting owner owns only to the line of the street, a railroad having legislative and municipal authority to construct and operate its road on a street may lawfully do so, and no condemnation proceedings are necessary. But light and air and means of access through, over, or by means of a street to the property of an abutting owner have been held to be easements, and therefore property, and so, where any of these are cut off or interfered with by the construction or operation of a railroad, condemnation in the exercise of eminent domain 1 L.R.A. (N.S.)

is necessary, and this was the state of affairs in the Brakken and Adams Cases.

But in the Carroll Case, where the injury is stated by the court to have arisen from the lawful and proper and prudent operation of the railroad by the company upon its own lands, or upon land in which the plaintiff had no interest, it was held that the railroad company was not liable. And yet the injury was of the same character and was caused by the same noise, smoke, noxious odors, and vibration of the ground as was caused by the defendant in the Adams Case. This particular subject will be further alluded to in connection with what are known as the New York Elevated Railroad Cases.

Right here would seem to be the proper place to give an illustration of the ridiculous effect of the rule claimed by those courts and judges who hold that a corporation clothed by an act of the legislature with quasi public authority is exempt from liability for the commission of an act which amounts to a private nuisance and affects an owner of land abutting on a street to his injury. Let us suppose that A owns lands on both the east and west sides of a street running north and south in a city, and owns the fee of the street, and conveys the land owned by him on the west side of the street to B, but gives him title only to the side of the street. Thereafter a railroad company duly authorized by the legislative act of its incorporation to construct and operate its railroad upon the streets of the city, and having also the license and permission of the municipal authorities so to do, proceeds to construct its railroad through the street. Now, in accordance with the decisions in New York and most of the other

TENNESSEE SUPREME COURT.

G. C. GOSSETT, Appt.,

v.

SOUTHERN RAILWAY COMPANY et al.,

and Two Other Cases.

(.... Tenn.)

1. Blasting—effect of legislative authority.

A railroad company is not relieved from liability for injuries to adjoining property and the health of its occupants by blasting for its right of way, by the fact that it is a quasi public corporation authorized by the legislature to condemn, take, and use land for railroad purposes and works of public improvement, even if the work can be and is done without negligence.

2. Same—nuisance.

Blasting which causes loud noises and unusual and unpleasant concussions of air, and renders adjoining property untenable by reason of the fact that its occupants are inconvenienced, frightened, and

states, in order to do so it must first condemn the right of A in the fee of the street, and in doing so the authorities entertaining the condemnation proceedings must not only award damages for the actual invasion and physical taking of the land, but, under the decisions in the Elevated Railroad Cases, must also take into consideration the damage which the remaining lands are liable to suffer from noise, smoke, offensive odors, vibration, etc., and he is awarded damages accordingly; but when B, who, simply owning to the side of the street, has nothing which is taken and therefore nothing to condemn, comes into court for damages from injuries which he sustains from the same causes for which A was awarded damages in the condemnation proceedings, the judges and courts that we have mentioned turn him down, with the assertion that his injuries are consequential, and that, the railroad being clothed with the authority to construct and operate its road, such injuries are, as to him, *damnum absque injuria*, and must be borne by him without compensation.

Destruction of easements in street.

Wherever a railroad is lawfully built with proper care and skill, there it is not a nuisance. What the law sanctions and authorizes is not a nuisance, although it may cause damages to individual rights and property. If a railroad be built upon a highway after acquiring the public right and the private property, if any, in the street or the soil thereof, then the owners thereof are not responsible for any damages necessarily resulting from the construction or operation of the railroad to private property adjacent or near to the

L.R.A. (N.S.)

made restless and that their health is affected, is a nuisance.

3. Nuisance—discomfort—right of action.

Mere occupants of property adjoining that where a nuisance is being maintained have no right of action, where they are merely disquieted and kept in a state of alarm and apprehension, if it does not result in sickness or physical injury.

4. Same—injury—freehold.

A landowner who is driven from his home by the maintenance of a nuisance on adjoining property, or whose comfort is so interfered with as to lessen the desirability and usable value of his home, is entitled to recover damages therefor.

5. Pleading—accord and satisfaction.

An accord and satisfaction cannot be set up under the general issue or plea of not guilty.

(October 13, 1905.)

A PPEALS by plaintiff from a judgment of the Circuit Court for Knox County in favor of the defendants in actions brought

road. *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536.

And so, where a railroad company which had acquired all the rights of adjoining owners in the streets of a city, and, under a license from the city authorities, had raised the grade of a street in front of the lands of an adjoining owner so as to make the grade of the street the same as that of the railroad crossing it, the work being done by the railroad company with sufficient care and skill, and it not being alleged or proved that the street as a street for travel was in any way injured or its use unnecessarily impaired,—it was held not liable for any consequential damages to the plaintiff's land; the reason being that, as the city could have raised the grade of the street without liability to adjoining owners, it could lawfully authorize the defendant to do so without such liability. *Ibid.*

The court, after citing several cases which it claimed had settled the law to this effect, further stated that the case of *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, so far as it holds a contrary doctrine, had been overruled by the cases it had just cited, which were the *Radcliff Case* and the *Bellinger Case*, and *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186, and *Kellinger v. Forty-second Street & G. Street Ferry R. Co.* 50 N. Y. 206. This is a sample of the careless manner in which some judges refer to cases and to what they decide. The following is from the opinion in the *Kellinger Case*. "The decision in *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, is cited and relied upon by the plaintiff. There the defendants were authorized to build a railroad upon a line to be selected by themselves, and to cross public highways, by restoring them to their

to recover damages for the alleged maintenance of a nuisance. Reversed.

The facts are stated in the opinion.

Messrs. E. F. Mynatt and Pickle, Turner, & Kennerly, for appellants:

One who uses high explosives in excavating so near to the property of another that the natural and probable result of an explosion will be injury to such property is liable for the injuries caused even by the vibration of earth and air, however high a degree of care he may have exercised in their use.

Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 59 L. R. A. 421, 65 N. E. 249; Longtin v. Persell, 30 Mont. 306, 65 L. R. A. 655, 104 Am. St. Rep. 723, 76 Pac. 699; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556,

10 Pac. 395; Tiffin v. McCormack, 34 Oh. St. 638, 32 Am. Rep. 408; Carman v. Stebbinsville & I. R. Co. 4 Oh. St. 399; Scott v. Bay, 3 Md. 431; 1 Thomp. Neg. § 76; Knoxville v. Klasing, 111 Tenn. 134, 76 S. W. 814; Kolb v. Knoxville, 111 Tenn. 31, 76 S. W. 823.

An action lies for damages to property or for interference with its enjoyment caused by lawful business, useful to the public, carried on in a suitable locality with the best and most approved appliances or methods.

Swain v. Tennessee Copper Co. 111 Tenn. 432, 78 S. W. 93; Ducktown Sulphur Copper & I. Co. v. Barnes, (Tenn.) 60 S. W. 600; Madison v. Ducktown Sulphur Copper & I. Co. 113 Tenn. 336, 83 S. W.

original usefulness. In crossing the highway near the plaintiff's premises, they raised an embankment which obstructed free access, and otherwise injured his property, and they were rightfully held liable for the damages." To the same effect as the Uline Case, Conklin v. New York, O. & W. R. Co. 102 N. Y. 113, 6 N. E. 663.

While many things were said touching the necessity of acquiring rights of private individuals by the exercise of eminent domain, and as to what would and what would not be considered a private nuisance, and many cases on both of these subjects were considered and discussed by the judge who wrote in the Uline Case an opinion of more than twenty-five pages of the official report, the judge who thus wrote commenced his opinion with these words: "Many exceptions were taken at the trial on behalf of the defendant, which its counsel argued before us and relied upon for a reversal of the judgment. But I shall notice those only which have reference to the rule of damages laid down by the trial judge."

A railroad company authorized by an act of Congress to extend its line into the District of Columbia and the city of Washington, which built its road in that city in conformity with a grade specified by a subsequent act of Congress, is not liable to a lot owner on the street by reason of the grade being raised 2 feet higher than it was, such change in grade being also authorized by the city authorities, whereby water was formed into pools and deep holes in front of and near his property and access thereto rendered difficult. Nottingham v. Baltimore & P. R. Co. 3 MacArth. 517.

A railroad company had been required by mandamus to construct a viaduct or bridge over a street, and elevate the roadbed of the latter so as to allow its trains to pass under the same, with approaches on either side of the bridge so as to give an easy or convenient grade for the travel over such bridge. By the terms of the statute constituting the railway charter under which defendant was acting, it was given the right to construct its railway across any

highway or street subject to the obligation and duty, expressly enjoined on it, to put such streets in such condition and state of repair as not to interfere with the free and proper use of the streets; and it was in fulfillment of this requirement of the charter that the judgment was rendered and its enforcement compelled on behalf of the city in the mandamus case. The defendant railroad company built the viaduct and also the approaches as commanded, and thereby damaged the plaintiff's property by cutting off his access to the same by vehicles, and consequently depreciating the value thereof. In an action to recover damages for such depreciation it was held that, as the work was done by the authority of the state, and was clearly within the purpose for which the street was laid out and dedicated, and was done with reasonable prudence and skill, and it was competent for the legislature to provide therefor, and to authorize and require the defendant to construct the improvement, and since such improvement was confined to the highway, the defendant was not a trespasser, and was not liable for consequential damages to plaintiff. Robinson v. Great Northern R. Co. 48 Minn. 445, 51 N. W. 384.

The trouble with that decision is that it was not a case of consequential damages but was one of a taking of plaintiff's easement of access.

A charter of a railroad company authorized them to lay out and construct a railroad between certain termini, which they did. They procured from the plaintiffs a conveyance of the land belonging to them over which the railroad passed, and the road was lawfully constructed. The deed from the plaintiffs to the company reserved the right of way over the land conveyed to them, and the obstruction complained of consisted in the raising of the grade of the highway so that the public travel would pass over a bridge which had been erected above the railroad, instead of on the level of the road. It was held that, while it might be admitted that the rights of way over the land conveyed could not be used

3; Watson, Damages for Personal Injuries, § 4.

Messrs. Jourlmon, Welcker, & Hudson, appellées Southern R. Co. and Condon. Messrs. Templeton, Lindsay, & Templeton for appellee W. J. Oliver & Company.

Wilkes, J., delivered the opinion of the court:

These three causes were consolidated and tried together in the court below against the Southern Railway Company, W. J. Oliver, and S. P. Condon for damages resulting from blasting near the premises and one of the plaintiffs.

Some wordy controversy is had as to whether it is an action for a nuisance, or an action on the case, with which we need

not concern ourselves. The action is plainly one on the facts of the case; and the facts set out in the declaration, so far as necessary to be stated, are that plaintiff C. C. Gossett owned and occupied as a residence a certain house and lot near Knoxville. His wife and minor child, about two years old, resided with him and constituted his family. The defendant railroad located, graded, and constructed its line immediately adjoining the home and premises of the plaintiff, and within a few feet of their lot and residence house. Large quantities of dynamite and high explosives were used day and night for a long time in blasting and loosening earth and rock in the construction of the road by the railroad, and by Oliver and Condon, as contractors, caus-

with the same facility that they could have done before the alteration, and that the access to the plaintiffs' house was less convenient, and that the value of their property was diminished by what had been done, it is a sufficient answer that the defendants, in all which they thus did which might be injurious to the plaintiffs, acted in the performance of a public duty, upon compulsion, a fact, of the constituted authorities; for which reason their acts must be deemed lawful, and of course they could not be liable as wrongdoers. *Towle v. Eastern R. Co.*, 17 N. H. 519. In this case the charter of the railroad company provided, among other things, that corporations should have power to raise or lower any turnpike, highway, or private way crossed or intersected by it, so that the railroad, if necessary, might conveniently pass under or over the same; and the court said that, as the legislature had the right to provide for such alteration in the highways as the public good might require, by reason of the construction of the railroad, and to prescribe the mode by which this should be determined, a lawful alteration of the highway, although it might operate injuriously to an adjoining land holder, could not be made the subject of an action for damages.

A street in a city, 30 feet wide, extended along a tow path of a state canal, connecting two streets, each of which ran at right angles to and came to an end at it. On the corner of the street first mentioned and one of the other two, plaintiffs had erected a brick warehouse with reference to the then existing grades of the streets, so far as the same had been fixed and determined, so conceived as to give them a ready access to the canal, for purposes of trade and business, upon which the value of the property was largely depended; and the plaintiffs and those under whom they claimed had been in the uninterrupted exercise and enjoyment of these rights and privileges until the time of the filing of the bill. A railroad company having a charter from the legislature to construct its road and permission of the city to occupy the canal

street, and in order to construct the same, raised the street 12 feet. The gutters, culverts, bars, posts, and gates put up by the company were in conformity to their contract with the city. The effect of this was to cause the store and warehouse of the plaintiffs to overflow in heavy rains, and, in addition thereto, the plaintiffs were prevented, owing to the raising of the street by the railroad embankment and trestle work, from draying salt from the canal to their store, across it, as they did when the street was 12 feet lower. The court held that under these circumstances an action for an injunction could not be sustained, and dismissed the bill, and in doing so made use of the following language, which, it may be stated here, is about the reason given by the Pennsylvania supreme court in a large number of cases for the position which it assumes, and which would seem to be antagonistic to that of the ultimate courts of other jurisdictions,—and to justice:

"This railroad, in connection with the Pennsylvania railroad, forms a continuous line of travel and traffic between the metropolises of Pennsylvania and that of the flourishing state of Illinois, and we are asked by two private individuals, the owners of one small property on this railway of hundreds of miles, to put a stop to the whole of this valuable trade, by tearing up the railroad on Canal street, in the city of Allegheny, and thus preventing the cars and locomotives from incommoding the owners and occupiers of this single store." *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* 36 Pa. 99.

The judge who made these remarkable utterances knew just as well as any ordinary lawyer does, that the equity action was brought by the plaintiffs, not with any hope that the railroad would actually be torn up and the traffic stopped, but in the hope that the injunction which they claimed they were entitled to would be granted, but its operation probably be suspended in order to permit the railroad company to do what it should have done in justice in the first place.

ing great noises and explosions, shocks and concussions, of the earth and the air, near and at the home of the plaintiff, and greatly alarming and frightening the plaintiffs Carrie and Calvin Gossett, so as to deprive them of the necessary sleep, rest, and repose, and, it is claimed, impairing the health of the said Carrie, and alarming and terrorizing said Calvin, until they both became sick and disordered in body and mind, nervous, and otherwise injured, driving them away from home, at great trouble and expense, for several months.

To the declaration in each case the defendants plead not guilty.

It appears that the railroad was constructing its line in front of the plaintiff's premises, and had a force of from eighty

to one hundred men employed at it, working day and night, for twenty hours per day. They blasted rock during the day and during the night, using both deep blast and surface or adobe blasts. This was done in a cut about 15 feet from plaintiff property, and 30 feet from their house.

The house was struck by flying stones and the weather boarding was shattered. The concussions were so great that the windows in the house were smashed, and crockery, china, fruit jars, clocks, pictures and other personalty were broken, shattered, and otherwise injured. Carpet mattings, and curtains were likewise injured by the dust. The work was continued from August, 1903, to June, 1904, and, as a consequence of the nervous strain and fright

and what the court by its mandatory process should have compelled them to do,—pay these two private individuals, "the owners of one small property," for the destruction of that "small property."

In an action against a railroad incorporated under several acts of the legislature, for constructing an embankment $3\frac{1}{2}$ feet high across two highways, on the corner of which the plaintiff's store, bakery, and dwelling house were situate, it was held that the railroad company having constructed its roadbed with as little injury to the plaintiff's premises as was consistent with the convenient grade of the railroad and the public use of the highways, the damages suffered by the plaintiff were consequential, and under the acts authorizing the construction of the railroad an action for them could not be maintained. *Hatch v. Vermont C. R. Co.* 25 Vt. 49, Approved in *Richardson v. Vermont C. R. Co.* 25 Vt. 465, 60 Am. Dec. 283.

The Hatch Case was again under consideration in 28 Vt. 143. The court said in this case that, unless the plaintiff could stand upon the ground of negligence or want of proper care in the defendants, in the construction of their road, the principles of the case were settled by the court in its previous decision in 25 Vt. 49.

After approving what was said in *Hatch v. Vermont C. R. Co.* 25 Vt. 49, the judge delivering the opinion in *Richardson v. Vermont C. R. Co.* 25 Vt. 465, 60 Am. Dec. 283, said that he did not feel called upon to vindicate the soundness of that decision, and neither should he enter into the reasons or the authorities upon which it was founded; that it sufficed to say that it had been fully done by the chief justice, and he would only add that the decision was, in his view, according to the adjudged cases.

7. The New Jersey decisions.

The New Jersey courts have had so much difficulty with the question under discussion that for emphasis they are grouped under a division by themselves.

In *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, a case 1 L.R.A. (N.S.)

arising in the city of Camden, the vice-chancellor, after deciding that the smoke, dirt, cinders, noises, and smells referred to by the witnesses in the case worked inconvenience, discomfort, hurt, and damage to the complainants, as by reason of the same they were not permitted to have anything like the same comfort and enjoyment in their home that they otherwise would, as the value of their property for a dwelling was therefore greatly depreciated, and that if these things were so, that what is generally denominated a nuisance existed in the case, proceeded to say, further, that one of the complainants' neighbors were engaged in any vocation on an adjoining lot and were to do and carry on any business, however legitimate in itself, which could only be carried on by making like noises as smoke and dirt, he certainly would be enjoined, and that the defendant had no greater rights or more extended than as an individual; that the law was intended to operate alike upon all persons, artificial as well as natural; that the defendant's franchises did not extend to doing damage of this character without compensation or restraint; and that it could not be said that the legislature ever intended to authorize the defendant to commit a trespass, or any other injury, to any citizens; that there was nothing in the charter to that effect read it as you might. The counsel for the railroad company insisted that the act complained of were authorized by law, and therefore could not be a nuisance, citing the *Hinchman* and *Hogencamp* Cases. The vice-chancellor said that he did not understand that the point before him was before the chancellor who decided those cases; that a corporation of any sort can no more invoke these cases as a shield than can the butcher, soap boiler, or tallow chandler; that the business of each of these, and all the like, is perfectly legitimate, and stands on as firm a rock as any corporation can; but they cannot carry it on to the detriment of others; that it may put the butcher to some inconvenience to erect his slaughter pen outside of the city, and drive his beer

he wife and child were rendered very nervous, and deprived of rest and sleep during the night; and about January, 1904, they were compelled to leave their home and seek refuge and temporary rest in another locality. Gossett was put to extra expense in maintaining his family away from home, and at the same time looking after his property at home.

It appears that defendants repaired plaintiffs' house, so far as physical damage was done to it by the explosions; and for these and the injury to personal property no recovery is sought, but only for the injury, physical and mental, done to the plaintiff and his wife and child, and rendering the house uncomfortable and less valuable as a residence. At the conclusion of the evi-

dence the defendants moved the court for peremptory instructions that there could be no recovery by the wife and child, on the ground that no physical injury had been shown to them, and therefore no recovery could be had in their behalf.

The court sustained this motion, and directed a verdict in favor of the defendants in these two cases, to which action the plaintiffs excepted. He then charged the jury in the third case of C. C. Gossett against the defendants, and under that charge the jury rendered a verdict in favor of the defendants, and the plaintiffs have all appealed to this court.

It is assigned as error that the court improperly instructed the jury to render a verdict in favor of the defendants against

here, and cart his meat back into the city or sale, but the health, the comfort, and the enjoyment of the citizens require it, and the law compels him to go outside, or to abandon his trade; and that it was certainly much more reasonable to say that the defendant should continue to make up and distribute its trains elsewhere than to inflict the discomfort and injury upon the complainants. The vice chancellor made a decree advising an injunction, and on appeal therefrom to the court of errors and appeals that court held that, following the prayer of the bill, the decree and injunction below were in the main correct, but that perhaps they might be interpreted as going further than they should, in that they absolutely forbade, under any circumstances, the use of defendant's tracks in front of complainants' premises for the purpose of distributing and shifting cars and making up trains, and putting and placing thereon cars laden with cattle, sheep and hogs; that such a use might, sometimes, in extraordinary emergencies, be unavoidable, and, if it then should occasion a material injury to complainants, should be paid for in damages, rather than be prohibited by injunction. The injunction should be against the use of those tracks for the purposes indicated, in the transaction of the ordinary business of the defendant, leaving it at liberty to show, in response to any attempt to punish it for violation, that an occasional use was necessitated by an unforeseen contingency, and that in order to make this modification the decree below should be reversed. In deciding the appeal the court held that the acts of the defendant railroad complained of were a nuisance, and that the nuisance was continuous and materially diminished the comfort of plaintiffs in their residence, and that this made the case one proper for an equitable remedy by injunction, unless the defendant could justify its conduct; and that the justification attempted by the defendant at the argument, upon the ground that the legislature and the common council of the city had authorized the defendant to use the avenue for its business, and that

its business required such use as the defendant had hitherto made, and that therefore the use could not in a legal sense be injurious, could not be upheld for two sufficient reasons, the first being that neither the legislature nor the common council had attempted to grant so extensive a privilege as was here set up. The charter of the original railroad company under which the present defendant claimed to act, authorized it to construct and operate a railroad, with all necessary appendages, within certain limits embracing the locality under consideration, and that thereafter the common council of the city, by resolution authorized that company to use the avenue in question for the purposes of its roadway; that thereafter the legislature authorized railroad companies whose incorporating acts limited the quantity of land which they might hold at their stations, to purchase and hold so much land as might be strictly necessary for most conveniently storing and working upon their engines, cars, fuel, and materials to be used on their roads, and for receiving and delivering property transported on their roads to the best advantage, and for tracks, wagon roads, platforms, and all other strictly station and railroad purposes; after which the city council, by an ordinance to afford facilities to the original railroad company for running their trains through the city, gave its consent and authority to the company to lay side tracks running obliquely from a point on the railroad, along the avenue in question, between two other streets, and to and upon the company's depot property lying west of one of said last-mentioned streets; that from these laws and regulations arose whatever rights the defendant, who was the lessee of the original company, appeared to have in the avenue in front of complainant's house; and, in the judgment of the court of errors and appeals, they indicated that those rights were such as pertained to the use of the avenue for the purposes of the way, not for the purposes of a station yard; that the primary privileges given was that of passage; and that this and its reasonable

the wife and child, and, also, that he erred in his charge to the jury in regard to the liability of the defendants to C. C. Gossett, and that he refused to give in charge to the jury certain requests made by the plaintiffs. It is also assigned as error that there is no evidence to support the verdict.

Without attempting to dispose of the assignments of error as they are made, we proceed at once to consider the several interesting and difficult questions which are presented by the record and the assignments of error, premising that we think that they have all been virtually settled by former adjudications of this court, most of which are quite recent.

In the first place, the fact that the defendant is a quasi public corporation, author-

ized by the legislature to condemn, take and use land for railroad purposes and works of public improvement cannot, under the authority conferred upon it by the legislature, exempt it from liability, even if the work can be done without negligence. We think the true doctrine is aptly expressed in the case of *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 5 Am. Rep. 6, note, 8 N. E. 537: "The power granted to such railroad corporations as to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the act were done by an individual in the exercise of such powers. See also case of *Garvey v. Long Island R. Co.*

incidents covered the whole scope of the grant; and that the right of storing engines and cars, either for a longer or shorter period, and the right of making up or breaking up trains, were not embraced in such a concession, these being strictly station and terminal purposes, and by providing for station yards the legislature had indicated its intention that business of that nature should be transacted there. But the court would not say that the company might not, under any circumstances, do upon its roadway what ought commonly to be done in its yards; for no doubt unforeseen occurrences might sometimes render such acts almost indispensable, and then other less urgent rights, of the public at least, must give way; but that when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might; and that this was what the defendant did in the avenue in front of complainants' house. Having a right of passage there, it used its tracks as though they were in its terminal yard; and so used them constantly in its everyday concerns; and for this there was no legislative or municipal authority.

Thereafter, in *Beesman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, in an action for damages alleged to have been done to the houses and lands of the plaintiff by the running of the defendant's trains the declaration was that the defendant had used its track in Jersey City within 10 feet of the dwelling houses situated on the rear of plaintiff's lots, for the passage of locomotives and cars to transport cattle, sheep, swine, manure, and other freight, so as to render said dwelling houses of the plaintiff unfit for habitation and of no use or value to the plaintiff whatever; and that the defendant during all the time mentioned, both in the daytime and at all hours of the nighttime, had wrongfully allowed its cars loaded with cattle, sheep, swine, manure, and other freight, emitting noisome and unhealthy odors, to stand upon the track, within 10

feet of the dwelling houses on the rear of said lots, and had then and there shifted and distributed its cars, and blown the whistles of its locomotives, and started its trains of cars, and suddenly stopped them and backed them and started them again causing great and unusual noises in the neighborhood of said dwelling houses, and causing divers noxious, offensive, and unwholesome vapors, fumes, smoke, smells and stenches to flow, arise, and surround said dwelling houses, and thereby also jarring the doors and walls of said dwelling and breaking the plaster upon the wall, and by such means had driven the tenants from such houses, and rendered the same uninhabitable and unfit for use. To this the defendant pleaded and set out its chartered right to build its road, and then averred that all that it did was in execution of said powers and by force and virtue of said acts. To this plea the plaintiff demurred. In overruling the demurrer, *Beasley, Chief Justice*, delivering the opinion of the court, said that the "defense, stripped of all verbosity, is that, by force of its franchise derived from the public grant, it has built its road and run its trains, carrying merchandise and freight near to the lands of plaintiff, doing the plaintiff no more damage than that which necessarily results from the transaction of such acts and business. Its position is that for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property a railroad is *per se* a nuisance whenever it throws a detriment such as would be actionable at common law on such property." The chief justice further said that, if railroad companies were to be regarded purely as private corporations, it inevitably resulted that they must be responsible to each person whose possessions were thus molested; that such a doctrine would make these companies, touching such landowners, general tortfeasors; that their tracks run for miles through the cities of the state, and every landowner on each side of the track would be entitled to his

159 N. Y. 334, 70 Am. St. Rep. 550, 54 N. E. 57.

The court proceeded upon the idea, and charged the jury upon the theory, that the railroad company and its contractors in constructing the railroad were engaged in what might be termed "governmental functions," delegated, first, to the railroad company by the state, and by the railroad company to its agents employed to do the work, and that, if no damage and injury were done to the plaintiffs except what was necessary to be occasioned in the prosecution of such work, then the defendants would not be liable. In other words, if the work was authorized and legitimate, then the defendants could only be made liable for the negligent prosecution of it. This is contrary to the hold-

ings of this court, and, as we think, to the great weight of authority, though there are cases, a few of which have been cited to us by counsel, holding that, if the work is legitimate, then the only damage that can accrue to the company prosecuting the work must arise out of its negligent execution. In the case of *Madison v. Ducktown Sulphur, Copper, & I. Co.* 113 Tenn. 331, 83 S. W. 658, it was held that the defendants were conducting a lawful business in a lawful way and by the most scientific and approved methods, and had made every effort known to science and experience to avoid injury to the plaintiff, but injury had resulted as a necessary consequence of the work itself; and the court further held that there was no other place to which the hurtful opera-

tion; and so, in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by the thousands: and that it was questionable whether the running of railroads would be practicable if subjected to such a responsibility: but that it was a radical error to regard these corporations as simply private; that it was quite irrational to say that the making of the track is an act done so far in behalf of the community that the eminent domain of the state may be resorted to for its furtherance: but that the running of trains upon such track is a purely private affair, in which the people at large have no interest: that the legislature may authorize the altering of the grade of a city street; such act may occasion immense loss to the owners of the abutting property, and such loss is *damnum absque injuria*, the reason being that the improvement is a matter of public concern, and that each individual member of the community, while he is entitled to its benefits, must submit to its evils: and that the attitude of a railroad company, so far as relates to the applicability of legal principles, is not dissimilar, as they run their trains by legislative authority for the public benefit, and that account, in doing such acts, they are so far forth the representatives of the body of the people: and that the defendant here having alleged that it had kept entirely within the limits of its charter rights in running its trains, and that the plaintiff suffered no damage except such as was necessarily incident to such transactions, it seemed to him that if this was true the action could not be maintained. He distinguished *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, and *Baltimore & P. R. Co. v. Fifth Baptist Church*, 106 U. S. 328, 27 L. ed. 739, 2 Sup. Rep. 719, saying that the former presented to the court the naked proposition whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*, the court having found as a

fact that the defendant was continuously doing to the detriment of the complainant that which was entirely unauthorized by its charter; and that the decision of the Supreme Court of the United States in the other case referred to rested on the same basis. One of the four judges composing the court dissented.

On a writ of error to the supreme court from the court of errors and appeals the judgment of the supreme court was affirmed for the reasons given by the court below. 52 N. J. L. 221, 20 Atl. 169.

The futility of the reasoning to the effect that the plaintiff should not have his action because every landowner on each side of the track would be entitled to his action, and the litigants would be numbered by thousands, and that it was questionable whether the running of railroads would be practicable if subjected to such a responsibility, is plainly apparent. As is stated elsewhere, the experience in New York city, in what are known as the Elevated Railroad cases, is a perfect answer to any such chop logic as this. The effect of the decisions in those cases was to compel the elevated roads to pay to each and every owner of property on the streets on which the roads were located, in a thickly settled city,—the metropolis of the Western Hemisphere,—for a distance of miles in extent, compensation for the damage to his property by the construction and operation of the road. Notwithstanding all which the roads are still running, and have increased in number, and all are paying extensive profits to their stockholders.

The weakness of this case as an authority would seem to consist in the reasons given for distinguishing it from the two cases mentioned. The same railroad company was defendant in the *Beseman* Case as in the *Angel* Case, and so the authority contained in the charter was identical in both cases; and to say that there was any difference in substance in the circumstances that were held to be a nuisance in the *Angel* Case from those which were held to be within the authority of the charter in the *Bese-*

tions could be transferred. Still, the court said that a judgment for damages in this class of cases is a matter of absolute right, where injury is shown. This was a case where injury was inflicted by noxious fumes and smoke spreading from the furnace property over adjoining property, so as to create a nuisance and injure the adjoining property.

In the case of *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104, it was held, in substance, that a person, even in the prosecution of a lawful trade or business upon his own land, cannot gather there by artificial means a natural current, like electricity, and discharge it upon his neighbor with such force and to

such an extent as to break up his business or impair the value of his property, without being responsible for the resulting injury.

The Fifth Baptist Church Case is a leading case upon this question; and it was there held, among other pertinent matters, that grants of privileges or powers to corporate bodies, like railroads, conferred no license to use them in disregard of the private right of others, and with immunity for their invasion. It was there said: "The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." In the same case it is said: "The acts that

man Case would appear to require a mental operation such as it is not usual to ascribe to the judicial mind. To allow cars loaded with cattle, sheep, swine, manure, and other freight to stand upon the track in close proximity to a dwelling house, and to shift and distribute its cars, and blow its whistles, and start its trains, and suddenly stop them and back them and start them again, is very much like doing what was done in the Angel Case. And the fact that the court of error and appeals affirmed the case for the reasons given in the court below would look as though the affirmance was more a matter of form than if the appellate court had written an opinion and made some pretense of an endeavor to reconcile the case with the Angel Case.

Thompson v. Pennsylvania R. Co. 51 N. J. L. 42, 15 Atl. 833, was an action to recover damages for injury to the possession of two pieces of property on one of which the plaintiff dwelt, situate on the same avenue in Camden as was the property of the complainant in the Angel Case. The suit was to recover damages for alleged injury to the possession of these tenements by surrounding them with noises, noisome and offensive smoke, and stenches, through unlawful management by the defendant of its railroad. There was a verdict taken for the plaintiff at the trial, and a rule granted to show cause why that verdict should not be set aside. The supreme court, in making the rule absolute and ordering a new trial, said that it was proved in the case, and that it was not contested, that the defendant of right occupied the avenue in question with its railroad, and was endowed with due authority to run over its lines of road trains for the transportation of passengers and freight, and that the rule was not put in question that the adjacent landowner can maintain an action at law for damages resulting from the running on such public highway when, and only when, he can show a negligent exercise by the company of its legal rights, or a use in excess of such rights, injurious to such owner; and that it was not denied that those incidental in-

conveniences which unavoidably follow the careful and skilful running of trains upon a railroad, whether from noise or other disturbances necessarily arising from such use are within the corporate privileges, and give no ground of action to the persons suffering from them; that this concession of the relative rights of the parties in respect to the subject-matter of this suit was only in recognition of principles clearly established by settled adjudication,—and cited the Angel Case and the Beesman Case as authority therefor. The court then said, further, that, conceding that there was evidence in the case to go to the jury, tending to show such illegal management in the running of defendant's trains and consequent annoyance to the plaintiff in the enjoyment of his property, there had been error in the admission of evidence without qualification, as the first direct question to be resolved was, What loss in depreciation of the rental value of the plaintiff's property was occasioned by unwarranted uses of the defendant's railroad? and that the plaintiff had not pursued a course of inquiry that could throw light on this issue, but, instead, each of his witnesses called to speak on the question of damages was asked in his turn to give his opinion and estimate of the depreciation of the plaintiff's property by reason of the presence of the railroad in the street; and that the opinions of these witnesses all related to the depreciation of such value wrought by the presence in the street of the defendant's railroad, and were not based upon injury to plaintiff's property caused by injurious acts of the defendant in excess of its charter rights; and that the jury had been led to consider the damages of the plaintiff upon an entirely erroneous principle; and for this and other reasons the rule for a new trial was made absolute.

Evidently upon the same state of facts, and before or after the action at law, the same plaintiff had brought suit in equity to enjoin the actions of the defendant in the street opposite his dwelling houses as a nuisance. The vice chancellor (the same who delivered the opinion in the original

a legislature may authorize, which without such authorization would constitute nuisances, are those which effect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." See case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

In the case of *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 741, 61 L. R. A. 189, 72 S. W. 957, it is said: "To a claim

for exemption from liability rested on a charter right, the answer may be properly made that the state has not authorized the wrong complained of, and in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner, it did so at its peril." And, again, it is said: "Grants of power to corporate bodies like these can give no license to use them in disregard of the rights of others and with immunity for their invasion." To the same effect see the case of *Swain v. Tennessee Copper Co.* 111 Tenn. 437, 78 S. W. 93. All of these cases have been cited, analyzed, and commented upon in the case of *Louisville & N. Terminal Co. v. Lellyett* (Tenn.) 85 S. W. 886 *et seq.*, and many other cases are there referred to. The gist of these

suit in the *Angel Case*) stated that the complaint in this case was that the defendant so managed the engines, cars, and trains on its road, opposite the dwelling house of the complainant, as to create a nuisance to the complainant. That the allegations in the bill were so similar to, and the testimony so nearly corresponded with the testimony in, the *Angel Case*, that he should be content with calling attention to that case. That in that case the court of appeals decided that acts similar to the ones established in this case amounted to a nuisance. And that so far as the questions raised in this case were similar to the questions raised and decided in that, the counsel for the defendant did not expect him to disregard the law as laid down in that case. The vice chancellor then said, further, "It is true that counsel called my attention to the case of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164; and the counsel claims that the supreme court decided in favor of the company, and that the facts on which the judgment was based were in all respects similar to the facts in this case. But, unless the questions now before me are quite distinguishable from the *Angel Case*, I shall not be justified in departing from the rule there laid down."

On appeal to the court of error and appeals the decree was unanimously affirmed for the reasons given by the vice chancellor. *Pennsylvania R. Co. v. Thompson*, 45 N. J. Eq. 870, 19 Atl. 622.

Thus it would seem that for the same transaction causing the same injury the supreme court of New Jersey set aside a verdict for damages on account of the injury, and the court of error and appeals affirming a decree of the vice chancellor (being the same vice chancellor who made the decree in the *Angel Case*) awarded an injunction restraining the railroad company from continuing the acts which produced the injury. It is true that one reason given for the decision of the supreme court was that the new trial should be granted because the testimony of witnesses had not been distinctly to the only fact for which damages

should have been awarded; but inasmuch as the new trial was also granted for the reason that the defendant of right occupied the avenue with its railroad, and that an adjacent landowner can only maintain an action at law for damages when he can show a negligent exercise by the company of its legal rights, or a use in excess of such rights, and the court cited as its authority therefor the *Beseman Case*, it can hardly be said that the question was not decided in that case; and when it is seen that the vice chancellor in an equity action by the same plaintiff and for the same injury and to restrain a repetition and continuance of the same acts, although the *Beseman Case* was called to his notice, practically ignored the latter and followed the *Angel Case*, and was unanimously affirmed by the court of error and appeals in doing so, the question whether the plaintiff or the defendant in the two *Thompson Cases* succeeded or was defeated is a difficult nut to crack.

In *Ridge v. Pennsylvania R. Co.* 58 N. J. Eq. 172, 43 Atl. 275, the complainant owned a three-story brick house fronting on a street 100 feet north of the avenue on which plaintiff's property was situated in the *Angel Case*, and also in the *Thompson Case*, and the bill charged that for a long time the company had unlawfully used three tracks in that same avenue for the purposes of distributing cars and making up trains, and had used engines there for shifting and coupling and detaching cars near the dwelling of the complainant; and that at frequent intervals during every day and night the engines stopped and kept standing near said house from one to thirty minutes, and discharged large volumes of smoke, soot, cinders, and gases which were carried into the rooms of the house; and that cars loaded with cattle and manure were kept standing there; and that the noise of bumping cars, shouting of men in drilling cars, the ringing of bells, the blowing of whistles, the hissing of steam, and the groaning of cattle was a nuisance. The defendant answered that it had acquired the fee to the soil on the ave-

decisions, so far as applicable to the facts of the present case and the questions here involved, is that a railroad company, in constructing its road, although it may be guilty of no negligence and exercise proper care and caution, will still be liable to adjacent property owners, if the work done, although necessary to be done, and in fact skilfully constructed, shall result in injury to such property. Most of the cases cited by counsel holding a contrary doctrine are cases in which the work was being done under government directions and control; and, so far as they do not rest upon this feature of government regulation and control, they are not in accord with the holdings of this court, nor, as we think, with the weight of authority, nor are they

in accord with sound reason and legal justice.

It remains to be considered whether the injuries complained of in these cases were injuries for which liability arises.

In *Fitz Simons & C. Co. v. Braun*, 19 Ill. 390, 59 L. R. A. 421, 65 N. E. 249, it was held that one who uses high explosive in excavating so near the property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused even by the vibration of earth or air, however high a degree of care he may have exercised in their use. To the same effect are *Longtin v. Persell*, 30 Mont. 306, 65 L. R. A. 653, 104 Am. St. Rep. 723, 76 Pac. 698; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556,

nue on which the three tracks were laid, together with the property purchased on the north side, and that the same was acquired for terminal purposes, and constituted the throat of the yard, and had been used in connection with the terminal. It denied the general allegation in respect to the standing of cattle and manure cars; and in respect to the emission of smoke, gas, and noises it stated that it was one of the incidents of defendant's business, and the result of the necessary use of the property so acquired, for the purpose of drawing cars upon it in order to clear the switches in front of the passenger station, or to run them upon the storage tracks, and to draw freight cars to place them upon their proper tracks to be made up into trains. The court said that if the right of the railroad company to use the three tracks had not been enlarged since the decision of the *Angel Case* the complainants were clearly entitled to an injunction. It appeared that since the decision in the *Angel Case* the company had acquired a fee in the land covered by the three tracks, and 60 feet of the street had been vacated, leaving the fee in the company disencumbered of the easement. The vice chancellor held that although the company had the right to use the strip of land in conjunction with their former yard he did not think that the company had the right to so use the strip of land in the same way that they could use their former yard. He distinguished the *Beseman Case*, saying that the plea in that case, as construed by the court, set up that the injury charged was a necessary incident in the operation of the defendant's road under its charter; that the court held that, as railroads possess a public character, therefore any injury which is the consequence of the necessary exercise of their charter privileges is *damnum absque injuria*. (It will be remembered that the question in the *Beseman Case* arose on a demurrer to the plea, no evidence, and the facts were of course taken to be as stated in the plea.) He further called attention to the fact that in the opinion in the *Beseman Case* the case of *Balti-*

more & P. R. Co. v. Fifth Baptist Church, 108 U. S. 328, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, was referred to, and the doctrine there laid down was approved in the opinion of the *Beseman Case*, upon the ground that in selecting a place for repair shops the railroad company acted altogether in a private capacity; and after stating what further was said, as we have seen in the *Beseman Case*, and also in the *Baptist Church Case*, he proceeded further to say that therefore the right of this company to use the strip of land upon which the three tracks were placed between the two streets, on the avenue mentioned in all these cases, for terminal purposes, did not include the right to use them for all purposes to which a terminal yard might be devoted, and that the company was bound to take into consideration the environments, and adjust its operations so as to produce the least annoyance to persons and property in placing the instruments necessary to transact its business; but, after stating this, the vice chancellor proceeded to consider the testimony, and concluded by saying that there was not proved such a clear case of habitual violation by the defendant of the rights of the complainant as would justify an injunction, even in the very general form in which such a writ would have to be drafted if allowed; and he advised a decree dismissing the bill.

Beideman v. Atlantic City R. Co. (N. J. Eq.) 19 Atl. 731, was a suit in equity to enjoin the defendant from using its tracks for the purpose of shifting its cars, in making up its trains or in unmaking, in the vicinity of complainant's dwelling. The tracks were about 60 feet from the dwelling, and were used by the defendant in preparing trains for departure, and in shifting cars of incoming trains to various localities. The work was done by the use of the engine, and more or less noise was made, and smoke and steam cast off from the engine. These noises and the smoke more or less disturbed the complainant and his wife, by keeping them awake and by affecting their dwelling, imparting to it a trembling or

10 Pac. 395; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Scott v. Bay*, 3 Md. 431.

Mr. Thompson, in his work on Negligence (§ 772), uses this language: "The subordinate courts of the state of New York, following the analogy of early decisions in that state, have held that a railroad company is liable to an adjoining property owner for injuries which are the direct and necessary result of blasting rock by such company for the purpose of leveling its right of way, although such blasting is done without negligence, and although no rock or earth is thrown upon the adjoining premises. But the court of appeals of that state have more recently held otherwise. In one of these decisions the action was against a con-

tractor executing public work under the United States; and the decision proceeded partly on the ground that he was acting in virtue of the sovereignty of the United States, and could no more be called to answer in damage than the government could. But the other case holds that a railroad company, in grading its right of way, can shake a dwelling house to pieces by the concussions produced by the frequent firing of blasts, without being liable to pay any damages therefor, provided it is made to appear that the blasting is necessary and that it is done without negligence. This decision, though concurred in by the whole court, is directly opposed to principles laid down by the same court in early cases. It manifests such gross insensibility to jus-

vibratory motion, so that a tumbler would not stand upon the table, nor a lamp upon the mantelpiece, and by rendering the atmosphere unpleasant, if not unwholesome. The wife of the complainant would be awakened by it at night, and she claimed that it produced nervous prostration. It was insisted that the use of the track for these purposes was not only unlawful, but unnecessary, and that the shifting of the trains was a part of the terminal business of the company, and that the statute expressly provided for the condemnation of sufficient land for that purpose. In dismissing the bill the same vice chancellor who decided the *Angel Case* and the *Thompson Case* said that this method of reasoning would not aid the complainant, for the reason that, whatever land might be condemned, the work of shifting cars and making up trains might still be carried on just as near to his residence, or to the residence of some other citizen, and work all the inconvenience and discomfort now complained of. The vice chancellor further said that he did not understand that it was insisted that the land so condemned for terminal purposes should be at any given distance from the residence of citizens, or that it should be of any particular form, such as a square, or long or narrow; nor did he see that the court could prescribe the bounds or fix the shape or character of the land used for terminal purposes; and that if this were so, then, in every case where the tracks are used for the purposes above indicated alone, the court could only inquire whether there had been any abuse of the privilege or franchise which the law conferred; that in this case it had not been disputed by the defendant but that the use of its tracks for the shifting of its cars caused a trembling motion in the house of the complainant, and a nervous prostration at times to his wife, and aroused them from sleep at night during three or four months of the year, on every Friday, Saturday, and Sunday nights. He further said that the inquiry was whether or not a railroad company might be adjudged guilty of a nuisance when it used

its main tracks, not only for outgoing and incoming trains, but for the necessary shifting of its cars in making up and unmaking trains, when in so doing it caused disturbance, discomfort, or nervousness to the individuals residing near its track, unless some abuse of its charter privileges was clearly shown to accompany the act, and that the facts which show results in every given case must control the court, whether the individual complaining resides near by or at a greater distance, providing he is near enough to be affected. After saying that it had not been shown that the wife's nervous condition resulted from the operation of the defendant's road alone, the vice chancellor further said that the fact that there was still difficulty in determining the rights of the parties was made very apparent by numerous cases; and that with that element out of it, and the question for consideration being whether or not the defendant had abused the franchises granted to it by the legislature and the city authorities, he was constrained by the great weight of adjudication to conclude that it had not; and said that it was upon this theory that the *Angel Case* was decided, and the same view, he thought, was also sustained in the *Thompson Case*; and that in those cases, while the shifting of the cars was complained of, the great burden which rested upon the defendant company was not only in allowing engines to stand long periods of time in front of the complainant's dwelling, emitting large quantities of smoke and steam, and in making hideous noises by whistling and casting off steam, greatly beyond any necessity, but especially in allowing great numbers of cars loaded with cattle, sheep, or swine also to stand long periods of time near by and in front of said dwellings. He further said that he was aware that the complainant's counsel relied upon the first two of these cases, and insisted that the present one was clearly within the rules there laid down, but that after a very full consideration he was wholly unable to come to that conclusion; that there was no proof in the

tice that, although concurred in by the whole court, it scarcely deserves respectful mention." Mr. Thompson, in his notes, cites the various cases referred to, most, if not all, of which are relied on by counsel in this case. His own opinion of the law proceeds upon the view that the carrying on of an employment so dangerous near the land of another, thereby keeping him in continual danger and alarm, is a nuisance *per se*; so that, if any damage happens to him thereby, he may recover, irrespective of the question of diligence or negligence in carrying on the dangerous work. And he says: "If it is a nuisance *per se*, then, if the existence of negligence is necessary to support an action for the damage, it is for the same reason negligence *per se*." [§ 764.]

case to show that the defendant had negligently exercised the right conferred by the legislature; and that the bill must be dismissed.

And it would seem as though the complainant's counsel very naturally, relied upon the Angel Case, for the same vice chancellor had in that case said: That if one of the complainant's neighbors were to engage in any vocation on an adjoining lot, and were to do and carry on any business, however legitimate in itself, which could only be carried on by making like noises and smoke and dirt, he certainly would be enjoined, and that the defendant had no greater or more extended rights than an individual; that the law was intended to operate alike upon all persons, artificial as well as natural; that the defendant's franchises did not extend to doing damage of this character without compensation or restraint; and that it could not be said that the legislature ever intended to authorize the defendant to commit a trespass, or any other injury, to any citizen. The counsel for the railroad company in the Angel Case insisted that the acts complained of were authorized by law, and therefore could not be a nuisance, and that contention was speedily disposed of by the same vice chancellor who decided the present case. Whether or not it is the business of an annotator to endeavor to reconcile decisions which seem to assert different doctrines, when such decisions are based upon the opinions of the same judge the task is indeed a difficult one.

In *Hayes v. Waverly & P. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648, it appeared that the owner of a piece of land conveyed half of the same, and in such conveyance stipulated that the premises so conveyed should not be used for certain purposes, mentioning them, or any other purpose that should be a nuisance or detrimental to the surrounding property of the plaintiff. Such restriction, however, was not to be held to apply to a railroad on the level of the adjoining streets. Thereafter the grantee in the deed conveyed to the defendant railroad company her title

Most of the cases to which we have been referred and which we have been able to find, involving damages by blasting, proceed upon the idea of a trespass upon the adjoining property, where dirt or rock or other material is actually thrown upon it, as where the buildings and improvements are damaged and shaken; and the right of recovery in such cases seems to be clear, as it is also where water is illegally thrown upon a man's land; but the present case goes further than this. All these physical damages to the property caused by the blasting, it is shown, have been settled for and satisfactorily adjusted. The present action is for rendering the home uncomfortable, insecure, and unpleasant, and for virtually compelling the occupants to vacate

to a portion of the land, and a railroad track was laid over the land so purchased, on the level of the adjoining streets, but was subsequently taken up; and at the time of the filing of the bill the railroad company was engaged in erecting an embankment upon it, which when completed would be 15 feet high, upon which its railroad would be laid and operated. The bill, after stating these facts, prayed for an injunction to restrain the operation of the railroad on the embankment. Upon a demurrer to the bill it was insisted for the defendant that the plaintiff had no right to equitable relief, because the erection and operation of the defendant's railroad were authorized by law, and, being executed within the limits of the legislative authority and with due skill and care, the damages resulting therefrom to abutting property were merely incidental to the lawful undertaking, and no recovery could be had because of them. The court admitted the general proposition on the authority of *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164, *Affirmed* in 52 N. J. L. 221, 20 Atl. 169, and said it was perhaps difficult to logically reconcile this rule to the full extent to which its protection might be invoked, with the constitutional requirement that private property should not be taken for public use without compensation, and said, further, that what is accepted in New Jersey as the reconciliation is stated in the opinion in that case. The court then held that the railroad company was concluded by the restrictive stipulation in the deed from the complainant to its grantor, inasmuch as it was not brought within the exception of the stipulation, that the railroad to which the stipulation would not apply must be a railroad on the level of the adjoining streets.

c. Other charters.

A statute authorizing in general terms the creation of corporations for manufacturing and supplying illuminating gas will not exempt a corporation organized under its provisions from liability for consequential injuries to adjoining property

the premises during the time when the work was being prosecuted; and it is said that the noise and discomfort from the repeated concussions and loud noises was so great as to affect the comfort and health of the family. It is not shown that any of them were made sick; but they were inconvenienced, frightened, and made restless, so that the home was no longer a place of refuge and quiet, and it became untenable as a home for several months; and it is for this class of damages that the suit is brought; and the argument is made that there is liability for noise which creates discomfort and nervous disturbance, just as there is for gas and smoke, solids and liquids, which affect the comfort and health of the tenant. Our courts have recognized

the right to damages in cases of nuisances arising from foul odors, smoke, and gas; and there is no good reason why the same doctrine would not apply to loud noises and unusual and unpleasant concussions in the air. In support of this doctrine we are referred to *Knoxville v. Klasing*, 111 Tenn. 134, 76 S. W. 814; *Kolb v. Knoxville*, 111 Tenn. 311, 76 S. W. 823; *Swain v. Tennessee Copper Co.* 111 Tenn. 432, 78 S. W. 93; *Ducktown Sulphur, Copper, & I. Co. v. Barnes* (Tenn.) 60 S. W. 600; *Madison v. Ducktown Sulphur, Copper, & I. Co.* 113 Tenn. 336, 83 S. W. 658.

Bearing upon this feature of the case it is said in *Louisville & N. Terminal Co. v. Lellyett* (Tenn.) 85 S. W. 889: "It is not every inconvenience or discomfort that

holders, flowing from the careful prosecution of the business for which it was created. To have such a result the statutory exemption must be express, or must be a clear and unquestionable implication from powers expressly conferred; and it must appear that the legislature contemplated the doing of the very act which caused the injuries. *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246.

In *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 1, 55 N. Y. Supp. 192, the court said that the pleadings in the case raised plainly the issue as to the existence of a private nuisance; and the verdict of the jury established the affirmative of that issue; and in answer to the exemption claimed by the defendant for the reason that it, as a chartered corporation, held a franchise from the state to manufacture gas, and it was, therefore, lawfully engaged in a business in the conduct of which those things complained of by the plaintiff were necessary incidents, and that it carried on all its processes of manufacture by methods productive of as little inconvenience as possible to those in the vicinity of its works, and that its apparatus and appliances were adapted to that end, and that it exercised the greatest care in that regard,—the court said that the exercise of care to prevent annoyance and discomfort, or to reduce to a minimum the injurious consequences incident to the manufacture of gas, could not affect the question of liability, so long as that care was ineffectual; for there was no duty to construct or operate the gas works imposed by law on this private corporation organized for gain; nor did the mere fact that the defendant was engaged in the lawful manufacture of gas save it from liability for the injuries resulting to neighboring property owners from that manufacture, for the use of one's own land for the purposes of lawful trade may become, and as the jury had found in this case did become, a nuisance.

A pipe line company which was said to be a limited partnership without the right of eminent domain constructed a pipe line (L.R.A. (N.S.)

for the transportation of oil, and at a certain point took the oil from the pipe and loaded it upon tank cars for transportation by railroad. Their improvements erected for the purpose of storing and shipping their oil were entirely upon their own land and separated from the plaintiff's land by the railroad tracks and the public road. The evidence tended to show that oil escaped from defendant's pipes, percolated through the grounds, and injured plaintiff's springs and lands, destroyed the fish in a millpond, and rendered a tenant house uninhabitable. The defendants claimed that they were not liable for damages resulting from their business by reason of oil escaping from their own lands where it was being handled, unless such oil escaped through the negligence of the company or its agents. The trial court said: "We will answer this in the negative, saying to you, as has been said by our supreme court in the case of *Pottstown Gas Co. v. Murphy*, 39 Pa. 263, that the question is one of nuisance, and not of negligence." The supreme court said: "The court was right in saying that this is not a question of negligence, but of nuisance. The defendants think that as a corporation [this company is a quasi corporation simply] authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here—this was destroying a well. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where an incorporation, clothed with a portion of the state's right of eminent domain, takes private property for public use on making proper compensation." *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L. R. A. 642, 34 Am. St. Rep. 710, 26 Atl. 644.

By its charter act of incorporation a company was created for the construction and operation of motors and cables and the necessary apparatus and mechanical fixtures for applying and operating the same. It

will entitle a property holder to damages, even though it be material or considerable, and especially as against a public or quasi public enterprise. The noise of paved streets and of street cars is a material discomfort to abutting owners. The smoke from factories, hotels, and manufacturing establishments may form a material discomfort and annoyance to persons living near by; but these are discomforts and annoyances that the individual must bear in deference to the convenience and comfort of the public. The noise of trains passing through the country districts, and the dust of vehicles passing along the public highways, may be a great annoyance to residents along the line of such roads; and the rumbling of carriages of belated revel-

ers and of early market wagons along the paved highways may disturb the slumbers and harass the nerves of persons who desire to sleep in the cities; but it is not for such annoyances and discomforts that the law allows redress, but only where the discomfort and inconvenience proceed to such an extent as to injure the usable and rental or permanent value of the property that the law will award damages. It must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof. See *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. 705." In such case it is a nuisance and actionable. And this is the rule that prevails in all cases, whether it be an individual, a private cor-

was stated that it was not invested with the power of eminent domain; and in *Rogers v. Philadelphia Traction Co.* 182 Pa. 473, 61 Am. St. Rep. 716, 38 Atl. 399, the court said that its authority to hold real and personal estate necessary for its purposes did not in any way extend its charter power or privileges. That as an artificial person it could not, any more than a natural person, escape liability for special injury done to others, and that no such proposition as that, because it was a mere creature of the law, it enjoyed immunity from liability which natural persons do not, had ever been recognized in any well-considered case, and that no authority could be found for it, in the *Lippincott Case* or the *Marchant Case*, or any of that line of cases. In this case the facts were that the defendant owned a lot in the rear of plaintiff's properties fronting on a street, and it erected thereon a power house, in which it placed large and powerful engines and machinery, for the purpose of furnishing power to move its cable cars, and in consequence of the great and violent shaking, jarring, vibration, and concussion the plaintiff was annoyed, disturbed, and injured in the reasonable and ordinary enjoyment of the buildings on the property. The court cited and followed *Pottstown Gas Co. v. Murphy*, 39 Pa. 263, and *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L. R. A. 642, 34 Am. St. Rep. 710, 26 Atl. 644, in holding that where a corporation has no right of eminent domain the operation of its works causing a special physical injury to another's property is virtually an actionable nuisance; and that the fact that the defendant is a company authorized by law to erect and operate its works gives it no authority to maintain its works in a way that will produce a nuisance.

The injuries to which immunity from responsibility attaches are such only as arise incidentally from acts done under a valid act of the legislature, in the execution of a public trust for the public benefit, by persons acting with due skill and caution within the scope of their authority. If the injury be direct, or the work be done for

the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply, even though the public be incidentally benefited by the improvement. Where the main purpose of an act incorporating a water power company is the promotion of the private interests of the members of the company by increasing their capacity to prosecute their business and navigation, an action will lie to recover damages if an injury be direct, even though there is an incidental advantage to the public to be derived from it. *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

V. Effect of direct grant of power.

a. In general.

In considering the question of the effect of a direct grant of power to do a particular act which may constitute a nuisance, the distinction must be maintained between those which will result in a public and those which will result in a private nuisance. Legislative authority is a complete protection against accountability for a public nuisance, but whether or not the same is true in regard to a private nuisance depends upon the power of the legislature to authorize such nuisance. Many courts, however, without considering the latter question, have applied the rule as to public nuisances in cases where they were unquestionably private, and have denied a liability when it undoubtedly existed. In many cases the question is so plain that there can be no room for doubt.

Thus, in an action for a nuisance in a river by erecting a grist mill, dam, etc., under the plea of not guilty the defendant relied much upon a license which he had obtained from the town in whose bounds and stream he was to erect the mill and dam; but the court said that the license, however it might estop the town from proceeding against the dam as a common nuisance, could be no excuse or justification for an

poration, or a quasi public corporation. In all such cases the maxim, *Sic utere tuo, ut alijs non laedas*, applies, and no matter how lawful or necessary the improvement may be, nor skillfully it may be constructed, nor carefully it may be operated, if it results in injury to the adjoining property owner, the party causing it is liable in damages, either recurring or permanent, dependent upon whether the nuisance is abated or not.

Under the rules which we have laid down in the cases we have cited and commented upon, we are of opinion that there could be no damages, or rather no liability, to the wife and child in this case. There is no evidence that they were physically injured, nor that their healths were impaired. The most that is proven is that they were dis-

quieted and kept in a state of alarm and apprehension, but this is not shown to have resulted in any sickness or physical injuries. We think, therefore, that the trial judge was not in error in instructing the jury that these parties had no right of action.

The question which should have been submitted to the jury, in our opinion, is whether the injuries complained of in this case amounted to a nuisance, and whether the usable or rental value of the homestead was destroyed or lessened temporarily to such an extent that the law will award damages therefor. It is not claimed that there were any permanent damages to the freehold. We think the case should have been submitted to the jury upon this theory,

injury done to private property; and there was a verdict and judgment for the plaintiff. *Nichols v. Pixly*, 1 Root, 129.

So, in *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655, the supreme court of California held that, while the board of supervisors of the city and county of San Francisco granted the defendant a license to erect and maintain a steam engine, they could not license him thereby to create a nuisance; and he, having done so by allowing soot to issue from the smoke stack of the boiler, was enjoined from permitting the same to continue.

So, a grant of powers and privileges by a city council, under their authority, to do certain things, does not carry with it any immunity for private injuries which may result directly from the exercise of such powers and privileges. *Larson v. Ring*, 43 Minn. 90, 44 N. W. 1079. There the plaintiff was injured by coming in contact with a guy or rope stretched across a street, and it was held that the city authorities could not, by any license or privilege granted to contractors, absolve either themselves or the contractors from the charge of negligence, if the guy or rope was not put high enough.

So, where the corporate authorities of a city have power, under the charter, to license hackney coaches, and to designate such portions of the streets of the city for the standing places thereof as they see fit, they are bound to exercise that power with reasonable discretion; and, as no ordinance of the corporation can lawfully authorize the creation of a private nuisance, it follows that no such ordinance will justify him who creates one. *Masterson v. Short*, 7 Robt. 299. In this case it was held that the continual blocking up of the only doorway of the plaintiff's stable by hackney coaches standing in front of it, which the owners of such coaches were licensed to do, was a nuisance which neither the provisions of the ordinance nor the charter permitting the passing of an ordinance licensing hackney coaches would justify.

So, a saloon keeper's license for the sale

of intoxicating liquors is no defense against liability to adjoining property owners, as to whom his saloon may constitute an actionable nuisance. *Haggart v. Stehlin*, 137 Ind. 43, 22 L. R. A. 577, 35 N. E. 997.

But although, in the absence of any statutory provision or regulation, a bawdy house, or house of ill fame, is a public or common nuisance, it has been held that where a city by its charter is clothed by the legislature with power to "regulate or suppress bawdy houses," a house of that character licensed by the city authorities under such provision of its charter is not a nuisance so long as it is kept within the regulations prescribed by the ordinance licensing it. And under such circumstances the owner of a building where such a house is maintained is not liable for leasing it, in an action by one whose residence has been damaged and its value diminished by the proximity of the house in question. *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421.

This seems to be the only case in which a court has had the hardihood to declare that the legislature might authorize a nuisance of such an outrageous character to be committed by a private citizen to the injury of neighboring property.

In *Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462, it appeared by a statute that the defendant was authorized to build a dam across a creek or river, and one of the provisions of the statute was that once in every three years, if required by any person who had sustained any damage by his land being flowed by the dam, the court should appoint freeholders, who should once in every year appraise the damages sustained in consequence of the dam, which should be paid by the defendant. The action was a case for overflowing the plaintiff's land by reason of the dam, and the court held that, notwithstanding the authority of the statute, and its provision for ascertaining the damage, and the payment thereof, inasmuch as the statute, in giving such remedy, did so without a negative expressed or implied, and it was a matter which was action-

and, in not doing so, the trial judge committed error. If the plaintiff was driven from his home by the blasting and other operations carried on by the defendants, or his comfort was so interfered with as to lessen the desirability and usable value of his home during the time the work was being prosecuted, for these things the plaintiff should be entitled to recover.

The trial judge instructed the jury that they might find an accord and satisfaction of the plaintiff's claim for damages, if the facts should so justify. We think this was error, as there was no plea of accord and satisfaction, and that defense could not be set up under the general issue or plea of not guilty.

We think that, if there is any liability

able at the common law, the plaintiff might still sue at the common law, as well as proceed upon the statute, for damages sustained by reason of the dam overflowing his land.

An action was brought by an insurance company as insurers of a canal boat and cargo of wheat, which was lost in consequence of the canal boat's striking the piers of a bridge built by the defendants, which loss the insurance company had been obliged to pay. It was alleged that the defendants placed the piers in the channel of a navigable river so as essentially to obstruct the navigation of the same, and that in consequence of such obstruction the loss occurred. The defense was that by an act of the legislature of the state the defendants were authorized to erect the bridge, and place as many piers in the bed of the river as might be necessary for the support and construction of the bridge, provided a certain space from pier to pier, which embraced the principal channel of the river, were left and always kept open for the passage of all craft navigating the river. It was held that a demurrer to the plea should be sustained upon the ground that it did not deny the allegation of the declaration, that the bridge was a material obstruction to the navigation of the river. *Columbus Ins. Co. v. Curtenius*, 6 McLean, 209, Fed. Cas. No. 3,045.

The action was continued against the Peoria Bridge Association as defendant, which corporation had been substituted for the original defendants; and their new pleadings traversed the averment in the declaration that the bridge, as constructed, was a material obstruction to the navigation of the river. The court held that the state, having the power to provide means of crossing the river by bridges when the wants of the public required them, might, or if they delegated the power to a corporation, the corporation as a general thing was exclusively to, judge of the time, place, and circumstances which were to give it exercise. That every bridge, except a suspension bridge, may be said to be an obstruction to

for damages under the facts of this case it is a joint liability upon the part of the railroad and the contractors; and in such case we do not understand that there is such a thing as primary and secondary liability.

For the reasons which we have indicated the judgment of the court below in the case of *C. C. Gossett v. Southern Railway Company et al.* is reversed, and the cause is remanded for a new trial, and the defendants will pay the costs of the appeal; and the judgments in the cases of *C. C. Gossett and Wife, and Calvin Gossett, by Next Friend, v. Southern Railway Company*, are affirmed, and these causes are dismissed at the cost of the plaintiffs herein.

navigation, but that delay or risk which is inseparable from the existence of the thing which the state has the power to create does not make it an obstruction in contemplation of law. The necessity is the justification, and for such delay or risk the law will not give a right of action. 6 McLean, 70, Fed. Cas. No. 3,046.

A bridge constructed over a navigable river in accordance with the legislation of both state and Federal governments must be deemed a lawful structure, however much it may interfere with the public right of navigation. *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228. The plaintiff in this suit had brought the action in the circuit court of the United States to restrain the erection of the Brooklyn bridge, claiming that the erection thereof at a height of 135 feet above mean high water would obstruct, impair, or injuriously modify the navigation of the river, and prevent vessels with masts of a greater height than that from reaching his warehouse above the bridge. The opinion states that the court below did not find in the allegations of a possible loss to the plaintiff in his warehouse business, or in the proofs offered to sustain them, sufficient ground to restrain the completion of the work, and dismissed his case as being without substantial merit.

It will be noticed that in that case the court was considering the question of public nuisance, holding that no private nuisance had been established.

But in *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85, it was held that a bridge thrown across a navigable stream from the terminus of one highway to that of another, without encroaching on the plaintiffs' soil or invading their dominion, which would, if done without authority, be a nuisance and the subject of an action on the case, was not actionable, because the bridge company was authorized by its charter to build the bridge and make the road conform to it, under the principle which it was claimed was laid down in *Philadelphia & T. R. Co.'s Case*, 6 Whart. 43, 36 Am. Dec. 202, that a state or a company author-

KANSAS SUPREME COURT.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Plff. in Err.,

v.

J. B. ARMSTRONG.

(.... Kan.)

1. Nuisance—municipal authority.

An authorized business, properly conducted at an authorized place, is not a nuisance, for whatever is lawful cannot be wrongful; and the owner of a railroad thus authorized and operated is not liable in damages to one whose residence is permeated by smoke, cinders, and gas emitted from the engines

Headnotes by GREENE, J.

ized by charter may take the property of a street, without compensation to the corporate government of the town or the individuals residing in it. The court merely stated the proposition, giving no reason for it, nor any authority except that of *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101, which had no reference whatever to the question under consideration.

That ruling is correct so far as it affects plaintiff's rights as one of the public, but if it interfered with his private rights in the stream it cannot be justified.

When a state is admitted into the Union on an equal footing with the original states, the sovereignty, for all internal municipal purposes, and for all purposes, except such purposes and with such powers as are expressly conferred upon the national government by the Constitution, passes to the state. Thenceforth the only interest of the United States in the public lands is that of a proprietor, like that of any other proprietor, except that the state, under the express terms upon which it is admitted, can pass no laws to interfere with their primary disposal, and they are not subject to taxation. In all other respects the United States stands upon the same footing as private owners of land. They can authorize no invasion of private property, either to enable their grantees to mine the lands purchased by them of the government, or otherwise. And so, where a mining company had purchased mining lands under grants from the general government, such purchase gave them no right to fill up the navigable waters of the state, or its non-navigable water channels, and send their debris over the neighboring country to the destruction of farms and improvements of their owners, on the ground that Congress knew, when it authorized the sale, that the grantees of the United States could not make the lands so purchased available for all the uses for which they were valuable, and in many instances for which they were only valuable, such as mining gold, without committing such nuisances. *Wood- I.R.A. (N.S.)*

to such an extent as to be injurious to the health and comfort of the inhabitants.

2. Same—railroad—injury to health and property.

One whose residence is rendered uncomfortable or unhealthy to the occupants by smoke, cinders, and gas emitted from the locomotive engines of a railway company cannot recover damages therefor, in the absence of any special constitutional or statutory authority, where it appears that such company has not abused or exceeded its authority in locating or constructing its line, or in the operation of its engines.

(May 6, 1905.)

ERROR to the District Court for Johnson County to review a judgment in

ruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 753.

A statute of the state provides that if the works or materials of any manufactory or other corporation cause any inconvenience to those in the same or neighboring houses, by diffusing smoke or nauseous smells, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police or the customs of the place. In *Lewis v. Behan*, 28 La. Ann. 130, the defendants operated a whisky distillery in a city, the distillery being established under authority from the city. The plaintiffs brought the action to abate the operation of the distillery as a nuisance and to recover damages. It was held that, the defendants being in pursuit of a lawful business, and there being nothing in the evidence to warrant the conclusion that they were not conducting it properly and with a due regard to the police regulations of the city, though the smoke and noise might disturb the plaintiffs, it was an inconvenience from which they could not be relieved. One of the judges dissented in the following language: "The evidence in the record satisfies me that the defendants' distillery is to them [the plaintiffs] a nuisance, and that it greatly deteriorates the value of their property. The noise of its machinery is heard by day and by night; the smoke from its chimney, when the wind is from a certain point of the compass, fills their houses, blackens the walls thereof, soils their furniture, settles upon the roofs, whence it is carried into their cisterns, thus polluting the water which they use for all family purposes; the nauseating smell which heated grain gives out infects the air which they breathe. What is this but a nuisance?"

. . . The defendants claim that they are protected by a license from the city. I do not think that the council has any power to authorize the erection of a nuisance in a populous portion of the city. If its power is unlimited in this regard, it can authorize the establishing of a soap factory in the neighborhood of the St. Charles Hotel; for

favor of the plaintiff in an action brought to recover damages for the operation of an alleged nuisance. Reversed.

Statement by Greene, J.:

The plaintiff sued to recover damages on two causes of action, the first being based on injuries sustained by the defendant's having deprived him of access to his property by closing an alley, and the second on injury resulting from his residence being permeated with cinders, smoke, and gas from defendant's locomotive engines. The facts, summarily stated, are as follows: There is a block in the town of Gardner bounded by Washington street on the north, Kane street on the south, and Elm street on the west, through which there is an

alley, 16 feet wide, running east and west. For the purpose of this case it may be said that the plaintiff owns the north half and the defendant the south half of this block. The plaintiff has a valuable residence on the north half facing west on Elm street. The defendant operates a line of railroad which runs across the south half in a northwesterly direction, crossing Elm street near the south line of the block. None of the land occupied by the defendant as a right of way ever belonged to the plaintiff. Several years after the defendant built its road the plaintiff erected his residence, and after the residence was built, the defendant lowered its roadbed through Gardner to such a depth that the smokestacks on its engines were on a line with the surface of the earth

instance, and make that building in that neighborhood uninhabitable."

Attention is also called to *Blanc v. Murray*, 36 La. Ann. 165, 51 Am. Rep. 9, in which the court held that the legislature had no power to authorize a private nuisance.

In one case it was held that a canal company authorized by an act of the legislature "to make, construct, and forever maintain a canal, or slack-water navigation of suitable width, depth, and dimensions, to be determined by the corporation," has the power under such authorization to alter by widening and deepening whenever, in the judgment of the company, the dimensions previously adopted shall, by reason of the increase of business, become unsuitable, provided the same is done upon their own lands or lands on which they have acquired the legal right to enter and use for that purpose; as the canal, though not strictly a public work, is yet of the nature of one, as much as a railroad, and is to be regarded as a public work in the same sense. The acts of such construction and enlargement, therefore, being authorized by express enactment of the legislature, and performed in good faith upon a work of a public nature, the canal company is not liable for injuries to the lands of an adjoining owner by water which soaked through the banks in consequence of raising the banks and increasing the depth of water in the canal, where there is no allegation of bad faith on the part of the canal company or their agents, or of any negligence or want of skill in the construction or management of the work, but the damages are merely consequential, naturally flowing from the construction and maintenance of the work by reason of the nature and character of the structure. *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634.

That decision is so obviously unsound as to require little comment. If the canal company did not confine the water within its banks, but permitted it to flow out upon and occupy adjoining property there was a taking of such property to the extent of the occupation, for which the Constitution requires the making of compensation.

1 L.R.A. (N.S.)

Where various acts of Congress appropriated moneys for the improvement of a certain channel which had been obstructed with rocks and thereby was rendered dangerous it was held, in *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 30 Am. St. Rep. 649, 31 N. E. 328, Reversing 58 Hun, 359, 12 N. Y. Supp. 181, that the court would take judicial notice of such acts of Congress; and that where a dredging company had entered into a lawful contract with an officer of the United States government, who was duly authorized to make the same on the part of the government, to remove the obstructions from such channel injuries to a house from blasting, caused merely by the shaking of the earth or pulsations of the air, or both, gave no right of action in the absence of negligence in doing the blasting, where it was done for the purpose of removing such rocks under such contract.

It will be noticed that the injury in the case was committed by a performance of government work, and that the only provision for protection against injury or encroachment by the Federal government is that property shall not be "taken" for public use without compensation.

Under the clause of the Massachusetts Constitution which authorizes the legislature to pass all laws which it deems to be for the public good, the court of that state has sanctioned legislation which could not be upheld elsewhere.

Under the Massachusetts statute ordinarily known as the "mills act," for the erection and maintenance of mills and mill dams, it was held, in *Eames v. New England Worsted Co.* 11 Met. 570, that the same was a remedial statute for the purpose of securing to a landowner whose land had been flowed or directly damaged by water raised by a dam for mill purposes, by another, on his own land, a fair and adequate compensation for that damage arising directly from that cause; and where a complainant sought, in addition to such damage to recover for damage done to other lands—uplands not reached or affected by the water

This cut made that part of Elm street where the tracks crossed impassable. The defendant then entered into a contract with the city that, in consideration of the city's vacating a certain portion of Kane street for the company's use, and giving it some other privileges, it would quit-claim certain property to the city, build a viaduct over its lines at the crossing of Elm street, and make approaches thereto from the north and south in accordance with certain specifications made by the city. An ordinance was passed containing all these conditions, and specifying the width of the approach and per centum of the grade. After the ordinance was accepted by the company, the latter built the viaduct and made the approaches in accordance with

its provisions. The approach on Elm street north, the same having been made in accordance with the per centum of grade established by the city, extended past the alley in the rear of, and some distance along the plaintiff's property, in front of his residence. The plaintiff claimed in the first cause of action of his petition that this approach deprived him of access to the rear of his property by way of the alley, and he recovered judgment. For his other cause of action he stated that, as a result of the defendant's lowering its roadbed and tracks through Gardner, smoke, cinders, and gas emitted from its locomotive engines could not rise before reaching his residence, and were blown therein, thereby injuriously affecting the health of himself and family, and great-

raised by the dam—in consequence of noxious and offensive smells proceeding from the land flowed when not covered by water, by means of which such uplands were rendered less eligible and valuable as building lots. Such damage was held too remote and not within the scope of the act.

In *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, the defendant was enjoined from ringing a large bell for the purpose of arousing keepers of boarding houses and operatives in defendant's mill before a certain hour named in the injunction, on the ground that the same was a private nuisance. Thereafter a statute was passed by the legislature authorizing "manufacturers and others employing workmen for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate." The selectmen of the town where a mill was situated granted a license to the owner to ring the bell on the mill at an hour which in the previous suit had been enjoined. Thereafter the mill owner brought a bill of review praying that the injunction might be dissolved, or the decree modified so as to enable plaintiffs to act under their license without violating the decree; and it was so ordered. *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27.

b. Constitutionality of statutes.

In considering the effect of legislative authority to commit an act which will create a private nuisance, the constitutional limitation of the legislative power must be kept in mind. Not only do the Constitutions provide that private property shall not be taken, and in some instances injured, for public use, without compensation, and implicitly forbid the taking of private property for private use, but many forbid the granting of special immunities and privileges, and all confine the functions of the legislature to legislation. It has been said that the taking of property from one person and giving it to another would not be
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legislation, but robbery. Equally is it robbery to permit the destruction of one man's property by the maintenance of a nuisance on adjoining property for the sole benefit of its owner, and so beyond the legislative power. As the Texas court in *Rainey v. Red River, T. & S. R. Co.* (Tex.) 89 S. W. 768, says, the legislature may authorize a public service corporation to commit a nuisance, "provided always the damages be fully compensated by the payment of money."

The court, in *Hooker v. New Haven & N. Co.* 15 Conn. 312, which involved the question of the liability of a canal company for injury to neighboring property by the discharge of waste water, after saying that it was not claimed on the part of the defendants that any express authority was given to them to protect their works by the act of the legislature at the expense of injury to others, but that the court was called upon to say that it was implied, upon the principle that an authority to do an act necessarily implies that the grantee may use the means necessary to accomplish it,—further said that, had the legislature expressly given such a right to the corporation without providing any compensation to the party injured, it would have demanded their serious consideration whether such an act was constitutional; and that they were not bound to give such a construction to the legislative grant as would subject the legislature to the imputation of great injustice, if not a violation of constitutional rights, where such an intent is not clearly expressed.

And in *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668, the court said that whenever the legislature should enact that streams generally, or any streams, should be used as sewers, without liability to the owners of the soil through which they run, the question of constitutional protection to private rights might be forced upon the courts for decision.

In *Blanc v. Murray*, 36 La. Ann. 165, 51 Am. Rep. 9, the plaintiffs, owners of valuable property occupied by them as dwellings, complained that the defendant was

ly damaging and decreasing the value of his residence property. He also recovered on this cause of action. The defendant prosecutes this proceeding in error. There are no allegations in the petition that the lowering of the track was not properly and skilfully done, that it was not a betterment of its roadbed, and necessary to the proper and efficient conduct of defendant's business and operation of its trains; nor was negligence charged on the part of the defendant's locomotive engineers in the management of their engines. By subd. 6 of § 1316, Gen. Stat. 1901, railway companies are empowered to take and convey persons and property on their railway by the power of steam; and by § 1320 they are authorized to "change the roadbed or road line, or any part thereof,

for the purpose of shortening the line or to overcome natural obstacles."

Messrs. A. A. Hurd, Alfred A. Scott, and Robert Dunlap, for plaintiff in error:

The legislature may legalize a nuisance—that is to say, it may make lawful an act, state, or condition of affairs which, without such authorization, would constitute a nuisance.

21 Am. & Eng. Enc. Law, title Nuisance, 2d ed. p. 736; Atchison & N. R. Co. v. Gar side, 10 Kan. 552; Dunsmore v. Central Iowa R. Co. 72 Iowa, 182, 33 N. W. 456; Beideman v. Atlantic City R. Co. (N. J. Eq.) 19 Atl. 731; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27.

constructing, contiguous to them, within the fire limits of the city, and in violation of its ordinances, an inflammable and dangerous wooden structure, in which he had placed a large quantity of pine and cypress lumber, which endangered their property and the lives of their families, and diminished the value of the former and impaired its use, thus causing them irreparable injury and creating a nuisance. One of the defenses was that the defendant was constructing the building according to law and in compliance with the city ordinances. In affirming a judgment perpetuating an injunction, the court said that it was indisputable that noise, smoke, noxious vapors, unwholesome smells, or other cause which creates a public nuisance, may, by interfering with comfortable enjoyment of property, create a private nuisance, and occasion a special and particular damage which will justify and sustain an individual action for damages; and that where a right to the private remedy exists there can be no doubt that an injunction will lie. The court said, further, that the defense that a structure is authorized by the city council, and has been made in compliance with its requirements, will not avail if the proof establishes the fact of private nuisance; as a municipal body cannot legally do more than the legislature of a state, and, although the latter may authorize a use of property that will operate to produce a public nuisance, it cannot authorize a use of it that will create private nuisance; or, to put the doctrine in more exact form, that which is authorized by the legislature, within the scope of its constitutional power, cannot be a public nuisance, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom. And the doctrine sometimes stated in the elementary works, and which has been held by some courts, that whatever is authorized by a legislature cannot be a nuisance of any kind, is exploded. Citing and referring with approval to Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 1 L.R.A. (N.S.)

719, the court further said: "The highest judicial authority has recently said, in reference to the grant by Congress to a railroad of the right to lay its track within the limits of the National Capital and to construct other works necessary to the proper completion and maintenance of its road 'Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privilege or powers to corporate bodies confer no license to use them in disregard of the private rights of others and with immunity for their invasion.' . . . And what is true of a grant by Congress to a railway corporation is *a fortiori* true of an authorization by a city council to a private individual."

The use of a public street cannot be granted to a private corporation for use which constitute a private nuisance and result in injury to abutting owners, either by legislative enactment or a city ordinance, except upon making compensation for such injuries, as such a corporation has no more right than a private person to erect and maintain a nuisance on its own premises on a public street. Chicago G. W. R. Co. v. First M. E. Church, 50 L. R. A. 488, 42 C. C. A. 178, 102 Fed. 85.

The use of a public way may be granted to a railroad company for passage through a city or town, or for switches from its main track to its depot, or as a receptacle for passengers and freight, because it is in many cases necessary and may be done without materially injuring the street as a public way. But even a grant for that limited purpose cannot be made, or the right under it exercised, except upon condition of the company being liable for injury done thereby to owners of abutting property. For legislative power does not exist to exempt either an individual or a corporation from obligation to so use his or its own as not to hurt others. Owensboro & N. R. Co.

Struthers v. Dunkirk. W. & P. R. Co. 87 Pa. 82; Randle v. Pacific R. Co. 65 Mo. 325; Omaha. H. & G. R. Co. v. Doney, 3 Kan. App. 515, 43 Pac. 831; 10 Am. & Eng. Enc. av. title *Eminent Domain* 2d ed. p. 1112; Mawa. O. C. & C. G. R. Co. v. Larson, 40 Kan. 401, 2 L. R. A. 59, 19 Pac. 661; Pennsylvania R. Co. v. R. Lippincott, 116 Pa. 472, 2 Am. St. Rep. 618, 9 Atl. 871; Pennsylvania R. Co. v. Marchant, 119 Pa. 541, 4 Am. St. Rep. 59, 13 Atl. 690; Pennsylvania Co. v. Pennsylvania S. Valley R. Co. 151 Pa. 334, 31 Am. St. Rep. 762, 25 Atl. 107; Jones v. Erie W. Valley R. Co. 151 Pa. 30, 17 L. R. A. 58, 31 Am. St. Rep. 722, 25 Atl. 134; Hatch v. Vermont C. R. Co. 28 Vt. 143; Parrot v. Cincinnati, H. & D. R. Co. 10 Ohio St. 624. Where an individual brings an action

for damages on account of an alleged public nuisance, he must show that he has sustained damages peculiar to himself; it is not enough that such damages are greater in degree than those suffered by the public at large,—they must be different in kind.

School Dist. No. 1 v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253; Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625.

In the accomplishment of works of a public nature, or in or over which the state retains an interest or control, the legislature may validly permit the doing of incidental or consequential damage to property of private individuals without liability therefor.

Cooley, Torts, 2d ed. p. 66; King v. Pagham, 8 Barn. & C. 355; Northern Transp.

Sutton, 12 Ky. L. Rep. 247, 13 S. W. 666.

And so, on appeal from a judgment enjoining and restraining defendant from passing and repassing plaintiff's dwelling house with its locomotives, in making up its trains in the street, and from using the street as a depot for cars, and from receiving and discharging freight from its cars therein, the judgment was affirmed, the court holding that there was no reason or necessity in this or any other case like it, for a railroad company to use a public street as a place for making up its trains, or as a depot for standing cars, or for receiving or discharging freight; for such use necessarily defeated the purposes for which streets are dedicated to the public, prevented a reasonable enjoyment by owners of abutting property, and consequently a municipal legislature is without power to grant the right. *Ibid.*

In *Sadler v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, after proceeding to state the effect of a law which did what the bridge company claimed in this case that its charter did, the court said, further, that in this country the more plain and explicit the legislature might be in authorizing the taking of private property, or a "direct" injury hereto by a nuisance *per se*, or any trespass, without compensation, the more plain it would make manifest that it had exceeded its constitutional powers, and that the full extent of legislative power to legalize and shield a nuisance is to exempt it from public prosecution.

It is a principle of the fundamental laws of the state, that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor: and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. *Seifert v. I.L.R.A. (N.S.)*

Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321.

VI. The Elevated Railroad Cases.

The cases known as the Elevated Railroad Cases, decided by the New York court of appeals, are, strictly speaking, not on the question here involved; but, inasmuch as they incidentally touch upon it, it has been thought that some benefit may be derived from what was said in some of those cases.

The first of these cases was *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146. The main and general proposition which was there established is that abutters upon public streets in cities are entitled to such damages as they may have sustained by a diversion of the street from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses. Thereafter, in *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528, the court of appeals held that the *Story Case* had definitely determined:

"First. That an elevated railroad in the streets of a city, operated by steam power and constructed as to form, equipments, and dimensions like that described in the *Story Case*, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners.

"Second. That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property shall forever thereafter continue for the free and common passage of and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be,—acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circu-

Co. v. Chicago, 99 U. S. 640, 25 L. ed. 338; Hammersmith & C. R. Co. v. Brand, L. R. 4 H. L. 196; London, B. & S. C. R. Co. v. Truman, L. R. 11 App. Cas. 45; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Cameron v. Chicago, M. & St. P. R. Co. 42 Minn. 75, 43 N. W. 785; Lincoln v. Com. 164 Mass. 368, 41 N. E. 491; 1 Sedgwick Damages, 7th ed. p. 207; 4 Sutherland, Damages, 3d ed. p. 3024; Cooley, Const. Lim. 7th ed. p. 548; Burroughs v. Housatonic R. Co. 15 Conn. 124, 38 Am. Dec. 64; Vaughan v. Taff Vale R. Co. 5 Hurlst. & N. 679; Atchison & N. R. Co. v. Garside, 10 Kan. 552; Kansas, N. & D. R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1052; British Cast Plate Mfrs. v. Meredith, 4 T. R. 794; Hatch v. Vermont

C. R. Co. 25 Vt. 49; Wellington v. Boston & M. R. Co. 158 Mass. 185, 33 N. E. 393; Struthers v. Dunkirk, W. & P. R. Co. 57 Pa. 282; Randle v. Pacific R. Co. 65 Mo. 325; Decker v. Evansville Suburban & N. R. Co. 133 Ind. 493, 33 N. E. 349; 21 Am. & Eng. Enc. Law, 2d ed. p. 737, note; Dolan v. Chicago, M. & St. P. R. Co. 118 Wis. 302, 95 N. W. 385; Carroll v. Wisconsin Central Co. 40 Minn. 168, 41 N. W. 661; Cameron v. Chicago, M. & St. P. R. Co. 42 Minn. 75, 43 N. W. 785; Kaje v. Chicago, St. P. M. & O. R. Co. 57 Minn. 422, 47 Am. St. Rep. 627, 59 N. W. 493; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Pennsylvania R. Co. v. Thompson, 45 N. J. Eq. 870, 19

lation of light and air through and over such street for the benefit of property situated thereon.

"Third. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the state, and requires compensation to be made therefor, before it can lawfully be taken from its owner for public use.

"Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

The Lahr Case was an action brought to recover damages to plaintiff's property abutting on a street in the city of New York, alleged to have been caused by the construction and maintenance of an elevated railroad over the street. The chief judge, delivering the opinion of the court, commenced by saying that the action was the sequel of the Story Case, and stated that the doctrine of that case, although pronounced by a divided court, must be regarded as *stare decisis* upon all questions involved therein, and as establishing the law, as well for the court as for the people of the state, whenever similar questions might be litigated. In considering the question of damages which the plaintiff should recover of the elevated railroad company, in answer to the claim of the defendant that the railroad company was not liable for the operation of its trains, and the consequences flowing therefrom in respect to the manufacture and distribution in the air of gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances from its locomotives and trains, as they moved to and fro over its tracks, the court took the

position that inasmuch as, under the decision of the main question, the railroad company was unlawfully occupying the street to the plaintiff's damage, it did not see any reason why the defendant should not be liable for the injury thus occasioned provided the evidence established the fact that they were destructive of the easements of light, air, and access belonging to the plaintiff; and that no partial justification of the damages inflicted by an unlawful structure and its unlawful use could be predicated upon the circumstance that, under other conditions and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrators liable for damages. Of the six judges present at the argument two concurred with the chief judge, one took no part, and the remaining two—who dissented in the Story Case—concurred in the result on the authority of that case, but deemed it necessary to add their opinion that the abutter could not recover damages to or upon their abutting property, caused by the lawful operation of the road, and not by the deprivation or destruction of their easements in the street. By the Constitution of New York, if four judges do not concur to reverse a judgment on appeal to that court the same is affirmed, and the judgment was affirmed in this case upon the concurrence of three judges only; one of the judges of the court having recently been elected thereto, it is presumed he did not hear the argument, and another took no part, so that only five judges of the seven took part in the decision of the case. As will be seen hereafter, one of the judges, who dissented from the rule of damages laid down by the chief judge and concurred in by two of the others, declined to recognize it as a rule established by the court.

In Drucker v. Manhattan R. Co. 106 N. Y. 157, 60 Am. Rep. 437, 12 N. E. 568, that judge, after recapitulating what had been decided in the Lahr Case, referred to the rule laid down by the three judges, who, as before stated, were the majority of the

Atl. 622; *Beideman v. Atlantic City R. Co.* (N. J. Eq.) 19 Atl. 731; *Costigan v. Pennsylvania R. Co.* 54 N. J. L. 233, 23 Atl. 510; *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456; *Georgia E. & Bkg. Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315; *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L. R. A. 59, 19 Pac. 61; *Ricket v. Metropolitan R. Co.* L. R. 2 H. L. 177; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Langing v. Smith*, 8 Cow. 146; *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634; *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 53

Am. Rep. 123, note, 4 N. E. 536; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690, 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Pennsylvania Co. v. Pennsylvania S. Valley R. Co.* 151 Pa. 334, 31 Am. St. Rep. 762, 25 Atl. 107; *Jones v. Erie & W. Valley R. Co.* 151 Pa. 30, 17 L. R. A. 758, 31 Am. St. Rep. 722, 25 Atl. 134; *Rand v. Boston*, 164 Mass. 354, 41 N. E. 484; *Glasgow Union R. Co. v. Hunter*, L. R. 2 Sc. H. L. App. Cas. 78; *Spencer v. Pt. Pleasant & O. River R. Co.* 23 W. Va. 427.

Neither the raising nor lowering of railroad tracks affords the abutting owner any

judges taking part in the decision, but a minority of the whole court, saying that it was a "restricted rule, which had not as yet received the sanction of the court."

In *Kane v. New York Elev. R. Co.* 125 N. Y. 186, 11 L. R. A. 640, 26 N. E. 278, the court, with one judge dissenting, said that, if the defendant had the lawful right to operate its trains in the street, such inconvenience as might result to the plaintiff in the enjoyment of his property, from the ordinary and useful operation of the defendant's road, would not, in the absence of negligence on its part, furnish a ground of action; but that the court had held in the *Lahr Case*, that as to abutting owners having easements in the streets through which the road was constructed, whose rights had not been acquired by condemnation, the defendant railroad company was a trespasser; and that upon general principles, therefore, it would seem that any consequential injury to the plaintiff's property from the acts of the defendant while engaged in the unauthorized occupation and use of the street was proper to be considered by the jury.

The construction and operation of a surface railroad along and upon a city street, substantially upon the same grade therewith, under authority from the legislature and by permission of the city, is not a taking of any property of an abutting landowner who has no title to any portion of the street, which will entitle him to compensation, either for interference with any of his easements in the street or for consequential damages to his adjoining property, necessarily resulting from a reasonable operation of the road, where the use of the street is not exclusive in its nature, and the passage through and across it is left free and unobstructed for the public. *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919.

In this case the judge who delivered the opinion of the court said: "Looking carefully over the cases involving the elevated railroads and their rights and liabilities, we cannot see that any new rule was adopted in any of those cases which would hold the

defendant herein liable, under the facts proved, for the taking of any property or any portion of an easement belonging to the plaintiff. On the contrary, we think the plaintiff's case is still governed by the case of *Drake* and the other cases in this court which have already been cited, and in which the principle decided in the *Drake Case* [*Drake v. Hudson R. R. Co.* 7 Barb. 508] has been assented to and affirmed. Upon such facts it has been held that there was no taking of any property or easement of an adjoining owner who had no title to any portion of the land upon which the street was laid out, where the company was authorized by law and licensed by the city to so use the street."

The logic of the reasoning in this case is not apparent. If the cases known as the *Elevated Railroad Cases* were correctly decided, it is difficult to see how the *Fobes Case* was, as it would seem as if, when the construction and operation of a railroad in a street deprive an abutting lot owner of the easements of light and air and means of access, it can make no difference whether the railroad is operated upon the surface or upon stilts.

And the decision in the case of *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493, 12 Am. St. Rep. 644, 39 N. W. 629, where it was held that a surface railroad which, under authority of the legislature, was so constructed and operated as to interfere with an abutting lot owner's easement of light and air, was within the inhibition of the Constitution of that state, prohibiting the taking of private property for public use without just compensation, was a more logical view.

Afterwards, in *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 155, 20 L. R. A. 752, 32 N. E. 1050, the general term of the supreme court had reversed a judgment entered upon the report of a referee, which enjoined the defendants from operating their elevated roads in front of the plaintiff's premises until they had paid certain damages to him for the injuries caused by such operation, including those caused by the

right to recover alleged damages consequent thereon.

Muhlker v. New York & H. R. Co. 173 N. Y. 549, 66 N. E. 558; *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 5 N. E. 142; *Kotz v. Illinois C. R. Co.* 188 Ill. 578, 59 N. E. 240; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. 67; *Penn. Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; *Galt v. Chicago & N. W. R. Co.* 157 Ill. 125, 41 N. E. 643; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690.

The legislation which we are considering is the exercise of the power of eminent domain.

smoke, dust, vibration, etc., which resulted from the passing of trains (61 Hun, 539, 16 N. Y. Supp. 392). The judge who delivered the unanimous opinion of the court of appeals said that the general term justices, in their opinion, took the quite unwarrantable view that the defendants, in acquiring the right to maintain their structure in the street, were not bound to make compensation for the incidental injuries produced by the running of trains upon the same, and that future discharges of smoke, cinders, and noxious gases were not items of damage which should be considered in the estimate of the compensation to be made, and that the defendants' counsel concisely stated the proposition of the general term justices to be that the plaintiff had no easement which could be taken by the running of trains, and that he earnestly and ingeniously sought to sustain its correctness, his argument being that, although such item may properly enter into the estimate of damages suffered in the past, the trespass itself consisted only in the maintenance of a permanent structure in the street; and the lawful operation of the company's franchises, in the running of trains upon the structure, whatever might be the incidents attendant, if necessarily so, could not afford grounds for an award of compensation when the company sought to acquire or to condemn the rights of the abutting property owner. The court said that the argument rested almost wholly upon the decision in *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919, and that that decision was very much misapprehended when it was sought to make use of it as an authority for such a doctrine, as in that case the question presented grew out of the operation of a steam surface railroad upon the bed of the street, and related to the right of an abutting owner whose property was bounded by the exterior line of the street, to hold the railroad company liable for consequential damages; that the doctrine of the elevated railroad cases was that in their occupation and use of the street they took from the abutting lot owners a

The right to take or injure private property for public uses is a right inherent in the state.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 406, 25 L. ed. 208; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Giesy v. Cincinnati, W. & Z. R. Co.* 4 Ohio St. 309; *Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 Kan. 453.

Messrs. J. W. Parker and J. P. Hindman, for defendant in error:

If the smoke or dust, or both, that arises from one man's premises and passes over and upon those of another, causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance.

portion of their easement in the street without making compensation, and hence that they were, as to them, illegally there, and thus liable for the consequential damages caused by their unlawful use of the street.

But the elevated railroads had the same legislative authority for the construction and operation of their roads as the surface railroad.

In an action brought to enjoin an elevated railroad company from running its trains in front of the plaintiff's dwelling, it was admitted that the defendant occupied the street from curb to curb, opposite to the plaintiff's premises, by an elevated steam railway, and that there was a deprivation of light and air, and a noise and stench created, and an exposure of the privacy of the plaintiff's dwelling, and a diminution of the value of the same in consequence of the occupancy and running of the trains of the defendant; and it was held that the corrupting of the air of a man's dwelling by noisome smells is a nuisance, and the infliction thereof by the defendant upon the plaintiff in this action was not justified by the statute of the state authorizing the construction of elevated railroads, as neither the acts of the legislature under which the company was incorporated, nor the requirements or conditions imposed upon the defendant by the board of commissioners created by the legislature, conferred, or attempted to confer, any right or power to introduce into the plaintiff's premises the stench or noxious gas of which the plaintiff complained, and which the defendant admitted, and which greatly diminished the plaintiff's enjoyment of his dwelling house. *Caro v. Metropolitan Elev. R. Co.* 14 Jones & S. 138.

VII. Grant to municipal corporation.

a. General rule.

The rule prevails in grants of authority to municipal corporations, that authority to commit a nuisance will not be implied, but must be express. And in the use of their private property they are subject to the

(Cooley, Torts, 2d ed. 712; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Ft. Worth & N. O. R. Co. v. Pearce, 75 Tex. 81, 12 S. W. 864; Ross v. Butler, 19 N. J. 24, 294, 97 Am. Dec. 654; Stone v. Fairbury, 2 & N. W. R. Co. 68 Ill. 394, 18 Am. Rep. 56; Wesson v. Washburn Iron Co. 13 Allen, 6, 90 Am. Dec. 181; Omaha & N. P. R. Co. v. Janacek, 30 Neb. 276, 27 Am. St. Rep. 99, 46 N. W. 478; Daniels v. Keokuk Waterworks, 61 Iowa, 549, 16 N. W. 705; Churchill v. Burlington Water Co. 94 Iowa, 89, 62 C. W. 646; Pennoyer v. Allen, 56 Wis. 502, 3 Am. Rep. 728, 14 N. W. 609; Chicago-Firden Coal Co. v. Wilson, 67 Ill. App. 443; Mills, Em. Dom. § 183; 1 Lewis, Em. Dom. 20; 21 Am. & Eng. Enc. Law, 2d ed. pp. 682-694; Wood, Nuisances, chaps. 13, 14.

In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases.

Rigney v. Chicago, 102 Ill. 64; Brand v. Hammersmith & C. R. Co. L. R. 2 Q. B. 223; Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42, 14 S. W. 259; Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

It is no defense that plaintiff came to the nuisance.

21 Am. & Eng. Enc. Law, 2d ed. p. 691; Cooley, Torts, 612; St. Helen's Smelting Co. v. Tipping, 35 L. J. Q. B. N. S. 66, 11 H. L. Cas. 642; Bushnell v. Robeson, 62

same rules as individuals; but in the exercise of the governmental power delegated to them, the only rule applicable is the constitutional provision that private property shall not be taken for public use without compensation. They are not subject to the rule as to special immunities or equal protection of the law. Nevertheless, in many cases where there has been a direct and distinct taking of property, the courts have shielded them from liability under the theory of consequential damages.

The following from the opinion in *Brower v. New York*, 3 Barb. 254, is believed to state the true rule with regard to the rights and liabilities of municipal corporations in the use of real property owned by them: "The premises known as the North Battery are owned by the mayor, aldermen, and commonalty of the city of New York, and while as such owners they enjoy, in respect to this property, all the rights to which private persons would be entitled, they are subject also to the same duties and obligations in respect to others owning adjacent lands, that the law imposes upon private persons owning real estate. That the premises in question are held as a public trust, and that no private gain or profit is to be derived from their possession, does not in the least diminish or vary the duties and obligations of the common council in respect to adjacent owners whose rights may be injuriously affected by a particular mode of using this property. The great injunction of the law, addressed to all proprietors of real estate, is, 'So use your own as not to injure another;' and a municipal corporation owning lands is as much bound to the observance of this precept as a private person. . . . The idea of the irresponsibility of such a corporation, or their lessees. . . . can only be entertained by the courts where the corporation is in the exercise of a purely governmental function. . . . As a law-giver, a municipal corporation is irresponsible, and the court cannot interfere with its police regulations, which are ordained as laws for the observance of the citizen. But it can enforce the obligation which rests 1 L.R.A. (N.S.)

alike upon owners of land, whether corporations or individuals, so to use their property as that adjacent proprietors shall be rendered secure in the enjoyment of their estates."

In *Sadlier v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, although the decision of a single justice of the supreme court at special term, is an admirably considered opinion which deals with the question under consideration in a very able and lucid manner in both aspects. The action was against the city as the owner of what is known as the New York & Brooklyn Suspension Bridge, which on the Brooklyn side of the river was about 80 feet above the roof of the plaintiffs' building, which was about 20 feet away from the bridge, on the southerly side thereof. Dirty water and slush accumulated on the wagon roadway of the bridge on that side, and ran off in considerable quantities, and was blown by the wind upon the roof and against the windows of the plaintiffs' building, the effect of which, as to the roof, was to clog the waste pipes, causing them to overflow and the water to leak through the roof. It was contended that the things complained of were necessarily and unavoidably incident to the existence and use of the bridge, and that, therefore, as the legislature located and authorized the construction and use of the bridge, just where it was and as it was, the plaintiffs were remediless; that the injury done to their property had to be deemed *damnum absque injuria*; that the law of this state is that individuals can have no redress in the courts for injury done to their property by a nuisance authorized by the legislature, or by reason of the construction or use of any public work so authorized, unless the legislature also provides that compensation be made for such injury. In refusing to sustain the contention the court said that there was no such rule in this state nor anywhere in this country, and, more than that, that it was impossible that there should be, under our constitutional restraints on legislative power in respect of the property rights of individuals; and,

Iowa, 540, 17 N. W. 888; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *King v. Morris & E. R. Co.* 18 N. J. Eq. 397.

The fact that the business was a lawful one will not relieve from the rule.

Cooley, Torts, 601, 2d ed. 714; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588; *Dodge v. Essex County*, 3 Met. 380; 21 Am. & Eng. Enc. Law, 2d ed. pp. 689, 692; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 9 L. R. A. 737, 25 Am. St. Rep. 595, 20 Atl. 900.

Nor is it any defense that the business is carried on in a proper manner and on their own land.

Missouri, K. & T. R. Co. v. Calkins (Tex. Civ. App.) 79 S. W. 852; *Republican Valley*

R. Co. v. Fellers, 16 Neb. 169, 20 N. W. 217; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567.

The idea that if, by a wrongful act, a serious injury is inflicted upon a single individual, recovery may be had against the wrongdoer, and that if, by the same act numbers are so injured, no recovery can be had, is absurd.

3 *Sutherland, Damages*, 423; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181; *Omaha & N. P. R. Co. v. Janeeck* 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; *Park v. Chicago & S. W. R. Co.* 4 Iowa, 636; *Wood, Nuisances*, 657; *Davenport, R. I. & N. W. R. Co. v. Sinnet*. 111 Ill. App. 75.

If the plaintiff's rights are invaded, "be

further, that the misunderstanding on this head arose from the inadvertent citation of English decisions, which, by reason of the superior and unrestrained power of Parliament, really have no application with us.

In an action against a city to restrain the erection of a pest house on land near that of the plaintiff, but which was outside of the city limits, the court, after holding that the simple erection of the pest house outside of the city, under a statute which provided where and how the pest house might be established, put no restrictions upon the municipal corporation as to obtaining the consent of other municipalities or other authorities, further held that a law which provided that a city might establish a quarantine ground or grounds within or without its own limits and which further provided that if such place be without its limits the consent of the municipality or township within which it is proposed to establish it shall first be obtained, did not apply, and that the erection of the pest house was not a private nuisance. *Lorain v. Rolling*, 24 Ohio C. C. 82. In this case the court further said: But if a method is pursued that will necessarily make it dangerous beyond that already contemplated by the law, then it may be a nuisance, and, before actually using, might be condemned by the authorities and they be enjoined from using it; but that if the mode prescribed and manner contemplated had been pursued, or if no mode or manner was definitely pointed out by the law, if that generally approved was pursued, then there could be no injunction, and no declaring it a nuisance until it was wrongfully used; and that if it was so negligently used, so carelessly used, and so used contrary to the intent of the law, it might become a nuisance, and it might then be enjoined.

In *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1090, the court, after holding the erection and maintenance of a structure covering nearly half of a pier which was owned by the plaintiff and the city in severalty, and the manner in which the half of the pier be-

longing to the city was used for the conveyance of the refuse matter and garbage of the city into boats for transfer to the ocean, to be a nuisance, refused to sustain the contention of the city that a municipal corporation engaged in the performance of a public duty upon which the public health and comfort depend, and acting by express authority of the legislature, is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as to individuals, on the ground that power to do the act complained of was not expressly, nor by clear and unquestionable implication, conferred by the legislature. To support its ruling the court cited the statement of Chief Justice Marshall in *United States v. Fisher*, 2 Cranch. 390, 2 L. ed. 314, wherein he says: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness . . . to suppose a design to effect such objects."

Some courts have, however, been so impressed with the necessities of the public that they have permitted the rights of individuals to be borne down under the weight of public convenience,—a result which it was the very purpose of the Constitutions to prevent.

In *Alexander v. Milwaukee*, 16 Wis. 248, it appeared that the plaintiff was seeking to recover damages alleged to have been sustained by him in consequence of the city's making a harbor improvement consisting of a channel known as a straight cut, a work which the city was specially authorized by the legislature to make. The court said that there was no allegation in the complaint that the damages resulted from any unlawful or improper act on the part of the city authorities in making the improvement; but it appeared that the plaintiff owned a lot bordering or situated on the Milwaukee river, near the shore of Lake Michigan, and also two lots situated on an island in that river, upon which he had a

is entitled to protection, be the consequences what they may."

Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L. R. A. 737, 25 Am. St. Rep. 595, 20 Atl. 900.

Neither the injury done to the plaintiff nor that done to anybody else has ever been compensated for.

Bradley v. New York & N. H. R. Co. 21 Conn. 294; *Wilkinson v. Leland*, 2 Pet. 27, 7 L. ed. 542; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477; *Bangor & P. R. Co. v. McComb*, 60 Me. 290.

The municipality could not legalize a nuisance as against plaintiff's rights.

Leavenworth, N. & S. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297; *Chicago, K. & W.*

R. Co. v. Union Investment Co. 51 Kan. 600, 33 Pac. 378; *Atchison, T. & S. F. R. Co. v. Arnold*, 52 Kan. 720, 35 Pac. 780; *J. K. & W. H. Gilcrest Co. v. Des Moines (Iowa)* 102 N. W. 831; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203; *Central Branch Union P. R. Co. v. Andrews*, 30 Kan. 590, 2 Pac. 677; *Hedrick v. Olathe*, 30 Kan. 351, 1 Pac. 118; *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 51 Kan. 604, 33 Pac. 606; *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051.

While the state may restrict its own rights, it cannot restrict or take away rights which are purely individual, even though they are intimately associated with the public right.

dock, a shipyard, and other valuable improvements; and it was alleged that the waves and waters of the lake were driven by the wind through the canal or channel made by the city, into the river and upon his lots, so as to wash them away, or to render them insecure, dangerous, and unfit for use. At the trial the court, on motion of the defendant, dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and on an appeal from a judgment so rendered, the court, in affirming that judgment, said, among other things: "We are not, however, prepared to say that the injuries complained of in this case come within the rule of being remote and speculative, and therefore not recoverable upon that ground. They might, perhaps, constitute a good cause of action if they resulted from the acts of a natural person. But they result from a municipal corporation making a great public improvement exclusively for the benefit of the public, in the precise way authorized by the legislature, and in a careful, discreet manner. And for damages thus sustained, however equitable, upon principles of justice, it may be that the party should be compensated by the state or the public, yet the current of authority is that the city is not liable. And it is quite obvious that if the appellant may maintain this action for them, so might every proprietor of lots lying along the river whose property had been at all affected by the work, just to the extent of his injury. This may not afford a conclusive reason why a municipal corporation should not be answerable for all such consequential damages, but it at least will convince anyone that if such corporations were answerable, few improvements of this nature would ever be undertaken by them." The court in this case cited several Ohio decisions which supported the opposite doctrine, which placed the liability of a municipal corporation upon the same grounds as that of an individual, and held it liable for any consequential damages, whether its agents acted with due skill and

caution in the exercise of corporate authority, or not, and said that the doctrine of the Ohio decisions appears to be fully supported by that of *Baron v. Baltimore*, referred to in *Stetson v. Faxon*, 19 Pick. 147, 158, 31 Am. Dec. 123, and stated, further, that they were cited with decided approval in *Goodall v. Milwaukee*, 5 Wis. 38; but claimed that the liability in that case was placed upon an entirely different ground. The court further said that as an original question there was much justice and equity in the principle of the Ohio cases, but said that the law seemed to be too well settled the other way to permit it to follow them.

So, in *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, it was decided that the trustees of a village who were commissioners of highways in and for the village, were not liable as such commissioners, in constructing a coffer dam which was necessary in order to build across a stream of water a bridge which they were authorized by law to build, for damages caused by the piling back of the waters of such stream upon lands above the dam so that crops growing, or which might have been grown thereon, were prevented for a whole season: where it was not alleged that there was unnecessary delay on the part of the defendants in the commencement or prosecution of the work of constructing the bridge, and the evidence fairly permitted the inference that they were not chargeable with any want of care which caused the injurious consequences and the time and the necessity for the construction of the bridge and dam were matters to be determined by the trustees, upon whom was imposed the duty in that respect; and that assuming, as the court must upon the evidence, that they had acted in good faith, their exercise of discretion in those respects was not the subject of review. That by the statute constituting the charter of the village the trustees had the lawful authority to do whatever was essential to the proper performance of the work of making the improvement, and it was for that purpose only that the coffer dam was erected; that

Cooley, Torts, 616; Pittsburg, Ft. W. & C. R. Co. v. Reich, 101 Ill. 157; Porter v. North Missouri R. Co. 33 Mo. 128; Dairy v. Iowa C. R. Co. 113 Iowa, 716, 84 N. W. 688; Chamberlain v. West End & C. P. R. Co. 2 Best & S. 605; Caledonian R. Co. v. Walker, L. R. 7 App. Cas. 259; Shively v. Cedar Rapids, I. F. & N. W. R. Co. 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146.

Where the injury is more than a mere annoyance, and is so serious as to result in a depreciation in the value of the real estate, or becomes injurious to the occupants, the injury amounts to a taking for which compensation must be made.

the necessity for it made it lawful, and its usefulness was dependent upon the obstruction by it of the flow of water in the channel at the place where the improvement was made. To the contention on the part of the plaintiff that the damages were incurred by the direct and physical invasion of his land by the defendants in the construction of the dam, and that it constituted a taking of his property within the meaning of the provision of the Constitution that private property shall not be taken for public use without compensation, the court said that the subject had had much discussion and judicial consideration, and that consequential damages to property of others, occasioned by the performance of public work, were not treated as the taking of it within the meaning of the Constitution was not an open question in New York. That the dam did not, nor did any of the work, encroach upon the plaintiff's premises. That the right to construct this dam, and thus obstruct the flow of water in that channel to the prejudice of owners of property affected by it, depended upon its necessity for the purpose of the work of the public improvement according to the plan devised for the structures to be erected, and that, assuming for the purpose of the question under consideration, that it was such and that the defendants properly and expeditiously performed the work, it could not be seen within the doctrine before stated how the defendants could be held liable for the consequences resulting from it to others.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, has settled the law to be that the flooding of land is just as much a taking as is a physical occupation of it. This being true, it is difficult to see any ground for holding that no compensation need be made when the taking is only for one season, instead of permanently. Equally sound would be the contention that the occupation of plaintiff's house by the laborers on the bridge for the season, to the exclusion of plaintiff, would be a consequen-

Rigney v. Chicago, 102 Ill. 64; Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622, 37 L. ed. 463; Hot Springs R. Co. v. Williamson, 45 Ark. 429; Penn. Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; Tipping v. St. Helen's Smelting Co. 4 Best & S. 616; 11 H. L. Cas. 642; Cooley, Torts, 161; Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 56 Am. Rep. 6, note, 8 N. E. 537; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667; West Chicago Street R. Co. v. Annis, 62 Ill. App. 180; Illinois C. R. Co. v. Grabill, 50 Ill. 241; Chicago & I. R. Co. v. Baker, 73 Ill. 316; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; 21 Am. & Eng. Enc. Law, 2d ed. p. 737; Shively v.

tial injury for which no compensation need be made.

b. Pollution of waters; sewers.

In Locks & Canals v. Lowell, 7 Gray, 223, the court admits that where a canal company, duly authorized thereto by a legislative act of incorporation, has constructed a canal, and appropriated, by purchase and condemnation to its use, lands necessary for the purpose, such lands and the use of the canal may be taken by a city for the purpose of drainage, under statutes containing suitable provisions and conferring the requisite authority; but where a statute contains no such provisions and confers no such authority, but merely authorizes the city, by a provision expressed in very general terms, to lay down drains and sewers through streets and private lands, and in it there is no such directness as to import that a new appropriation, to the public use, of lands which have already been lawfully taken and are still held and devoted by the canal company to another public service, is intended by, or even at all in the contemplation of, the legislature, such general provision will not justify the city in emptying its drains and sewers into such canal to the discomfort, annoyance, injury, and damage of the canal company.

Merely granting to a city authority to construct sewers for the convenience and benefit of its inhabitants does not necessarily make their use a governmental use in the sense that there can be no remedy, unless given by statute, for consequential injuries resulting therefrom. Platt Bros. v. Waterbury, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335, 45 Atl. 154.

And therefore the pollution of a river by city sewers, though it may become justifiable when done for a public purpose, is the subject of payment of compensation for invasion of the property rights of riparian owners. Ibid.

Legislative permission to construct and maintain a system of sewers confers no li-

Ledar Rapids, I. F. & N. W. R. Co. 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133.

The law considers the infringement of the rights of a party an injury for which damages must be given, because upon no other principle could one's rights be protected. Every infringement of them may, to some extent, endanger the right itself; in some cases, indeed, a continuance of the infringement would, in time, deprive the party altogether of his right.

8 Am. & Eng. Enc. Law, 2d ed. p. 551; Franklin County v. Lathrop, 9 Kan. 453; St. Paul, & P. R. Co. v. Schurmeir, 7 Wall. 572, 19 L. ed. 74; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386; Brisbane v. St. Paul & S. C. R. Co. 23 Minn. 114.

Railroad companies are not, by the com-

mon law, entitled to any greater immunity when causing damages to others than the practisers of other useful and longer established trades.

Brand v. Hammersmith & C. R. Co. L. R. 2 Q. B. 223; Bamford v. Turnley, 3 Best & S. 62, 31 L. J. Q. B. N. S. 286; St. Helen's Smelting Co. v. Tipping, 35 L. J. Q. B. N. S. 66, 11 H. L. Cas. 642; Chamberlain v. West End & C. P. R. Co. 2 Best & S. 605, 32 L. J. Q. B. N. S. 173; Senior v. Metropolitan R. Co. 2 Hurlst. & C. 258, 32 L. J. Exch. N. S. 225; Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42, 14 S. W. 259.

Greene, J., delivered the opinion of the court:
If the plaintiff, through the acts of defend-

and that the question of care and skill in conducting the work did not enter into the solution of the question, and that if filth is gathered together and poured into a stream, either directly or indirectly, if it pollute the waters of that stream so that the lands of the riparian owners are diminished in value, the person or corporation who causes the damage must pay for it; and not even the state is exempt from liability.
In Moody v. Saratoga Springs, 17 App. Div. 207, 45 N. Y. Supp. 365, which was an action against a village for injury caused by the discharge of offensive matter from a sewer, it was contended by the defendant that the act which authorized the extension of the sewer causing the injury, and the fact that the extension was not negligently or unskillfully executed, justified the defendant, and that it was not liable for the injury which the plaintiff had suffered; but the court said that the plaintiff did not complain of the construction, but of the use which was made of the sewer to his injury, and that the act authorizing the extension undoubtedly authorized the use of the sewer, but not such a use as resulted in the nuisance; as, assuming the lawfulness of the construction and the right to its use, the use must not be to the injury of any legal rights of another.

The title of riparian owners above tide water extends to the middle of the stream, subject only to the use of the public for the purposes of navigation; and as to such owners a statute authorizing the sewage system of a city is no protection to it for injuries to them by emptying its sewage into the river, as the pollution of the river by the sewage constitutes such a taking of the property as is inhibited by the Constitution, and therefore cannot be authorized by the legislature. Grey ex rel. Simmons v. Paterson, 60 N. J. Eq. 335, 48 L. R. A. 717, 83 Am. St. Rep. 642, 45 Atl. 995.
Although the Massachusetts court in a recent case (Morse v. Worcester, 139 Mass. 389, 2 N. E. 694) has held that the court cannot presume that the legislature intend-

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ant, was deprived of access to his premises by way of the public alley, he may recover damages therefor. Whether he was deprived of such access was a question of fact. The evidence was conflicting, some tending to show that such passage had not been materially interfered with, and some tending to prove the contrary. The jury, after hearing and weighing the evidence, found in favor of plaintiff, and this finding was approved by the trial court on a motion for a new trial. The judgment, therefore, must be sustained.

When this case was first submitted, doubts were entertained of the right of the plaintiff to recover for damage to his residence by reason of its permeation with smoke, gas, and cinders. Thereupon the

court deduced from the evidence and finding the following question, and resubmitted it for argument: Where a railroad company constructs and operates its road on its own land in a proper manner, is it ever liable to the owner and occupant of adjacent property for consequential damages arising from his residence becoming permeated with smoke and offensive vapors from its engines, which injuriously affect the health of such occupants? Counsel for both parties, realizing the importance of the question and of a correct decision, have ably reargued it orally and in briefs. The company having been specifically authorized to make the alleged improvement in its roadbed, in the absence of any charge that it was unnecessary, or unskillfully done, or

ed to exempt a city from the obligation to use due care in the construction and management of its sewers, it had held in a prior case that a city which, under state statutes and ordinances of its council, has constructed and operated a system of sewerage, whereby a stream of water is polluted and rendered less pure than in its original state, is not liable to a riparian owner on the stream below the city for such pollution. *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592.

Under the peculiar provision of the Massachusetts Constitution empowering the legislature to pass laws which they may deem to be for the public good, it may be a question if the provisions protecting property rights are not somewhat modified, so that the law applicable elsewhere might have less force in that state.

Where a city or board of municipal officers is authorized by the legislature to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to parties whose estates are thereby injured, the city is not liable to an action at law or a bill in equity for injuries which are the necessary result of the exercise of the powers conferred by the legislature. And where, in a bill in equity brought for the purpose of abating an alleged nuisance committed by the authorities of a city, the only acts charged against the city are the converting of a channel of a brook into a sewer, and the opening of other sewers and drains into the same, which acts were expressly authorized by a statute, and the only further allegations in the bill consist of a conclusion of fact, that a nuisance to the plaintiff was thereby created, and a conclusion of law, that the acts of the city were unauthorized and in violation of the plaintiff's rights, such a bill does not allege any negligence of the city, either in the manner in which the sewage was discharged from the mouth of the sewer, or in omitting to take proper precautions to purify it; and a demurrer to the bill must be sustained. *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458. 1 L.R.A. (N.E.)

In *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, the general statement is made that it had long been the settled law of Indiana that for consequential injuries resulting from the construction, maintenance, or operation of sewers, streets, and other public works, in the absence of negligence or want of due care and skill, a municipal corporation is not liable; citing as authority for such doctrine, *Macy v. Indianapolis*, 17 Ind. 267; *Weis v. Madison*, 75 Ind. 241. 39 Am. Rep. 135; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Evansville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139; *Terre Haute v. Hudnut*, 112 Ind. 542. 13 N. E. 686.

And so, a city which, in the construction of its sewerage system and in the operation thereof, uses due care, and causes such construction and operation to be done under the most approved system, and uses for the discharge of its sewers the natural drainage system of the country before the existence of the city, is not liable for the pollution of a stream to a lower owner of land. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610.

Following *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, and in line with it, is the case of *Valparaiso v. Hagen*, 153 Ind. 337, 48 L. R. A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062, where it was held that a city cannot be enjoined from discharging sewage into a stream, when it acts skilfully and in conformity to the statute, and the stream constitutes the only natural and reasonably possible line of drainage; and that damages resulting to the property of riparian owners by the discharge of such sewage into the stream in a skilful manner and in conformity to statutes are merely consequential, and give such owners no right to compensation; as what the law grants cannot constitute a nuisance *per se*, either public or private, and, if the law is obeyed, no actionable wrong can result.

In *Valparaiso v. Hagen* the court exhibits the careful consideration for the public municipality and the utter want of it for the rights guaranteed by the organic law to the

made at a place not authorized, it is not liable for damages as for the maintenance of a nuisance. That which is done under authority of law, at a place and in a manner authorized, cannot be a nuisance. Mr. Cooley, at page 670 of the second edition of his work on Torts, says: "An actionable nuisance may therefore be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." In the case of *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 640, 25 L. ed. 336, 338, it was said: "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law, such as this is. A legislature may, and often does, authorize, and even direct,

acts to be done which are harmful to individuals, and which, without the authority, would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded." Also in the case of *Hammer-smith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, 196, it was said: "If the legislature authorizes the doing of an act (which, if unauthorized, would be a wrong, and a cause of action), no action can be maintained for that act, on the plain ground that no court can treat that as a wrong which the legislature has authorized; and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought

individual, usual with those courts who, for the sake of the public, by their decisions actually work confiscation of the property of the private individual, in the following language: "Surely it is not the law that a salutary statute, essential to the health and welfare of the public, may be thus nullified by exhibiting a damage to private right. The sewage must be despatched or the city abandoned. The place adopted for the out-pour is that provided by nature, and cannot be had elsewhere. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good; and if the erection has been skillfully performed, and without negligence . . . and in a way to do the least mischief, it must be held to be a lawful exercise of power that equity will not restrain."

The New Jersey court has held that the power of the legislature to authorize municipalities to use a tidal navigable stream for sewerage purposes is beyond question, and the degree of pollution to be permitted is a matter over which the legislature has full power and control, and therefore the legislature may constitutionally confer on municipalities the right to use tidal streams for sewerage purposes; and where a city executes the powers thus granted, within the bounds of its discretion and with care, and thereby produces consequential damages to a riparian owner, such damage is a loss for which there is no remedy, being a burden to which the sufferers must submit as members of the community, from which they receive compensatory benefits. *Sayre v. Newark*, 60 N. J. Eq. 361, 48 L. R. A. 722, 83 Am. St. Rep. 629, 45 Atl. 985.

This ruling is put upon the ground that the title of riparian owners below tide waters is only to high-water mark, as the state is the absolute owner of the bed of the stream, and such riparian owners are not entitled to restrain a city from emptying sewage into the stream. *Grey ex rel. Simmons v. Pater-son*, 60 N. J. Eq. 385, 48 L. R. A. 717, 83 Am. St. Rep. 642, 45 Atl. 995. But the court overlooks the fact that the abutting owner

has certain easements in a highway the fee of which is in the public, which constitute property protected by the Constitution.

c. Obstruction of street or highway.

No recovery can be had in the cases mentioned in this and the following subdivision, if the act complained of merely constitutes a nuisance. The municipality being in the exercise of its governmental powers, there can be no recovery unless there is a taking of property, or unless the Constitution provides compensation in case the property is damaged. But the word "property" is not limited to real estate, but includes all the easements and property rights belonging to the landowner, and he is entitled to compensation in case any of them are taken or destroyed.

In *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91, it is said that when a municipal corporation has general authority by statute to make a public improvement in a public street, which does not involve direct encroachment upon private property, it is not liable for consequential damages, unless they are caused by negligence, misconduct, or want of skill on the part of its servants or agents. In such cases the corporation is the agent of the state, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect, but do not directly invade, private property. And so, a relief sewer built wholly in a public street without encroaching upon private property, and duly authorized by statute, under contract by the city with competent contractors, is no cause for which an action can be maintained against the city, although injuries are inflicted upon abutting property as an indirect result of the work, if they are not caused by wilful misconduct. The injuries consisted in causing the ground to settle in front of the plaintiff's premises, and in injuring her house, by reason of the trench dug for the purpose of laying the sewer. The value of the decision as an authority on the subject under consideration is somewhat lessened because the court also de-

it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit." The acts of the defendant having been done under authority granted to it, in the performance of which it neither exceeded nor abused such authority, the plaintiff cannot recover his alleged damages unless a recovery is authorized by the Constitution or some provision of the statute. The only provision in the Constitution that can have application to the question is § 4 of article 12, which reads: "No right of way shall be appropriated to the use of any corporation until full compensation

therefor be first made in money, or secured by a deposit of money, to the owner irrespective of any benefit from any improvement by such corporation." Section 1360 of the General Statutes of 1901 provides: "Upon application being so made in writing, such board of county commissioners shall forthwith proceed to lay off such route, side tracks, etc., for such distance through their said county as may be so desired, and of such width, within the limits aforesaid, and upon such location, as may be desired by such corporation, having the same carefully surveyed, and ascertaining carefully the quantity of land necessary for such purposes out of each quarter section or other lot of land through which said route, side-track, etc., is located, and appraise the value of

decided that it appeared in the case that the city had power to contract for the construction of the sewer, and had entered into a contract with competent contractors doing an independent business, who agreed to furnish the necessary materials and labor, and make the entire improvement, according to specifications prepared in advance, for a lump sum, or its equivalent, and that such contractors were not the servants or agents of the city, but were independent contractors. Moreover, if the settling of the ground was a necessary result of the work, so that the expenditure of money was necessary to protect the abutting property, there was a taking of the money within the meaning of the Constitution.

So, in *Plant v. Long Island R. Co.* 10 Barb. 26, it was held that if a city is authorized by its charter to construct a tunnel under a street, and if, in constructing the tunnel, the authorities injure an abutting owner of property on the street by impeding the carrying on of his ordinary business and preventing the free access of customers to and from his store during the continuance of the work, there being no complaint of negligence or unskilfulness, it is a case of *damnum absque injuria*; and the plaintiff was held not entitled to recover. In that case there was a taking of his easement of access, entitling him to compensation.

Where a city was authorized to construct a tunnel or passageway along the line of a street and under a river crossing the street, and in the construction of such tunnel they deprived one of access to his premises, which were bounded on one side by the street and on another side by the river, where the obstruction was not a permanent one, and was not continued during a longer time than was necessary to complete the improvement, and there was no unreasonable delay in pushing the work to completion, and a coffer dam constructed in the river for the purpose of the improvement, extending some 25 or 30 feet in front of such person's lot, was necessary and indispensable for the construction of the tunnel, an action could not be maintained by the lessee of such lands for the temporary 1 L.R.A. (N.S.)

injury sustained. *Northern Transp. Co. v. Chicago*, 99 U. S. 640, 25 L. ed. 336. It was argued by the plaintiff that the erection of the coffer dam and the necessary excavation in the street constituted a public nuisance, causing special damage to the plaintiff, beyond those incident to the public at large; and it was inferred therefrom that the city was responsible to the plaintiff for the injurious consequences resulting therefrom. The court said that the answer to this argument was that the assumption was unwarranted, as what the law authorized could not be a nuisance such as to give a common-law right of action; that a legislature may, and often does, authorize, and even direct, acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded.

It is to be regretted that the plaintiff's argument in that case obscured the point involved, so that the decision of the court, although right if placed on the ground suggested by the argument, actually worked injustice, and may be subject to question under the doctrine which should have been applied. There was no question of public nuisance in the case. The legislative authority settled that. But there was a temporary destruction of plaintiff's right of access to the street, which was a temporary appropriation of his property, for which he was entitled to compensation.

After the decision of the Supreme Court of the United States in *Northern Transp. Co. v. Chicago*, there was another Constitution adopted in Illinois, in which the prohibition against the appropriation of private property for public use without compensation was declared in different words from those employed in the former Constitution, and in which the provision was that "private property shall not be taken or damaged for public use without just compensation." And in *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820, the court said that an important inquiry in that case was to the

such portion of any such quarter section or other lot of land, and assess the damages thereto; and when such commissioners shall ascertain that such portion of such quarter section or lot belongs to different owners, they shall appraise the value, and assess the damages of each such owner's interest; all which doings the board of commissioners shall embody in a written report, and file in the office of the county clerk of such county." The plaintiff's case is not within either of the provisions quoted. Under each there must be an actual taking before recovery can be had; and then the owner may recover only the value of the land taken and the damage to the remainder of the tract or lot occasioned by such taking.

The damages alleged to have been sus-

tained in this case are purely incidental, and arise from a proper operation of the defendant's locomotive engines. Railroad companies are public corporations, organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience to the public, and disfigurement and possible damage to persons living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual for the general good. Such private inconveniences and injuries result, in a less degree, to persons who live along public highways, from dust arising from the passage of teams and wagons. For such injuries the law provides no remedy. This and similar questions have arisen in other courts of this country, and, so

meaning of the word "damaged," in that clause. There had been a judgment for the plaintiff against the city, and on the trial there was evidence before the jury tending to show that, by reason of the construction of a viaduct by the city, the actual market value of the plaintiff's lot for the purposes for which it was specially adapted, or in fact any other purpose for which it was likely to be used, was materially diminished by the access to it being cut off, and also that one of the results of the construction of the viaduct was that the coal yard of the plaintiff was often flooded with water running onto it from the approaches of the viaduct, whereby the use of the premises as a place for handling and storing coal (for which it had been used) was greatly interfered with and often became wholly impracticable. The Supreme Court of the United States affirmed the judgment, principally upon the ground that the question had been decided by the state courts of Illinois, although it did further hold that the introduction of the word "damaged" into a clause of the new Constitution indicated a deliberate purpose to abolish the old test of direct physical injury to the property affected.

That it is a legitimate use of a street or highway to allow a railroad track to be laid down in it, and for doing so the city is not liable for any damages which may accrue to individuals, was held in *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307. The court said that cases are constantly occurring where individuals are incommoded, and thus really damaged, in this way, for which the law can afford no remedy. The court gave an illustration, as, where portions of a street are occupied by building materials to the great inconvenience of a neighbor, to which he must submit from necessity and without compensation. The illustration is not apt; the railroad track being a permanent thing, while the building materials remain in the street only until the building is erected.

4 Nuisance caused by change of highway grade.

As indicated in the preceding subdivision,
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there can be no recovery against the municipality for a mere nuisance created by changing a highway grade, but if the change amounts to a taking of easements or other property rights, on principle there should be a recovery. However, the doctrine of consequential injuries has in many cases obscured the fact that property rights were actually taken.

In *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392, it was decided that while a city has absolute control over the grade of its streets, as their owner, that it can make the grade light or heavy, that it can elevate or lower it at pleasure, and that the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street for the purpose of ingress and egress, it has no more power than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages, without being responsible itself; and though a city may elevate or depress its streets, as it thinks proper, if in so doing it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his house, the city will not be excused from paying for the injuries it has directly wrought. Approved and followed, *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Jacksonville v. Lambert*, 62 Ill. 519; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *Toledo, W. & W. R. Co. v. Morrison*, 71 Ill. 616; *Rigney v. Chicago*, 102 Ill. 64.

In the *Nevins* Case the court said: "It must be admitted that the rule laid down by the courts of New York has been quite generally adopted. Thus the cases divide themselves into two classes: One, and the larger class, holding that a city is only held to reasonable care and skill in grading its

far as this court has been able to ascertain, a recovery has generally been denied, unless given under some constitutional or statutory provision. Some cases may be found which have construed similar injuries to be a taking. These, however, are exceptional, and without the general rule. In the case of *Carroll v. Wisconsin Central Co.* 40 Minn. 168, 170, 41 N. W. 661, which was an action for similar injury, the court said: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vi-

brations of the ground, interference with travel at the crossings of roads and streets and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of the railroad will feel the inconvenience in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible." In the case of *Par-*

streets, and that if these are used it can shield itself under its corporate powers from liability to individuals; the other holding that a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others. We cannot doubt that the latter is the sounder rule. We are unable to see why the property of an individual should be sacrificed for the public convenience without compensation. We do not think it sufficient to call it *damnum absque injuria*." *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392, was also approved in *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; and in that case it was further said that the cases of *Moses v. Pittsburgh*, Ft. W. & C. R. Co. 21 Ill. 516, and *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307, were essentially modified by the case of *Nevins v. Peoria*, and other subsequent cases in the supreme court of Illinois.

In *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 416, 96 Am. Dec. 243, it is said that nearly all the decisions on the subject recognize the rule that a municipal corporation may change the grade of its streets; and that lot owners on the street are remediless for damages sustained incident to such change of grade without improper execution or exercise of the power, the same being in a technical sense no injury, but an inevitable loss which must, as a misfortune incidental to an act rightly done, be borne without remedy. But this right of the municipality is not completely absolute and beyond control; and when a proposed street improvement will nearly destroy the property of an adjoining owner, or render it comparatively valueless, it will be enjoined.

A city had passed an ordinance establishing permanently the grade of certain streets in one of its wards, and providing that in case any person had theretofore or should thereafter erect any building fronting on said streets or either of them, the faith of the city was fully pledged that the grade should not be altered to the injury of such persons without the ward first making good

all damages which might thereby accrue to such persons; and in *Goodall v. Milwaukee*, 5 Wis. 38, it was held that the city was liable for damages caused by executing a subsequent ordinance of the common council of the city by which such grade was lowered some 20 feet or more, and by which buildings so erected in reference to the former grade were rendered of comparatively no value.

In *Weeks v. Milwaukee*, 10 Wis. 243, the court, in holding that it would not permit a city to assess a tax against the plaintiff's lots to abate a nuisance, which, it appeared, was created entirely by the act of the city in so constructing a street as to cause the water to flow and remain upon the lots when it would not otherwise have done so, said: "I cannot recognize the right of a corporation to create a nuisance on the lot of an individual. But to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this conclusion results from the reasoning of Mr. Justice Smith in *Goodall v. Milwaukee*, 5 Wis. 32, which I fully approve. And until I am prepared to say that private rights must yield, even to the extent of total destruction, rather than place any impediment in the way of whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen without making him any compensation for the damage, and then tax him to abate it."

Where a municipal corporation in opening, altering, improving, repairing, or changing the grade of one of its streets, which is an act done for the benefit of the public and under ample authority, does so in such a manner that no want of skill or care in doing the work can be imputed to the municipality, it is not liable to an adjoining owner for any injury suffered by him on account thereof, provided the legislature had power to grant the authority without providing for the payment of such consequential damages as have fallen upon the adjoining lot owners.

st v. Cincinnati. H. & D. R. Co. 10 Ohio 624, which was an action to recover damages for obstructing the street by a railroad track, and also for damages for noises, smoke, and vapor arising from the operation of the cars, it was said: "That each owner and occupant is entitled to damages for any obstruction to the street by earth, gravel, timber, or rail substantially affecting his use of such street as an annoyance to his premises. That in respect to the noises, smoke, vapor, or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling house has no more right to recover damages of the company than any citizen who resides, and may have occasion to pass, so near the

street and railroad as to be subjected to like discomforts. That a railroad authorized by law, and lawfully operated, cannot be deemed a private nuisance." As stated, there appears to be but little, if any, disagreement in the decisions upon this question. See, also, *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164; *Hatch v. Vermont C. R. Co.* 25 Vt. 49; *Dunsmore v. Central Iowa R. Co.* 72 Iowa, 182, 33 N. W. 456.

Counsel for defendant in error cite us to the case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, as a decision contrary to the opinion herein expressed. That was an action to recover damages for discomforts occasioned by the erection of a build-

Laddell v. Brooklyn, 4 N. Y. 196, 53 Am. Dec. 357.

The action was for damages against the city, claimed to have been sustained by the plaintiff's testator by the changing of the grade of a street, causing a portion of plaintiff's premises to fall, whereby his ground, shrubbery, fixtures, fences, etc., were wholly lost; and the effect of the holding by the whole court was simply an assertion of the doctrine that the injury caused to lot owners adjoining a street, by the change of the grade of the street, is *damnum absque injuria*; but the judge who delivered the opinion entered considerably into the question under consideration, and in doing so said of *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462, that it stood "on the somewhat questionable ground that the legislature did nothing more than to shield the railroad company from an indictment for the wrong which would otherwise have been done to the public by occupying the highway with their road, without giving the company any authority whatever so far as related to the rights of property of individuals."

In his dissenting opinion in *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 354, the present chief judge of the New York court of appeals, in alluding to this case, has this to say: "That case has been repudiated in many jurisdictions, and, though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries."

If it is not a taking of property to construct an excavation immediately adjoining it, of such a character that a fall of the property into the excavation is a necessary consequence, it is difficult to see why not.

A negligent and unskilful act on the part of a municipality is a nuisance, and when private property is injured the city must reimburse in damages. *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610, citing *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912. But the court in that case laid down the general principle that the improvement of

streets and alleys by a municipality is a lawful act, and if unavoidable injury ensues no liability results. That which the law authorizes is not a nuisance so as to give a right of action; citing *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; and *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460.

In *Smith v. Washington*, 20 How. 135, 15 L. ed. 858, it is said that with slight exceptions and qualifications it would seem to be the universal doctrine that where a municipal corporation has the trust confided to it and the duty imposed upon it, not only of opening streets, but of keeping them in repair, such streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit; and if the duty imposed on the corporation requires this to be done the power must be coextensive with the duty. And so the corporation has authority to change the level or grade in order to keep the street in repair, and, having performed this trust according to the best of their judgment and discretion on land dedicated to public use for the purposes of the highway, they have not acted unlawfully or wrongfully, and are, consequently, not liable to damages, where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public.

A municipal corporation has undoubted power to raise, pitch, grade, and make the street and avenue; and the proceedings for the purpose of doing so being regular it is lawful for the city to do so; and if any adjoining owner is thereby incommoded it is *damnum absque injuria*, and gives such owner no right of action against those who have only exercised a legal power vested in them for the public convenience and welfare. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

VIII. Remedies.

a. By action for damages.

In *Drake v. Hudson River R. Co.* 7 Barb.

ing for housing the locomotive engines of the railway company contiguous to a building used for Sunday school and public worship by a religious society. It was claimed that these services were habitually interrupted and destroyed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were so great at times as to prevent members of the congregation who might be sitting in parts of the church farthest from the shops from hearing what was said. The plaintiff was permitted to recover, but it was because the company had no authority to build its engine house

at the place where it did. On page 33 of 108 U. S., page 744 of 27 L. ed., as page 727 of 2 Sup. Ct. Rep., the court said "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city; and that as little smoke an

508, the court denied an injunction to restrain a railroad company from laying its tracks in the streets of a populous city, where the railroad company was duly incorporated by a legislative act, and had the permission of the municipality to lay its tracks in the streets, and held that the taking of property for public uses, forbidden by the Constitution unless compensation was made therefor, did not extend to the damage that property not actually and physically taken might suffer by reason of injury thereto caused by the railroad operating in the street; but in doing so said: "That the plaintiffs are entitled to compensation for any loss or damage they may sustain from the railroad, or any of the operations connected therewith, is not denied. And whenever and as often as any such loss or damage may arise or accrue from any such cause, the plaintiffs, or such of them as may sustain the same, will have their remedy therefor by action at law against the defendants. The right and privilege granted to them by the legislature to construct their railroad on such line or route as they may select, and to lay down rails and run trains of cars thereon, will not protect them from the claim of those whom they may wrongfully injure or aggrieve by their operations, for redress, nor be any defense to actions against them for damages from any such cause by the parties aggrieved."

In *Daniels v. Keokuk Waterworks*, 61 Iowa, 540, 16 N. W. 705, the court said that they were impressed by the evidence that the plaintiffs, because of the escape of smoke and soot from the defendant's smoke stack, were deprived of the comfortable enjoyment of their property, and that the statute defines this to constitute a nuisance for which the party injured may bring an action at law, in which action the nuisance may be enjoined or abated and damages recovered.

In *Rainey v. Red River, T. & S. R. Co.* (Tex. Civ. App.), 80 S. W. 95, the court said that the statutes of the state clearly authorized the acquisition by a railroad company, either by purchase or condemnation, of all real estate necessary for its right of way, or any other lawful purpose connected with or necessary to building, operating, or run-

ning its road; that a citizen whose property is actually taken cannot enjoin the construction of a railroad, however disastrous the consequences may be to him, but he is relegated to his remedy provided for damages; and for a greater reason one whose property is not actually taken, but is damaged only cannot enjoin the construction of the line of road; and in either case the remedy of one whose property is damaged is an action for damages, and not an injunction to abate the structure. That case was, however, reversed in 89 S. W. 768, the court holding that the facts presented a proper case for an injunction.

Damages sustained by the owner of a lot abutting on a street, caused by operations of a railroad corporation upon the street which will not amount to such an absolute destruction of the value of the property as will be equivalent to a virtual taking of it must be recovered, if at all, in an action at law therefor; and equity will not entertain jurisdiction to prevent the operations causing such damage. *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. 14. The court claimed to follow *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 427.

In *Garrett v. Lake Roland Elev. R. Co.* 7 Md. 280, 24 L. R. A. 396, 29 Atl. 830, it was claimed that the construction of an abutment of solid masonry in the bed of a stream and an elevated structure thereon, would, by reducing the width of the stream in front of plaintiff's lots to less than 10 feet, destroy the access to his property from the street and prevent him from reaching the same with vehicles ordinarily used in the city, and that this rendered his property entirely unsalable, and deprived him of the market value thereof, and constituted in fact and in law a taking of his property without making compensation therefor as required by the Constitution of the state, and that the structure deprived the premises of light and air; that this too was a taking of the property within the prohibition of the Constitution. It was further claimed that the act of the legislature and the ordinance of the city under which the railroad company claimed to be authorized to commit the act were both

noise are caused as the nature of the business in them will permit. In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house, or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city." Thus it will be observed

that the court held that the railroad company exceeded its authority in building its shops where it did, and on that ground permitted the plaintiff to recover. The inconveniences and discomfitures of which the plaintiff complains are such as all persons who live along a line of railroad must endure without other compensation than the conveniences enjoyed by living in proximity to such public thoroughfare.

The judgment of the court on this cause of action is reversed, and the cause remanded. The costs of the proceedings in this court are equally divided.

All the Justices concur.

unconstitutional. The court held that there had been no physical invasion of the plaintiff's property, and that the acts of the railroad company complained of did not constitute a taking of the property, and furnished no foundation for an injunction, but hinted that he had another remedy.

In *Werges v. St. Louis, C. & N. O. R. Co.* 33 La. Ann. 641, the doctrine of the *Harrison* case, "that the legislature has the power to authorize the building of a railroad on a street of the city, and may directly exercise this power, or devolve it upon the local or municipal authorities," was approved and affirmed. One of the judges, while concurring in the decision, stated that, in his judgment, if the plaintiff could prove damages by the running of the trains of the defendant, he did not doubt her legal right to recover therefor, as no act of the legislature, nor ordinance of the city council, nor both combined, authorizing a railroad to run its trains through the streets of a city, could protect it against the claims for damages by those whose property was injured thereby.

A railroad company in pursuance of legislative authority had changed a watercourse which drained a marsh belonging to the plaintiff, by making a ditch or canal along the side of the road. In an action by the owner of the marsh which the creek had drained, for an injunction requiring the railroad company to desist from filling up the creek, it was held that, while the railroad company would be bound to keep the canal that they had made in a proper state of repairs to carry off the water, the bill for the injunction must be dismissed, and that if in bridging a stream, or in any way or for any purpose changing a watercourse from its natural channel to another, while the railroad company should take care that it should be equally beneficial for the purpose intended, there should happen to be private property so situated that some damage must be done to it, which could not be obviated by reasonable precautions, inasmuch as the railroad company was expressly authorized by the legislature, to exercise the right of eminent domain, such proprietor must be left to seek his compensation in the mode provided

by the legislature. *Rowe v. Granite Bridge Corp.* 21 Pick. 344.

In *Murtha v. Lovewell*, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347, the court said that it was well settled in Massachusetts that, under statutes providing for the issuing of licenses by the authorities of cities for persons to operate some kinds of business, where the license is granted by such authorities, and the licensees are complying with the license, what they do cannot be considered as a nuisance or be restrained by the court. Under statutes providing therefor, a license was granted by the authorities of a city to erect a furnace for melting iron, with the provision that they build a stack 25 feet in height above the roof of the building, with a suitable spark arrester placed upon the top; and a copy of the license was served upon the defendants, but by mistake the height of the stack above the roof was stated to be 20, instead of 25 feet; and thereupon the defendants proceeded to erect their stack only 20 feet high. The mistake was afterwards discovered, and defendants filed a petition that the city authorities should revise the order by striking out the word 5 after the word 20; and thereafter the former action of the board was rescinded, and a new license was issued on condition that the chimney on said building be 20 feet high; but no notice, as required by statute, was given to anyone on this petition. It was held that as the defendants did not comply with the original license, even though it was no fault of theirs, and as the later license could not avail them because no notice was given, the plaintiff, if there were no other circumstances in the case, would be entitled to an injunction to restrain the defendants from continuing the nuisance, and to damages for the injury already done his premises; but it was conceded that as, since the trial of the action and since the case was reported to the appellate court the defendants had obtained a license in proper form, after due notice, it was the duty of the court here to do in effect what was done in *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27, and it was held that the plaintiff was not entitled to an injunction.

but only to recover damages which had been assessed.

Equity will not interfere to restrain the temporary excavation and obstruction of a public street, when the same is done by express license of the legislature; and a lot owner on such street, if actually damaged, must resort to his action at law therefor. *Turl v. New York Contracting Co.* 48 Misc. 164, 93 N. Y. Supp. 1103.

Grey ex rel. Simmons v. Paterson, 60 N. J. Eq. 385, 48 L. R. A. 717, 83 Am. St. Rep. 642, 45 Atl. 995, was an action brought by the attorney general on behalf of the state, at the relation of owners and possessors of land along a river, to restrain a city from depositing or discharging its sewage through its drains or sewers into the river, and from constructing new sewers to discharge into the river, and from enlarging or increasing its present sewerage system with outlets into the river. The defense was that what had been done by the city was done by virtue of an act of the legislature authorizing the construction of sewers and drains in the city, and of acts amendatory of the original statute. The court said that the only question in the case was whether the power inherited in the legislature to bestow authority upon the city to construct the system of sewers, the use of which the complainants sought by their information and bill to restrain, as full power was conferred by the legislature upon the city to adopt and execute its own plan of sewerage so far as the rights of the state were concerned; and if such power did inhere in the legislature the municipal corporation was not responsible for those incidental damages which result from the proper exercise of its functions, and such exercise would not subject it to the charge of maintaining a public nuisance,—citing the *Beseman Case*. It appeared that a part of the injury complained of was in the river below and a part above tide water, and the court held that the relators in the information, of the attorney general, who were riparian owners above the flow of the tide, had a right of property in the river, and in that respect the legal rule applicable to them differed essentially from that which pertained to those below them, where the tide ebbed and flowed; but that the title of the riparian owner on the navigable waters of the state where the tide ebbs and flows extends only to high-water mark; and that the state is the absolute owner of the bed of the waters beyond high-water mark; and that the action for an injunction could not be maintained as to those relators who were riparian owners above tide water. The court held that, while they were entitled to a remedy in the way of damages or compensation for their injury, yet, in view of the fact of the magnitude of the injury which would fall upon the public by prohibiting the use of the sewers, it would be inequitable to enjoin, if relief could otherwise be afforded.

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b. By injunction.

A court of equity has concurrent jurisdiction, by injunction, equally clear and well established, to prevent the maintenance of private nuisance. *Gardner v. Newburgh*, Johns. Ch. 162, 7 Am. Dec. 526.

Where a legal right is invaded by the maintenance of a nuisance, and substantial damage is found, it is not error to award an injunction. *Simmons v. Gloversville*, 175 N. Y. 346, 87 N. E. 622.

Where the charter of a railroad company provided that, if the railroad should cross any highway, it must construct the same as not to impede and obstruct the safe and convenient use of the same, and empower the company to raise or lower the highway so that the railroad, if necessary, might conveniently pass under, or over, or across such highway, the bringing of the highway to the same grade as the railroad, and crossing it at the same level, is not in itself a nuisance to the highway; nor is it, being thus authorized, evidence of a nuisance; and though it is authorized to cross on the same level, and to raise or lower the highway for that purpose, nevertheless if it so exercises what is and what it may deem to be its duty as to create a public nuisance, the court may interpose; and, if it is proceeding to do this, may restrain it by injunction. *Johnston v. Providence & S. R. Co.* 10 R. I. 365.

In *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296, the chancellor, in modifying an injunction, said that he would not determine the fact as to whether the charter of the defendants relieved them from the effect of a general statute against carrying on offensive trades, for two reasons: First, because it was a question of law which might be considered doubtful, or that it was at least in good faith disputed, and had not been adjudicated by the courts of law of the state, and therefore a court of equity must not grant the preliminary injunction, founded upon that statute; and secondly and chiefly, because if that statute was in force against the operation of the company it would simply render the manufacture of offal and animal remains unlawful, but that this court could not enjoin it any more than it could the selling of liquor by small measure without a license, or any other unlawful act simply because unlawful, unless it caused irreparable injury for which there was no redress at law. But that he had no hesitation in holding, and it was not disputed by the counsel for the defendants, that this charter did not empower the defendants to carry on the business authorized, in a way that would be injurious to others, or would materially affect their health, their comfort, or their property, and that he had decided that question upon granting the limited injunction.

In *Bulter v. White Plains*, 59 App. Div. 30, 69 N. Y. Supp. 193, which was a suit for an injunction restraining the village from polluting the waters of a stream, the com-

plaint was dismissed by the trial court upon the ground that the plaintiffs had an adequate remedy at law; but the appellate division reversed this decision, and held that, where the sewage of the defendant, by being discharged into a stream, produced at times a foul and offensive odor over the lands of lower riparian owners, and the discharge added to the discoloration and pollution of the stream, the riparian owner so injured was entitled to an injunction restraining the further operation of the sewer, even though the present damage was slight; it appearing that further increase of the discharge would be likely to create greater injury.

A statute authorized the council of a city to locate and cause to be opened a public street, and further provided that the space between such street and a river, after being improved and graded, should thereafter forever be occupied, used, and employed as a public landing. Claiming authority to do so under the provisions of this statute, the city authorities leased such space to an individual who proposed to erect structures thereon and maintain a landing, for the use of which he would charge. And in *Reighard v. Flinn*, 189 Pa. 355, 43 L. R. A. 502, 42 Atl. 23, which was an action brought against the lessee of the city by the owners of lots with buildings on them from a time before the lease mentioned was made, and who had always been accustomed to have a free and unobstructed passage to and over the public landing in front of their lots, which would be obstructed and their free access to and use of the public landing at that place and the enjoyment of light and air over the space be prevented, it was held that the city had no right to lease to its codefendant any part of such public landing, and that the plaintiffs had a right to maintain an equity action to declare such lease void, and to enjoin the lessee from erecting such structures, and for a mandatory injunction to compel the removal of those which had been erected.

Thereafter a supplemental bill was filed by the city to stay the injunction, on the ground that the city had become possessed of all the right of their former lessee to the property and improvements created by him, and which had been declared to be a public nuisance and ordered to be removed by him as such; and the court stated that the question then was, Had the city the right to maintain the same structure illegally erected by its lessee under and subject to its own authority as supervisor and comptroller of the public river landings of the city? and it was held that under the act first mentioned it had; and a judgment that the decree theretofore made, in so far as it required the removal or destruction of the dock or structure described in the supplemental bill, was vacated and modified so as to permit the city to maintain such docks or structure as a public landing, was affirmed. 194 Pa. 352, 44 Atl. 1080.

There can be no doubt of the right of a LL.R.A. (N.S.)

court of equity to interfere to prevent or restrain the maintenance of a private nuisance, where the consequence of a refusal to interfere would be to permit the perpetrators to do a material and irreparable injury to the complainant's property; but if the defendant in such an action be a railroad company authorized by law to construct their road on a route, a mere temporary injury which can be compensated for in damages will not justify a court of equity in stopping the progress of a great public work, although the work is nominally made by a railroad company which is a joint stock company. *Hudson & D. Canal Co. v. New York & E. R. Co.* 9 Paige, 323.

See also *Lorain v. Rolling*, 24 Ohio C. C. 82; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* 36 Pa. 99; *King v. Morris & E. R. Co.* 18 N. J. Eq. 397; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Pennsylvania R. Co. v. Thompson*, 45 N. J. Eq. 870, 19 Atl. 622; *Ridge v. Pennsylvania R. Co.* 58 N. J. Eq. 172, 43 Atl. 275; *Newark Pl. Road & Ferry Co. v. Elmer*, 9 N. J. Eq. 754; *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 416, 96 Am. Dec. 243.

IX. Conclusion.

The result of the investigation would seem to be that the weight of authority in the United States is to sustain the doctrines set forth *supra*, I., and that those cases which seem to have gone apart from these cardinal principles have done so mainly through a misapprehension and misapplication of the rule or maxim *damnum absque injuria*; and that they have extended that rule or maxim far beyond what was ever intended by those who originated it. They seem to have nearly lost sight of the doctrines which undoubtedly exist; viz.: First, that a legislative authorization to do an act which would in a private individual amount to a nuisance only protects the person or corporation so authorized from a prosecution, civil or criminal, at the instance of the state, and is no protection against a suit or action by a private individual to prevent or abate the nuisance, or to recover damages for its commission. Second, that powers granted by the legislature to corporations, municipal or otherwise, will not protect such a corporation, any more than an individual, for committing a private nuisance. Third, that the legislative authority which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury.

As was said in the commencement, what

constitutes a private nuisance has not been considered in the discussion of the question which is the subject of the note. When a court, or a jury acting under its instructions, has declared as a question of law or fact, or both, that a thing is not a nuisance, that case, of course, has no bearing upon the subject here considered; but when a court decides that an injury has been committed by a corporation upon an individual or another corporation, claiming to be authorized to do so by virtue of its charter or act of incorporation, and that by reason thereof it is by the legislative power protected and exempted from liability in doing an act which without such legislative authorization the court admits would be a nuisance, it may without hesitancy be stated that such a decision is not sound law under a proper application of the cardinal doctrines above enumerated. The whole theory and reason of the constitutional inhibitions contained in the Federal Constitution and in those of the several states, that private property shall not be taken, or, as in some of the state Constitutions, damaged, injured, or destroyed, without compensation, is that no real injury to an absolute right can be perpetrated under what is claimed to be authority of a legislative act. But there is another and a higher reason why this should be so, than the strict constitutional prohibition mentioned. It is no less true to-day than it was when the great commentator on the common law wrote that "the public good is in nothing more essentially interested than in the protection of every individual's private rights." 1 Bl. Com. 139.

Down to 1817, Connecticut, and to 1841, Rhode Island, had no Constitution whatever, except the provincial charters under which they were respectively originally organized as provinces of Great Britain; and while the people of the United States as a whole, and those of the several states respectively, have incorporated in the portion of their several Constitutions generally alluded to as the Bill of Rights, certain positive provisions and safeguards of the individual citizen's right to life, liberty and property, it must not be supposed that those are the only restrictions upon attempted legislative usurpation of power. There can be no question but that, in addition to the provisions of our written Constitutions, we have still preserved to us all the rights, privileges, and immunities which belong to the unwritten British Constitution.

It has been said that a state legislature possesses all power which is not in express terms denied to it by the Constitution. But it is conceived that the legislature was not created and given its place in our governmental structure until the foundation of such structure had been laid upon principles which were regarded as so fundamental and enduring that all the acts of the legislature must be in conformity with them, to be within the legislative power. The framers

of the Constitution and the creators of the legislature had just been through a life and death struggle for the maintenance of the doctrine as declared by themselves, that all men are created equal, and that they are endowed by their Creator with certain inalienable rights. Running all through the Constitutions framed for the organization of the government is this idea of equality, and it would have been absurd to suggest to men so imbued with these ideas, that it was necessary to insert in the instrument a provision that the legislature could not take the property of one citizen and give it to another or grant to one citizen immunity from acts which constituted a nuisance to his neighbor. To prevent just such acts of favoritism, and protect the individual in his equal property rights, was the very object of the government, as everyone knew, and to have stated it in the Constitution would have been as absurd as to have stated that the wind blows, or that the sun shines. So long as the question is confined to the granting of such special immunity to the individual, there would probably be no one found to contend that the legislature had this right. Especially is this true in view of the provision in the 14th Amendment to the Federal Constitution, declaring that no state shall deny to any person within its jurisdiction the equal protection of its laws. For if a law gives one man immunity from liability for a nuisance, which is denied to another, the latter is certainly denied the equal protection of the laws. These truths seem self-evident but even some of our greatest judges have drifted so far from the traditions of the fathers that it is sometimes necessary to recall the principles on which the government was founded, to find a guide for the course of the ship of state.

If such special immunity could not be given to an individual, it certainly cannot be given to a private corporation, since the artificial being has no greater rights or privileges under the government than has the natural person, its creator, and can be given none. But when the private corporation is organized to perform a public service, many courts have lost their bearings. Because it is necessary, in order for them to attain the objects of their creation, to exercise a portion of the governmental right of eminent domain, the courts have become confused, and regarded them as likewise possessing the immunities of government. Therefore it has been said that if the transaction of the business for which they are organized necessarily results in a private nuisance, the individual, and not the corporation, must bear the loss, in order to protect the public from inconvenience. But this conclusion by no means follows from the premises. A public service corporation is precisely like any private corporation, with the exception that it is permitted to exercise the paramount power of the state to attain its objects. It can take what property it

needs, wherever it can find it, upon paying for it; and although in the transaction of its business it causes injury to private property, no individual can stop such business, whatever injury it causes, provided it is willing to make good the injury. But with regard to such injury it has no greater immunity from liability to make it good than a private citizen, and the legislature can give it none. That matter is of no interest or concern to the public, but is merely a question whether the cost of the enterprise, which includes the damage caused by it, shall be borne by the private corporation, which is to obtain the profits, or by the private citizen, who has no interest in it other than as one of the public. The answer to this question, upon principles of justice, and upon those at the foundation of our government, seems so plain that it is strange that more than one answer should be given. The cost should be borne by the corporation which has undertaken to bear it, and this cost includes the depreciation in the value of adjoining property by reason of the business proving a nuisance to it; and the legislature cannot decree otherwise.

But cannot the legislature authorize the creation of a private nuisance by the public itself, or a subdivision of it, without making compensation to the person injured? The general fundamental principles of the government would probably answer this question in the same manner they have answered the former ones. But to protect himself against just such injuries, the citizen placed in his Constitution the declaration that private property should not be taken for public use without just compensation. The term "property" is not confined to the physical land, gravel, and earth, or the buildings, trees, and shrubs, but is the sum of all the advantages which flow from the possession of a title to land. If the necessary result of a particular act done by the public, or a particular use of a parcel of land, is to destroy a portion of the usefulness of adjoining land, either by noisome odors hovering over it, or the pollution of the water thereon, or the destruction of the necessary quiet which by nature belongs to it, that property is taken to the extent that its legitimate use is destroyed, as fully as though physical occupation of the land had occurred. In planning any enterprise, the public must secure land enough so that the whole enterprise, including its deleterious effects, can be confined to the property owned by the public; and the Constitution will not permit the public to secure only enough land to accommodate the material necessities of its enterprise, and then compel adjoining property to bear the burden of the remainder. So far as it does so, it creates a nuisance to that property, which, so far as it destroys value, constitutes a taking which the legislature has no power under the Constitution to permit, unless due compensation is made.

P. H. V.

1 L.R.A. (N.S.)

IOWA SUPREME COURT.

CLARENCE SHOEMAKER, By Next Friend,
v.

D. W. JACKSON, Appt.

(.... Iowa.)

1. Assault—assisting elopement—counterclaim.

The expense which a father has been compelled to incur to repair the clothing of his minor daughter and restore her to health, and the value of the services lost during her illness, may be set up by him as a counterclaim when sued for damages for whipping one who conspired with a third person to secure the elopement of the daughter, and assisted in taking the daughter from home under circumstances from which it might reasonably be supposed that her clothing would be injured and her health impaired.

2. Same—justification.

Assisting in the elopement of a minor girl will not justify the father in administering a whipping to the one so doing, which is the result of deliberation, after the lapse of sufficient cooling time.

(July 13, 1905.)

A PPEAL by defendant from a judgment of the District Court for Montgomery County in plaintiff's favor in an action brought to recover damages for alleged assault and battery. Reversed.

The facts are stated in the opinion.

Messrs. J. M. Junkin and Ralph Pringle, for appellant:

When exemplary damages are claimed, provocation should be admitted in mitigation.

Earl v. Tupper, 45 Vt. 275.

The time intervening between the time of

Case Note.—The reason for the rule that evidence of provocation is inadmissible in mitigation of damages for an assault committed after "the blood has had time to cool" is stated in *Rochester v. Anderson*, 1 Bibb, 428, in the following language:

"The law, out of respect to the frailty of human passions, may look with an eye of some indulgence upon the violation of good order, produced in the moment of irritation and excitement from abusive language. But where there has been time for deliberation, the peace of society requires that men should suppress their passions; and neither reason nor law will suffer them to claim a diminution of their responsibility for their misconduct. If opprobrious words for which the law allows an action have been used of a man, the law furnishes a remedy, and will not permit him to redress his own wrong. If they are so frivolous as not to be deemed by the law actionable, a peaceful citizen, when he has had

the assault and the provocation is tested by closeness, not of time, but by causal relation.

Wharton, Ev. § 262; Field. Damages, § 118; Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475; Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021.

All who assist in doing an unlawful act become answerable for all the consequences of such act.

Cooley, Torts, p. 133; Turner v. Hitchcock, 20 Iowa, 310; Addison, Torts, § 1321; Webb's Pollock, Torts, p. 231; Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070; Corey v. Havener, 182 Mass. 250, 65 N. E. 69; Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762.

Messrs. Beeson & Pomeroy, for appellee:

The court did not err in refusing to submit to the jury the issue of mitigation, for

time for reflection, will consult the peace and good order of society, as well as his own dignity, in disregarding them."

Among other cases on which the decision in Ireland v. Elliott, 5 Iowa, 478, 68 Am. Dec. 715 (cited in SHOEMAKER v. JACKSON), is based, is Avery v. Ray, 1 Mass. 12, in which, it appearing that the assault was deliberately planned, and committed without any provocation given by the plaintiff at the time, evidence of the circulation of a slanderous story by the plaintiff concerning the defendant's sister was excluded, Sedgwick, J., remarking that while he should be in favor of admitting evidence of provocation given, in mitigation of damages, upon a liberal scale, "to admit such evidence, where the blood had had time to cool, would be extending the rule so as to render it impossible to say where the court should stop."

Also cited in Ireland v. Elliott are Lee v. Woolsey, 19 Johns. 318, 10 Am. Dec. 230, where evidence of statements made by plaintiff, which came to defendant's knowledge on the evening preceding the assault, was excluded, the court considering such antecedent facts not "fairly to be considered as a part of one and the same transaction;" Barry v. Ingles, 3 N. C. (2 Hayw.) 102, in which evidence of a provocation given some months before, by newspaper publications, was excluded; Sledge v. Pope, 3 N. C. (2 Hayw.) 402, in which the rule under discussion was recognized, but held not to exclude evidence of prior threats made by defendant; and Waters v. Brown, 3 A. K. Marsh. 557, where, at the time of the assault, plaintiff presented a pistol at defendant, who thereupon shot him. Evidence of plaintiff's threats to kill defendant, made some time before, was held admissible, the distinction from the rule being made on the ground that they related to the acts which the plaintiff was attempting when he received his wound, and conduced to explain the acts of each party and the motives with which each acted in the encounter.

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the reason that the evidence showed without conflict that the alleged provocation occurred the day before the assault, and the assault was made premeditatedly.

Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. 748; Thrall v. Knapp, 17 Iowa, 468; Ireland v. Elliott, 5 Iowa, 478, 68 Am. Dec. 715; Keiser v. Smith, 71 Ala. 481, 46 Am. Rep. 342; Brooks v. Carter, 34 Fed. 505; Carson v. Singleton, 23 Ky. L. Rep. 1626, 65 S. W. 821; Quinby v. Minnesota Tribune Co., 38 Minn. 528, 8 Am. St. Rep. 693, 38 N. W. 623.

There was no error in refusing to permit defendant to offer evidence of damages after the separation of Shoemaker and Weyer.

Neither the injuries claimed nor any other injuries could have been anticipated by Shoemaker when he parted from Weyer.

Bishop, Non-Contract Law. §§ 37-47; 41

Ireland v. Elliott has itself been cited as an authority for the exclusion of evidence in Thrall v. Knapp, 17 Iowa, 468, of a slander circulated by plaintiff concerning defendant's daughters, brought to his knowledge on the day before, and again about three hours before the assault; in Gronan v. Kukkuck, 59 Iowa, 18, 12 N. W. 748, of a provocation arising on a day prior to the assault; in Cummins v. Crawford, 88 Ill. 312, 30 Am. Rep. 558, of threats made against the life of defendant, twenty days before; in Martin v. Minor, 50 Miss. 42, of the fact that defendants had learned about a month before that plaintiff was the father of their sister's illegitimate child; in Keiser v. Smith, 71 Ala. 481, 46 Am. Rep. 342, of the publication of libelous articles on the forenoon of the same day.

The case of Thrall v. Knapp, 17 Iowa, 468, relied upon in SHOEMAKER v. JACKSON, cites as authorities Cushman v. Waddell, 57, Fed. Cas. No. 3,516, where evidence that plaintiff, a schoolmaster, had severely punished defendant's son, was let in "to show the situation of the transaction," that the jury might decide "whether the defendant acted under the influence of the sudden excitement produced by the situation and story of his son, or a disposition to inflict a wanton injury or disgrace upon the plaintiff." Anderson v. Johnson, 3 Harr. & J. 102, where evidence of a quarrel between plaintiff and the defendant's friend, some time anterior to the assault was held to be improperly admitted; Matthews v. Terry, 10 Conn. 455, where evidence of misconduct before the chastisement complained of, of the plaintiff, who was defendant's hired boy, was held properly excluded; Fullerton v. Warrick, 3 Blackf. 219, 25 Am. Dec. 99, where evidence that the plaintiff had been for several years past, and up to the time of the commission of the assault, in the constant habit of abusing and slandering the defendant, and about six months before had said that the defendant was an unprincipled man and a liar, was held to

328; 5 Am. & Eng. Enc. Law, pp. 5-10; Sharp v. Powell, L. R. 7 C. P. 253; Sutherland, Damages, 3d ed. §§ 29-31; 1 Addison, Torts, Wood's ed. §§ 10-12; Allegheny v. Zimmerman, 95 Pa. 295, 40 Am. Rep. 649; Stewart v. Strong, 20 Ind. App. 44, 67 Am. St. Rep. 248, 50 N. E. 95; Lee v. Burlington, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; Dubuque Wood & Coal Asso. v. Dubuque, 30 Iowa, 176; Georgia v. Kepford, 45 Iowa, 48; Bosch v. Burlington & M. R. Co. 44 Iowa, 402, 24 Am. St. Rep. 754.

Ladd, J., delivered the opinion of the court:

One Weyer and plaintiff were walking along a street of Villisca in the afternoon of July 31, 1903, when defendant requested the latter to come up to his office. He did so, and when both were inside defendant

locked the door and administered to plaintiff a severe whipping. He had provided a whip for this purpose some time previous, having deliberately decided to have Weyer arrested and to chastise Shoemaker. To the petition claiming damages the defendant pleaded certain facts in mitigation, and also a counterclaim.

The only rulings complained of are the refusal of the court to submit the issue as to mitigation, and the rejection of certain evidence. The latter will be first considered. It appears that Weyer, then twenty years of age, had been paying his attentions to defendant's sixteen year old daughter, and that the plaintiff, a youth of eighteen summers, was trying to court the niece of a near neighbor. The boys had seen these girls at this neighbor's house in the afternoon of July 29th, and in the evening a

be improper. See, in this connection, Dolan v. Fagan, 63 Barb. 73, in which evidence of a series of provocations, repeated and continued from day to day, and that every time the parties met the plaintiff took occasion to insult the defendant with most opprobrious language, was held to be improperly excluded, the court saying that whether a party has had a reasonable time to cool his blood depends on the peculiar circumstances of each case.

Thrall v. Knapp, 17 Iowa, 468, has been cited in State v. Lawry, 4 Nev. 161, a criminal case, in which evidence of the acts relied on as a provocation, which occurred and were known to defendant a day or two prior to the assault, was excluded.

Gronan v. Kukkuuk, 59 Iowa, 18, 12 N. W. 748, has been cited in Quinby v. Minnesota Tribune Co. 38 Minn. 528, 8 Am. St. Rep. 693, 38 N. W. 623, an action for libel, in which evidence of a publication that induced the libel in question, made the day before, was held improper.

The test of causal relation, referred to in *SHOEMAKER v. JACKSON*, shows the application of a broader view of what constitutes the *res gesta*, viz., that evidence of the provocation is admissible if it gives color or character to the act of the defendant in committing the assault, as opposed to the narrower rule of most of the preceding cases, that provocation is not part of the *res gesta* when reasonable time for reflection and for reason to regain control intervenes. This divergence seems, however, to exist more in principle than in practice.

In the case cited, Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021, the plaintiff, articles in whose newspaper, published the day before, had aroused the animosity of the defendant, was shot by the latter without warning, while walking along the street. Evidence of the articles was held proper in mitigation of damages, the court resting its decision upon the ground that defendant's passion had not had time to subside, as well as upon that 1 L.R.A. (N.S.)

of causal relation, saying: "They caused the assault, provoked it, were of a character to greatly excite and inflame the passions of the defendant, and, while the time extended itself through the period during which the whereabouts of the plaintiff were unknown, the subsequent meeting brought the whole matter vividly before the mind, and again ignited the passions of a man thus put under the ban of a newspaper insult, which was, at the very time of the assault, under the eyes of thousands of his fellowmen, and which tended towards his utter degradation. He was taunted with the matter on every hand, and so far from cooling time, the lapse of time, itself short, and enforced by the absence of the offender, had only more and more excited the outraged passions of the defendant, and caused him to do an act which it is unreasonable to suppose he would have committed without them. They . . . were as essentially a part of the case as the assault itself." From which it appears that causal relation as a sole test is not supported by the case.

The case of Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475, cited in Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021, was an action for unlawful arrest and imprisonment, wherein defendant sought to introduce evidence that on the same day plaintiff had made certain statements, in consequence of which his arrest followed, which evidence was held admissible in mitigation of punitive damages, as giving color and character to the act.

In the case of Davis v. Franke, 33 Gratt. 416, which is also cited in Ward v. White, it is said:

"The rule which confines the defendant to proof of recent provocations received from the plaintiff is subject to modifications which more or less qualify the rule according to the particular circumstances of each case. In Fraser v. Berkeley, 7 Car. & P. 621, it appeared that the assault was made three or four days after the publication of the libel. Lord Abinger said the law

witness testified to having observed plaintiff hand defendant's daughter a piece of paper when the girls were at defendant's home, where they stopped that night. After the family had retired, defendant was awakened by whistling and heavy walking on the pavement. This continued some time, when he noticed a light had been struck in the girls' room. He then arose, and went downstairs to the front porch. The noise ceased at once, and he returned to his couch. This was repeated. The third time he noticed a person get in range with the window in the girls' room, whistle and stamp, and by going about the house he found such person to be Weyer, who, after being scolded, left. Immediately afterwards the plaintiff stepped from behind a tree, and, in the conversation which followed, stated that they were watching to see that other boys were not with the girls, admitted that he had been instrumental in effecting a reconciliation between Weyer and defendant's daughter, declared that he did not know of defendant's objections to Weyer, and promised not to interfere farther. A ladder, which had been placed by somebody at the window of the girls' room, was then removed, and defendant retired. He was up again at 4 o'clock A. M., only to find the young women gone. He immediately began search, and, after telephoning to neighboring towns and ascertaining that Weyer had left the livery stable with a team at about 2 o'clock in the morning, met plaintiff as he was returning with said team. In response to inquiry the plaintiff informed defendant that he had

left Weyer and defendant's daughter at Nodaway. Defendant, with the town marshal, left at once for that place, but found they had not been there. He then telephoned to Villisca, and was advised that they were at one Himiller's, 1½ miles south-east of Villisca. He then drove there, and learned that they had left after getting breakfast. The search was continued by the party until noon, when the marshal sent for men and teams to assist. At about 4 o'clock in the afternoon Weyer and the daughter were discovered, and the latter returned to her home.

After the facts as recited had been detailed, the following question was propounded to the defendant: Now, doctor, I will ask you the condition your daughter was in when brought home, as to her clothes being soiled, and her being sick, and how long that sickness continued?" This was objected to on the ground that it had not been made to appear that plaintiff caused or contributed to the injury of her clothing or the physical condition of the girl. The objection was sustained, whereupon counsel for the defendant stated that he proposed to show that defendant's daughter was strong and healthy prior to this escapade, but on her return she was ill, weakened, and confined to her bed for a week under a physician's care, and had since suffered from the nervous shock; that her clothing was soiled and torn; and that he proposed to show the value of her services lost thereby, and the cost of medical attendance and of repairing

would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation. He further said that in the case before him, as the blood has had time to cool, the parties, if death ensued, would be guilty of murder. The provocation three days before would not have availed them for going deliberately three days after to take their vengeance. At the same time he said, 'It appears to me too severe to say you should not look at the cause which induced the assault.' In other cases it has been held that although a considerable time may have elapsed between the provocation and the date of the assault, if the provocation was communicated to the defendant immediately preceding the assault it is admissible in evidence. *Gaither v. Blowers*, 11 Md. 536.

"And so, where the acts done or words spoken some time previous to the assault are a part of a series of provocations, repeated and continued up to the time of the assault, they may be received. *Stetlar v. Nellis*, 60 Barb. 524, 42 How. Pr. 163. 1 L.R.A. (N.S.)

"In *Rawlings v. Com.* 1 Leigh, 581, 19 Am. Dec. 757, the general court, while declaring that the rule in civil and criminal cases is the same, and that acts of provocation received so recently the blood has not had sufficient time to cool are only admissible in mitigation of damages, seemed to concede that, where at the time of the assault allusion is made to the provocation previously given, the evidence is admissible as explanatory of the nature of the assault: provided the connection between it and the antecedent provocation plainly appears."

The rule as stated in *SHOEMAKER v. JACKSON* may be found in the following text-books: 2 Greenl. Ev. § 93; *Field, Damages*, § 604, p. 475; 1 *Sutherland, Damages*, 227, 228. In 2 *Sedgwick on Damages*, 7th ed. p. 525, "547, it is said: "The defendant cannot give in evidence, in mitigation of damages, the acts or declarations of the plaintiff at a different time, or any antecedent facts, which are not fairly to be considered as part of one and the same transaction, though they may have been ever so irritating or provoking."

her clothing. Conceding all this, the court held that such damages were not the proximate consequence of what plaintiff had done. In this ruling we cannot concur. The clothing furnished his minor daughter was the property of the defendant, and he was entitled to recover for any injury thereto which resulted directly from plaintiff's act. *Parmelee v. Smith*, 21 Ill. 620; *Dickinson v. Winchester*, 4 Cush. 114, 50 Am. Dec. 760. So, too, was defendant entitled to recover for any loss of services or for medical attendance occasioned directly by the acts of plaintiff. See 21 Am. & Eng. Enc. Law, pp. 1044 *et seq.* This does not seem to be questioned, but it is urged that the sickness and injury to clothing did not result from plaintiff's acts in taking the parties to Himiller's, but after they had reached there. This view ignores the evidence tending to show a conspiracy between plaintiff and Weyer, in pursuance of which the latter attempted to elope with the daughter, and that what was done might have been found to have been done in pursuance of such conspiracy. True, the plaintiff and Weyer denied that any arrangement had been made prior to starting for Himiller's place, but this merely raised an issue to be determined by the jury. The facts that plaintiff, when in company with Weyer, handed the note to defendant's daughter, if he so did; that he and Weyer repeatedly signaled to her at a late hour of the night under circumstances indicating a purpose to induce the girls to leave the house; that he accompanied Weyer and defendant's daughter to Himiller's, and then, to put defendant on the wrong track, deliberately deceived him,—these were circumstances tending to establish the existence of a conspiracy between the young men to deprive the defendant of the custody of his daughter, and were sufficient to have sustained a verdict had the jury so found. If so, each was liable for all damages naturally flowing from any wrongful act of either in carrying out their joint enterprise. It cannot be said that it was contemplated that flight should terminate at Himiller's, but little more than a mile from her home. Pursuit was anticipated, else deception would not have been practised to put defendant off track. Weyer and the girl had no other means of continuing their journey, after plaintiff left them at Himiller's, than on foot. That the parties to the conspiracy, if such there was, contemplated that the journey should be continued, the jury might well have found. They knew the

conditions as to weather, roads, and fields, and that these were such that injury to clothing and health might result. At any rate, if such injuries were the natural consequence of what was done in executing the design of these young men, and resulted in damage to the defendant in the way of injury to his daughter's clothing and loss of her services and expense for medical attendance, he should have been allowed therefor on his counterclaim. The evidence was admissible. The plaintiff's conduct was most contemptible throughout, and he should not be permitted to escape responsibility for any damages directly consequent from the acts of either himself or Weyer, if within the scope of and in carrying out their common purpose.

2. The court instructed the jury not to take into consideration the circumstances pleaded in mitigation, in fixing the amount of damages to be allowed plaintiff. This was correct. The defendant admitted that he had deliberately decided to whip plaintiff and prosecute Weyer. Provocation, to be admissible in mitigation of damages, must be so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited. If the assault has been made after time for reflection, and under circumstances leading to the presumption that it was for revenge, he stands in the position of an original trespasser, and conduct of the other party will not serve as an extenuation. The test is whether "the blood has had time to cool." *Ireland v. Elliott*, 5 Iowa, 478, 68 Am. Dec. 715; *Thrall v. Knapp*, 17 Iowa, 468; *Gronan v. Kukkuick*, 59 Iowa, 18, 12 N. W. 748. In the last two cases it seems to have been thought that a provocation happening the day previous to the assault ought not to be shown, for that sufficient time had intervened to allow the passions to subside and reason to regain control of the mind. Conceding the correctness of the rule as applied to the facts of those decisions, it is doubtful whether any arbitrary limitation of time should be adopted. The test is not that of time, but of causal relation, and provocation happening a longer time previous may, in exceptional circumstances, be shown. See *Ward v. White*, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021. In the instant case, however, what the defendant did was after deliberation, and not in the heat of passion. He may have been aggravated with the conduct of the boy, but he did not whip him in the heat of passion.

Reversed.

IOWA SUPREME COURT.

FIRST NATIONAL BANK OF WEBSTER CITY

v.

WILLIAM J. DUTCHER.

PLANO MANUFACTURING COMPANY,
Cross Defendant, Appt.

(.... Iowa.)

1. Breach of warranty—question for jury.

The question of breach of warranty that a machine is of good material and workmanship, and will, when properly adjusted and operated, do good work, is, upon conflicting evidence, for the jury.

2. Sale—notice of defect—waiver.

The requirement of a contract for sale of a machine that notice of its failure to work must be given within two days of its receipt is waived by the continued and persistent efforts of the seller's agents, including the one who made the sale, to make the machine work after the expiration of the time limited.

3. Same—authority of agent.

The authority of an agent who sells a machine to waive a condition as to notice of breach of warranty is not destroyed by

a provision of the contract that "no person has any authority to add to, or abridge or change this warranty in any manner."

4. Warranty of machine—trying to make it good.

Delay in returning a machine which does not fulfil the warranty is justified so long as the seller's agent continues to work upon it and hold out encouragement to the buyer that it will be made as warranted; and its return within a few days thereafter is sufficient.

5. Breach of warranty—remedy.

A purchaser has a right to return the machine, and his remedy is not limited to an action for damages, under a contract for the purchase of a machine warranted to do good work, and requiring the purchaser to give written notice if, after two days' trial, it appears not to be as represented.

6. Question for jury—reasonable time.

Whether or not a warranted machine is returned within a reasonable time after the seller's abandonment of attempts to make it fulfil the warranty is a question for the determination of the jury.

7. Surety—as party on cross petition.

A surety on a contract for the purchase of a machine is not a necessary party to proceedings by cross petition on behalf of the purchaser, when sued by an assignee

Case Note.—As an authority for the doctrine that the notice of the failure of a machine to work properly, which must be given the vendor within a specified time, according to the contract of sale, is waived by the attempts of an agent or representative of the vendor to remedy the defect, the court cites the case of *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417. This case involved the sale of a harvester under a conditional warranty that if, after a trial, it failed to work, the purchaser must give immediate notice in writing. It was held that the notice was waived by the presence of the manager of the company, who had authority to sell machines and to receive those which should be returned as unsatisfactory, and who personally supervised the operation of the machine after it had failed to work.

Champion Mach. Co. v. Mann, 42 Kan. 372, 22 Pac. 417, was cited in *Aultman & T. Machinery Co. v. Wier*, 87 Kan. 674, 74 Pac. 227, in which it was held that notice to the selling agent of the failure of the machine to work, and the attempts of the machinists, who were under the direction of the selling agent of a branch office, to make the machine work, did not relieve the purchaser of his duty to notify the vendor, according to the terms of the contract, of the failure of the machine to work. The court distinguished this case from the case of *Champion Mach. Co. v. Mann*, on the ground of a difference in the contract of sale and the person who had notice of the defects.

In *Baker v. Nichols & S. Co.* 10 Okla. 692, 65 Pac. 100, the court recognized the doctrine of *L.R.A. (N.S.)*

trine laid down in *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417, and held that the provision of the contract for the sale of a threshing machine and engine, which requires that a written notice of the failure of the machine to work be given to the seller within a specified time, is intended for the benefit of the seller, and that, when an agent is sent upon request of the purchaser to fix the machine, the vendor will be held to have waived the provision of the contract requiring notice.

As another authority, the court in *FIRST NAT. BANK v. DUTCHER* referred to the case of *Massachusetts Loan & T. Co. v. Welch*, 47 Minn. 183, 49 N. W. 740, in which it was held that the company, by sending their machinists to make repairs, waived the requirement as to notice in case the machine failed to work. This case was cited with approval in *Nichols & S. Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41, which held formal notice in writing of the failure of the machine to work was waived by showing that the vendor's expert was present when the machine was set up, and saw that it did not work, and by showing that some agent or officer of the vendor was present nearly every day, trying to make the machine work, and that the foreman and the agent whose special duty it was to look after machines were also present.

But in *Trapp v. New Birdsall Co.* 109 Wis. 556, 85 N. W. 478, it was held that the mere fact that an agent of the vendor visited the boiler which had been sold, and attempted to make it work properly, after an insufficient notice had been given of the

on the purchase-money notes, to recover against the seller for breach of his warranty of the machine.

1. Suretyship—parol evidence of.

That one who signed a contract to purchase a machine was a surety only may be shown by parol for the purpose of showing that he was not a necessary party to a cross petition by the purchaser, when sued on the purchase-money notes, filed to bring in and hold the seller liable for breach of warranty of the machine.

2. Supersedeas—proceeding with trial.

The filing of a supersedeas bond upon appealing from an order refusing to proceed with a case as an equitable action does not deprive the court of jurisdiction to proceed with the trial as one at law.

(July 13, 1905.)

APPEAL by cross defendant from a judgment of the District Court for Hamilton County holding him liable for breach of warranty of a machine for the enforcement of the purchase-money notes for which the action was brought. Affirmed.

The facts are stated in the opinion.

Mr. Wesley Martin, for appellant:

It is competent for the parties to provide

by contract that a particular course shall be pursued upon a breach of the contract, and the parties are bound to pursue the course agreed upon.

King v. Towsley, 64 Iowa, 75, 19 N. W. 859; Aultman-Taylor Machinery Co. v. Ride-nour, 96 Iowa, 638, 65 N. W. 980; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa, 607, 55 N. W. 537, 94 Iowa, 144, 62 N. W. 700; Davis' Sons v. Robinson, 67 Iowa, 355, 25 N. W. 280; Russell v. Murdock, 79 Iowa, 101, 18 Am. St. Rep. 348, 44 N. W. 237.

The declarations of an agent are inadmissible to change, alter, or vary the express provision of the contract.

Lee v. Agricultural Ins. Co. 79 Iowa, 379, 44 N. W. 683; Whitam v. Dubuque & S. C. R. Co. 96 Iowa, 737, 65 N. W. 403; Ruthven Bros. v. American F. Ins. Co. 92 Iowa, 316, 60 N. W. 663; Wood Mowing & Reaping Mach. Co. v. Crow, 70 Iowa, 340, 30 N. W. 609; Zimmerman v. Home Ins. Co. 77 Iowa, 685, 42 N. W. 462.

When, upon the face of the contract, the name of a party appears as a purchaser, such contract cannot be varied by parol, so as to show that such person is not in

machine's failure to work, there being no proof that the vendor sent the agent, does not establish a waiver of the notice required by the contract. But the court said that if the seller acts in respect to remedying defects in the machine, without the notice which the contract calls for, the omission to insist upon such notice effectually changes the contract so as to make it conform to the conduct of the parties; and that such conduct waives the giving of any notice other than that upon which it is based, citing, as authorities, Massachusetts Loan & T. Co. v. Welch, 47 Minn. 183, 49 N. W. 740; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; Sandwich Mfg. Co. v. Feary, 40 Neb. 226, 58 N. W. 713; and Sandwich Mfg. Co. v. Trindle, 71 Iowa, 600, 33 N. W. 79.

In Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co. 116 Wis. 136, 92 N. W. 553, the court held that notice according to the contract, of the failure of an electric motor to work, was not waived by the vendor's remedying slight defects in the machine before it was set up, and by proof showing that communications passed between the vendor and its agents concerning the vendee's having trouble before the machine was set up. The court said that "mere information of defects in the machinery, communicated to respondent in a manner different from that stipulated in the contract, not acted upon, in lieu of the notice agreed upon, did not operate to waive the condition of the guaranty,—citing Davis' Sons v. Butrick, 68 Iowa, 94, 28 N. W. 27; Massachusetts Loan & T. Co. v. Welch, 47 Minn. 183, 49 N. W. 740."

Other cases citing the authorities men-

tioned in FIRST NAT. BANK v. DUTCHER, and sustaining substantially the same doctrine, are Canham v. Piano Mfg. Co. 3 N. D. 232, 55 N. W. 583; Robinson v. Berkey, 100 Iowa, 142, 62 Am. St. Rep. 549, 60 N. W. 434; Springfield Engine & Thresher Co. v. Kennedy, 7 Ind. App. 502, 34 N. E. 856; and Aultman & T. Co. v. Frazier, 5 Kan. App. 207, 47 Pac. 156.

The text-book writers also refer to the authorities cited in the case of FIRST NAT. BANK v. DUTCHER. In Mechem on Sales, § 1384, it is stated that the vendee's failure to make the test or give the notice, unless waived by the seller, will be deemed to be an acceptance of the goods. On the subject of waiver of notice, § 1385 states that the time or manner of notice stipulated for may be waived expressly or impliedly; as where the seller or his agent requests the continuance of the test after the expiration of the time specified, or where he acts without objection upon irregular or informal notice. But waiver will not be implied where the seller disavows any further responsibility, or refuses to remedy or take back the article. Section 1812 states that when the parties have stipulated for notice of the defect and an opportunity to remedy it, such notice and opportunity are, unless waived, conditions precedent to the buyer's right to maintain an action for the breach of warranty.

As an authority for the power of the agent who sells the machine to waive a condition as to notice of the failure of the machine to work properly, FIRST NAT. BANK v. DUTCHER cites Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.

fact a purchaser, but a surety for the purchaser.

Daly v. W. W. Kimball Co. 67 Iowa, 132, 24 N. W. 756; Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358, 25 N. W. 820; Davis v. Robinson, 71 Iowa, 618, 33 N. W. 132; Junge v. Bowman, 72 Iowa, 648, 34 N. W. 612; Osgood v. Bauder, 82 Iowa, 171, 47 N. W. 1001; McCormick Harvesting Mach. Co. v. Markert, 107 Iowa, 340, 78 N. W. 33; McEnery v. McEnery, 110 Iowa, 718, 80 N. W. 1071; Jackson v. Mott, 76 Iowa, 263, 41 N. W. 12; Meader v. Allen, 110 Iowa, 588, 81 N. W. 790.

Where a purchaser of machinery ascertains upon trial that the machinery does not comply with the contract of purchase, and cannot be made to comply, it is his duty promptly to return the property.

2 Mechem, Sales, 1901 ed. §§ 1380, 1382-1384; Allison v. Vaughan, 40 Iowa, 421; Frey-Sheckler Co. v. Iowa Brick Co. 104 Iowa, 497, 73 N. W. 1051; Berthold v. Seevers Mfg. Co. 89 Iowa, 506, 56 N. W. 669; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Olson v. Mayer, 56 Wis. 551, 14 N. W. 640; Pottlitzer v. Wesson, 8 Ind. App. 472, 35 N. E. 1030; Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090; Young Bros. Mach. Co. v. Young, 11 Mich. 118, 69 N. W. 152; Hirshhorn v. Stewart, 49 Iowa, 418; Mackey v. Swartz, 60 Iowa, 710, 15 N. W. 576.

Mr. W. J. Covil for appellee First National Bank.

Messrs. Boeye & Henderson, for appellee Dutcher:

The company, in legal contemplation, had notice from what its general and local agents saw for themselves.

Briggs v. M. Rumely Co. 96 Iowa, 202, 64 N. W. 784; Massillon Engine & Thresher Co. v. Shirmer, 122 Iowa, 699, 98 N. W. 504; Blaess v. Nichols & S. Co. 115 Iowa, 373, 88 N. W. 829; Pitsinowsky v. Beardsley, 37 Iowa, 9; Peterson v. Walter A. Wood

97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96. This was a case involving the sale of a reaping machine subject to the condition that immediate written notice of its failure to work well must be given the vendor, and that "no one has authority to add to, abridge, or change the contract." The court held that an agent who sells the machines, sets them up, and sees that they work properly, and receives them back in the event they do not work, has authority, notwithstanding the provision of the contract to the contrary, to waive written notice of the fact that the machine did not work, where he was present at the time it was started, and saw that it did not work.

The case of Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. 97 Iowa, 148, 1 L.R.A. (N.S.)

Mowing & Reaping Mach. Co. 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96.

Dutcher did not keep the machine an unreasonable length of time, however long if he did it at the request of the company or its general or local agents.

Warder, B. & G. Co. v. Horne Bros. 110 Iowa, 285, 81 N. W. 591; McCormick Harvesting Mach. Co. v. Brower, 94 Iowa, 144, 62 N. W. 700; McCormick Harvesting Mach. Co. v. Russell, 86 Iowa, 556, 53 N. W. 310.

It was proper to prove that Mrs. Dutcher was only a surety, provided the company knew the fact.

Piper v. Newcomer, 25 Iowa, 221; Preston v. Gould, 64 Iowa, 44, 19 N. W. 834.

It was for Wm. J. Dutcher alone to pursue the company for breach of warranty.

Mahaska County State Bank v. Christ, 82 Iowa, 56, 47 N. W. 886, 87 Iowa, 415, 54 N. W. 450.

Weaver, J., delivered the opinion of the court:

On September 9, 1901, the appellee William J. Dutcher, with his mother Permelia J. Dutcher, as an alleged surety, entered into a written contract with the Plano Manufacturing Company for the purchase of a cornhusking and shredding machine, manufactured by said company. The agreed price of the machine was \$850, for which Dutcher executed several notes, one of which was assigned to the plaintiff bank before maturity, and in due course of business. The bank having brought action to recover upon said note from William J. Dutcher, he appeared thereto and filed a cross petition, impleading the Plano Manufacturing Company. By this pleading it is alleged that the machine was purchased under a warranty, and, not complying therewith, the defendant had returned it and demanded of the plaintiff a surrender of the notes given by him for the purchase price, which demand was refused. It is also alleged that

59 Am. St. Rep. 399, 66 N. W. 96. was cited in Blaess v. Nichols & S. Co. 115 Iowa, 375, 88 N. W. 829. as an authority for the proposition that a general agent having power to sell machines has authority, after having entered into the contract, to change or waive its terms.

FIRST NAT. BANK v. DUTCHER also cites Pitsinowsky v. Beardsley, 37 Iowa, 9, in which it was held that an agent having power to sell threshing machines has authority, while the machine is being tested, to waive the provision of the contract relating to notice of its failure to work. This case was cited in the case of D. M. Osborne & Co. v. Backer, 81 Iowa, 380, 47 N. W. 70. and was recognized as a safe guide as to the authority of agents to waive conditions as to notice.

the notes have been transferred by the company to an innocent holder, against whom the defense based on a breach of warranty is unavailing. It is further shown that the warranty relied upon was in writing, and by its terms required the purchaser to give written notice to the company and its local agent, if, after two days' trial, the machine proved to be not as represented. The cross petition alleges that this condition was in fact complied with; but it is also claimed that the several conditions upon which the warranty was made to depend were waived by the company and its agents, and that by their request and direction the appellee continued the use of the machine and the attempt to make it work successfully beyond the time mentioned in the contract. Damages are asked from the company for the full amount of the notes given for the purchase price, \$650, and for freight paid upon the machine, \$29.25, with interest. The manufacturing company admits the sale of the machine and the warranty thereof upon the terms stated in the writing, but denies that the said purchaser has performed the conditions thereof on his part, and denies that it has ever waived such performance. In the principal case the bank recovered judgment against Dutcher for the full amount of the note sued upon, and from this judgment no appeal has been taken. On the issues joined upon the cross petition there was a trial to a jury and verdict in favor of Dutcher, and against the Plano Manufacturing Company, in the sum of \$750. From the judgment entered on this verdict the manufacturing company appeals. The appellant contends, first, that no breach of the warranty is shown by the record; and, second, that the record discloses without controversy the failure of the appellee to comply with the conditions upon which the contract makes the effectiveness of the warranty depend.

1. The proposition that the alleged breach of warranty is without support in the evidence cannot be maintained. The undertaking of the company was that the "machine is warranted to be of good material and workmanship, and, when properly adjusted and operated, to do good work." This is probably neither more nor less than the warranty which, in the absence of the writing, the law would imply, that the machine was reasonably well made, of good material, and adapted to the uses and purposes for which it was constructed. Without attempting to rehearse the testimony, we may say that, if the appellee and his witnesses are to be believed, the history of the attempt to operate the machine, from the time it was started under the supervision of the appellant's agent until the ex-

periment was finally abandoned, was a continuous series of failures. According to their story, though handled with ordinary care and skill, the machine was not only inefficient and incapable of turning out a reasonable amount of work, but the breaking of parts and consequent serious delays were a matter of daily occurrence. True, the appellant's testimony tends to show that the machine worked with reasonable success, and that the breaks and failures complained of were, in a large degree, at least, occasioned by negligence or want of skill on the part of the appellee and his assistants; but the conflict thus presented was one of fact, and, under familiar principles, its determination was a question for the jury.

2. The question most strenuously insisted upon in argument is whether there is sufficient evidence of a performance or waiver of the condition attached to the written warranty to justify the trial court in submitting the appellee's claim for damages to the jury. The conditions pleaded in the company's answer, and upon which it relies to defeat the recovery upon the warranty, are contained in written contract or order given for the machine, and are as follows: "If, within two days from the time of its first use, the said machine shall fail in any respect to fill the warranty, written notice shall immediately be given by the purchaser to the Plano Manufacturing Company, at Chicago, Illinois, by registered letter, and to the local agent through whom the same was ordered, stating wherein it fails to fill the warranty, and a reasonable time shall be given the Plano Manufacturing Company, and the agent through whom ordered, to send a competent person to remedy the difficulty; the purchaser to give the necessary and friendly assistance, and furnish the necessary material and power to start, operate, and test the machine, and help in general wherever it may be needed, free of charge.

. . . Possession or use of said machine after two days from the time of its first use, without giving notice as above, shall be conclusive evidence of the fulfillment of the warranty and full satisfaction to the purchaser."

Concerning the requirement for notice to the appellant, there was evidence from which the jury could find that, at the close of the second day's trial, the appellee did write and mail to the appellant's proper address an unregistered letter giving notice of his objections to the machine. It is argued that the failure to register the letter is such an omission as will, in itself, defeat any claim under the warranty. Upon this point the trial court instructed the jury that if the appellee, within the required time, mailed a

letter to the appellant, giving notice of the alleged defect in the machine, and the appellant did in fact receive the letter in due course of mail, then the failure to register was immaterial and the notice was sufficient. Error is assigned upon the giving of this instruction. The rule stated that the trial court has more or less support in the cases. See *Advance Thresher Co. v. Curd*, 27 Ky. L. Rep. 492, 85 S. W. 690; *Badgett v. Frick*, 28 S. C. 176, 5 S. E. 355; *E. T. Kenney Co. v. Anderson*, 26 Ky. L. Rep. 367, 81 S. W. 663; *Aultman-Taylor Machinery Co. v. Ridenour*, 96 Iowa, 638, 65 N. W. 980; *Frick Co. v. Morgan*, 24 Ky. L. Rep. 836, 69 S. W. 1072.

But, under the conceded facts in this record, we think that, even if erroneous, no prejudice to appellant could have resulted. It appears without dispute that the first two days' trial was had in the presence and with the personal assistance of the appellant's agent who sold the machine. That this trial was thought insufficient and unsatisfactory by both is evidenced by the fact that the agent continued with the machine, actively assisting and directing the effort to make it work, for much of the time covering a period of several weeks, when an expert employed by the appellant appeared and continued the experiment until within a short time before appellee returned the machine. The agent to whom reference has been made was a member of a firm, having charge of the appellant's local business at Webster City. He was also what he terms the "block man;" that is, he had the charge and oversight of appellant's business in a given territory, called a "block," comprising about one fourth of the state, including Webster City. He says his duties in that capacity were various,—“making settlements with local agents, furnishing repairs, taking notes, and selling machines and settling for them.” The appellee testifies that Rood (the agent) sent the expert “from the Plano Company,” and that such expert received letters from the company concerning the machine while he was working with it. These trials by the block man, the agent, and the expert must have covered very nearly the entire period during which the machine was in appellee's possession, and it is quite clear that he was induced to keep it and continue the endeavor to make it work by the encouragement, assurances, and requests of these different representatives of the appellant. All this was done after the expiration of the two-day limit for giving notice by the purchaser, and without any claim or objection that no notice had been given. Under the uniform holdings of this court, we must hold that the requirement for written notice after two days' use

of the machine was waived, and there was no error in submitting the alleged breach of warranty to the finding of the jury. *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 482, 61 N. W. 740; *Dean v. Nichols & S. Co.* 95 Iowa, 89, 63 N. W. 582; *Davis' Sons v. Buttrick*, 68 Iowa, 98, 26 N. W. 27; *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96; *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *Massillon Engine & Thresher Co. v. Shirmor*, 122 Iowa, 699, 98 N. W. 504; *Blaess v. Nichols & S. Co.* 115 Iowa, 373, 88 N. W. 829; *McCormick Harvesting Mach. Co. v. Brower*, 94 Iowa, 144, 62 N. W. 700; *McCormick v. Russell*, 86 Iowa, 556, 53 N. W. 310; *Warder v. Robertson*, 75 Iowa, 585, 39 N. W. 905; *Briggs v. M. Rumely Co.* 96 Iowa, 202, 64 N. W. 784; 2 *Mechem. Sales*, § 1385; *Flatt v. D. M. Osborne & Co.* 33 Minn. 98, 22 N. W. 440; *Sandwich Mfg. Co. v. Feary*, 40 Neb. 226, 58 N. W. 713; *Champion Mach. Co. v. Mann*, 42 Kan. 372, 22 Pac. 417; *Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856; *Seiberling v. Newlon*, 16 Ind. App. 374, 45 N. E. 151; *Massachusetts Loan & T. Co. v. Welch*, 47 Minn. 183, 49 N. W. 740; *McCormick Harvesting Mach. Co. v. Machmuller*, 1 Herdman (Neb.) 80, 95 N. W. 507; *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Herdman (Neb.) 605, 95 N. W. 850.

It is a well-settled rule that an agent having power and authority to sell a machine under a contract which contains conditions for the benefit of the seller has authority to bind his principal by a waiver of such conditions. *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *Warder v. Robertson*, 75 Iowa, 585, 39 N. W. 905; *McCormick Harvesting Mach. Co. v. Brower*, 88 Iowa, 613, 55 N. W. 537; *D. M. Osborne & Co. v. Backer*, 81 Iowa, 375, 47 N. W. 70; *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96.

The Peterson Case is also authority for the proposition that the personal knowledge of the agent that the machine sold by him fails to do good work renders unnecessary any written notice to him of such fact, although required by the strict terms of the contract of sale.

Nor is the application of this rule to be avoided by the clause of the contract providing that “no person has any authority to add to, abridge, or change this warranty in any manner.” The proposition is entirely too broad and sweeping to be effective. *D. M. Osborne & Co. v. Backer*, 81 Iowa, 375, 47 N. W. 70; *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96.

The appellant is a corporation which can

act only through agents and employees. It cannot divest itself of the power to waive a condition made for its benefit, and that power can be exercised only through some agent. These men were its servants, working in its interest, and must be presumed to have had the authority usually exercised by other agents under similar circumstances. To say that its agents were vested with the mere, naked power to sell and deliver, without any authority to waive or modify any term of the printed contract, would be, as is well said in the *Pitsinowsky Case*, "to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith." The stipulation in the contract which reserved the right to "the Plano Manufacturing Company, and the agent through whom ordered, to send a competent person to remedy the difficulty," is, in itself, a recognition of the authority of the agent to act in the premises. Hence, when, after the expiration of the two-day limit, the company or its agent exercised the right thus reserved to send its expert to take charge of the machine and to remedy its alleged defects, it is quite certain that this act, if not an admission of due notice, is sufficient, under the authorities cited, to uphold the plea that such limit was waived.

We may also say in this connection that as late as December 24, 1901, the appellee wrote a letter to the appellant, informing it that its expert and agents had been laboring for weeks to make the machine do good work, but without success, and that they had requested him to "keep on" with the trial. The letter further states his discouragement and dissatisfaction with the results produced, but offers to persevere in the trial, if the company will remedy the defects complained of. This letter was answered by the appellant under date of December 28th. In this answer it in no manner disavows or repudiates the acts of its agents or expert, but proceeds to give directions and advice concerning the management of the shredder. The correspondence thus disclosed is a significant circumstance, indicating that appellant's representatives were acting with its knowledge and approval. Within a few days after the receipt of this letter the appellee returned the machine to the agent's warehouse in Webster City. Was the return too late to comply with the terms of the contract? The contract provided no specific limit of time in which the return should be made. It did provide that if, after notice of the failure of the machine to fail to work as

warranted, and opportunity given to the appellant and its agent to send a competent person to remedy the defects, the machine still failed to satisfy the warranty, it was to be returned by the purchaser to the place where he received it. Now, so long as the appellant's agents and experts continued to work with the machine and hold out encouragement to the appellee that it would be made as warranted, we think he was justified in postponing its return. *Gaar, S. & Co. v. Stark* (Tenn. Ch.) 36 S. W. 149; *Walter A. Wood Mowing & Reaping Mach. Co. v. Calvert*, 89 Wis. 640, 62 N. W. 532. Those efforts continued down to within a short time before the return was actually made. About this time appellee, as we have seen, addressed the company directly, rehearsing his troubles with the machine, and asking that someone be sent direct from the house to see it and make it good, if possible. The answer was of a character to invite still further trial, and we cannot say, as a matter of law, that the return of the machine five days later was not in reasonable time. *Warder B. & G. Co. v. Horne Bros.* 110 Iowa, 285, 81 N. W. 591; *McCormick Harvesting Mach. Co. v. Russell*, 86 Iowa, 556, 53 N. W. 310.

Counsel argue with much earnestness that appellee kept and used the machine long after he had fully concluded it was not as warranted, and after he had made up his mind to return it. If this be so, then counsel is undoubtedly correct in saying that the right to rescind was lost. But for this court to say that such fact is established would be to invade the province of the jury. Taking some isolated sentences or expressions from the testimony of the appellee, this charge of duplicity may have some support; but, viewing it as a whole, and looking to his entire story, with the corroboration afforded by facts and circumstances developed on the trial, we think the jury could fairly find that he acted in good faith, and that the continued trial of the machine was induced by the conduct and assurances of appellant's representatives. Indeed, we see no good reason to doubt that the protracted experimentation with the machine was persisted in by both parties in an honest desire to give it a thorough and fair trial. That appellee began to have doubts as to its successful operation soon after the work began may be admitted. Certain it is he was not satisfied with it; and that he had good reason for dissatisfaction is demonstrated by the appellant's continued and unremitting efforts to remove the ground of his objection. But his dissatisfaction is not inconsistent with the continuation of the trial in good faith to give the appellant and its agents the amplest opportunity to

make good the warranty. Indeed, so far as the record discloses, there was no apparent reason or inducement for the appellee to continue the use of the machine while secretly intending to return it. There is no showing that its operation was attended with any profit to him; but on the contrary, the evidence indicates that it was productive only of loss.

Counsel's assumption that appellee, after refusing to give security upon his notes pursuant to a demand made on January 2, 1902, and after announcing his intention to return the machine, continued to use it, is not borne out by the record. At least, such proposition is not undisputed. Indeed, the work performed on the day named seems to have been done at the request of appellant's agent, and, if so, it would not deprive appellee of his right to rescind. The rights of the appellant were fairly guarded by the instructions of the court, and in this respect, as well as in those which have already been considered, the verdict is sustained by the evidence. It is to be remembered that the conditions attached to the warranty are framed by the seller to limit his liability, and restrict the benefit thereof to the buyer. It is a settled rule that such conditions are to be strictly construed against the party in whose interest they are made. *Parsons Band Cutter & Self-Feeder Co. v. Gadeke*, 1 Herdman (Neb.) 605, 95 N. W. 850; *Meyer v. Fidelity & C. Co.* 96 Iowa, 385, 59 Am. St. Rep. 374, 65 N. W. 328.

3. It is contended that, conceding the alleged waiver of the written notice of failure of warranty, appellee had no right to return the machine, and that his only remedy was in an action for damages. Such is not our view of the rights of the parties under their contract. Without again reciting its language, we may say in general terms that it provides for a notice to be given, following which the appellant is to have reasonable time to remedy the defects, and, upon failure so to do, the appellee may then return the machine. The time when the right to return must be exercised depends upon the expiration of the period in which the appellant might rightfully continue its efforts to make the machine conform to the warranty. It did not necessarily depend upon the giving of the notice; for the parties could waive the notice and the appellant proceed with its attempt to remedy the defects for a reasonable period, or so long as the parties should mutually consent thereto. The waiver of the notice has no effect upon the stipulation for a return; for that right, as we have seen, accrues only when the appellant has ceased its endeavor to remedy the defect, and has failed so to do. The appellant did not in fact relinquish its

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attempt to make this machine work until a very short time before appellee returned it; and whether the return was made within a reasonable time thereafter was for the jury to determine.

4. To the appellee's cross petition the appellant pleaded in abatement that *Permelia J. Dutcher*, who executed the contract of purchase with *William J. Dutcher*, was a necessary party to the determination of the matters stated in the cross petition, and not being a defendant in the main action, and therefore not entitled to unite in the cross petition, it should be dismissed. The appellee alleged that said *Permelia J. Dutcher* signed the order or contract for the machine as surety only, and was in no manner interested in the matters in controversy, save as such surety. The proof offered on the trial sustains the appellee's allegation in this respect, without controversy. *Permelia J. Dutcher* also appeared and filed a pleading disclaiming any interest in the machine or in the cause of action set up in the cross petition. Under this state of record the plea in abatement cannot be upheld. That, in an action upon a promissory note brought by an innocent holder, the maker may, by cross petition, implead the payee and recover from him upon a cause of action growing out of the transaction in which the note was given, and which might have been the subject of set-off or counterclaim, were the principal action brought by such payee, has been decided by this court. *Mahaska County State Bank v. Christ*, 82 Iowa, 56, 47 N. W. 886, 87 Iowa, 415, 54 N. W. 450. If then, the defendant *Dutcher* was in fact the purchaser of the machine, and, as between him and his mother, she was surety only, we think there is no rule of law which prohibits the pleading and proof of that fact. In an action brought by the seller upon the contract, it is possible that the rule which prohibits parol testimony to vary the terms of a written agreement would prevent the pleading or proof of such suretyship to the prejudice of the seller. The plaintiff in such case would have the right to rely upon the writing as executed; but, in so far as the relation of the two apparently joint purchasers to each other is concerned, it is always competent to show that one of them stands in the relation of surety to the other. This is true, even after judgment has been entered against both as principals. *Atlee v. Bullard*, 123 Iowa, 274, 98 N. W. 889; *Hill v. King*, 48 Ohio St. 75, 26 N. E. 988. If the appellant had any interest in having *Permelia J. Dutcher* made a party to the controversy, it was to protect itself against any possible claim by her in another action founded upon the same breach of warranty. Therefore, when she voluntarily appeared

and put herself on record as disclaiming all right and interest in the matter, we think the plea in abatement ceased to have merit.

5. When the pleadings were finally settled, and before trial was begun, the appellant moved to have the cause set down for trial as an equitable action. This motion was overruled, and the appellant appealed from said order, and filed a supersedeas bond. This, it is said, deprived the court of jurisdiction to proceed with the trial to a jury, and the judgment rendered upon the verdict is therefore void. The order appealed from was self-executing, requiring no writ or process of any kind to carry it into effect. There was nothing to supersede by the giving of a bond, and the filing of such an instrument could have no effect to deprive the court of jurisdiction to proceed with the trial. See second paragraph of the opinion in *Allen v. Church*, 101 Iowa, 123, 70 N. W. 127. To hold otherwise, and say that, by appealing from an interlocutory ruling, a party may deprive the trial court of jurisdiction to take any further step in the case until, in the slow course of appellate procedure, it is remanded, only to begin another round through the appellate tribunal from the next adverse ruling, would be to deprive courts of the power to administer substantial justice, and prolong litigation until *Jarndyce v. Jarndyce* would cease to be any exaggeration of the law's delays. Of course, the party who proceeds with a case after his adversary has taken an interlocutory appeal assumes the risk of the effect which an adverse decision by the appellate court may have upon his rights; but that risk is often preferable to waiting until time and change have deprived the main issue of significance and value. There is little to choose between indefinite delay and absolute denial of right. Owing to variance in the terms of the practice acts in the several states, we do not derive much aid from decided cases in determining to what extent an appeal from an interlocutory order affects the jurisdiction of the trial court. But, as affording more or less direct support to the conclusion we have announced, see *People ex rel. Scannell v. Whitney*, 47 Cal. 584; *Ford v. David*, 3 Abb. Pr. 385; *Fisk v. Albany & S. R. Co.* 41 How. Pr. 365; *Bramley v. Tyree*, 1 Lea, 531; *Barrow v. Rhinelander*, 3 Johns. Ch. 120; *Gorham v. Farson*, 18 Ill. App. 520; *State v. First Dist. Ct. Judge*, 17 La. 511; *Forbes v. Tuckerman*, 115 Mass. 115; *Barker v. Wing*, 58 Barb. 73; *Henry v. Henry*, 4 Dem. 253; *Sheaffer's Appeal*, 100 Pa. 379; *Barton v. Long*, 45 N. J. Eq. 161, 16 Atl. 683; *Atlantic Ins. Co. v. Lemar*, 10 Paige, 506.

It should be said in this connection that, 1 L.R.A. (N.S.)

in any case where an interlocutory appeal is taken from some ruling not involving the merits of the controversy, and not subject to supersedeas under the statute, the trial court doubtless has the inherent power to order a stay of proceedings pending the disposition of the appeal, either upon its own motion or upon application by a party. No such order was asked in this case. The only question raised is one of jurisdiction.

Other errors are assigned, but none, except those to which we have referred, are argued. We have, however, examined the entire record in the light of the points thus made, and find no prejudicial error.

The judgment of the district court is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

COMMONWEALTH OF VIRGINIA, For Use of A. M. VICARS, Plff. in Err.,
v.

W. G. WAMPLER et al.

(... Va. ...)

Assignment—of judgment—effect.

The assignment of a judgment does not carry with it a right of action against an officer and the sureties on his bond for failure, prior to the assignment, properly to return a forthcoming bond upon the judgment, notwithstanding a statute making choses in action assignable, and authorizing the assignee to maintain any action which the original obligee might have brought.

(September 14, 1905.)

ERROR to the Circuit Court for Wise County to review a judgment in favor of defendants in an action brought to recover damages for failure properly to return a forthcoming bond. Affirmed.

The facts are stated in the opinion.

Messrs. Vicars & Peery, for plaintiff in error:

The original judgment creditor could have maintained this action before the assignment

Case Note.—The authorities cited and discussed by the court in the case of *COM. USE OF VICARS v. WAMPLER* have been cited in other cases, but on different questions. Some cases not cited by the court in the above case also pass on the question of what incidental rights pass by the assignment of a judgment. Without exception, none of the authorities sustain the right of the assignee to a litigious claim against a third party for damages arising before the assignment, as an incident to the assignment of the judgment. In general, the only incident which passes is some security

of said judgments to appellant, and appellant, who is the assignee of said judgments, and the only party now interested in the collection of same, can maintain in his own name any action which the original judgment creditor could have maintained before said assignment.

Va. Code 1887, § 2860; Freeman, Judgm. § 431; Citizens' Nat. Bank v. Loomis, 100 Iowa, 266, 62 Am. St. Rep. 571, 69 N. W. 443; Bolen v. Crosby, 49 N. Y. 183; Allen v. Clark, 40 N. Y. S. R. 175, 21 N. Y. Supp. 338; 141 N. Y. 584, 36 N. E. 345.

Messrs. Ayers & Fulton, for defendants in error:

The assignment did not carry the liability of the officer.

Com. v. Fuqua, 3 Litt. (Ky.) 41; Timberlake v. Powell, 99 N. C. 233, 5 S. E. 410; Robinson v. Towns, 30 Ga. 818.

Whittle, J., delivered the opinion of the court:

The single question presented by this record is whether the assignee of a judgment is entitled to maintain an action for damages against an officer and the sureties on his official bond for a breach of the condition

for the debt, and not a collateral right of action.

Thus, in Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. 879, the assignment of a judgment in replevin was held to operate as an assignment of the bond given to obtain a return of the property.

But in Forrest v. O'Donnell, 42 Mich. 556, 4 N. W. 259, it was held that the legal title to the bond did not pass by the assignment of a judgment in attachment.

In Ullmann v. Kline, 87 Ill. 268, the court held that the assignment of a judgment after an appeal in equity carried with it the security given by the appeal bond in case of affirmance. But the contrary is held in Re Silvary, 127 Cal. 226, 59 Pac. 571, in which an appeal bond was not a necessary incident to the assignment of the judgment.

In Hagemann's Appeal, 88 Pa. 21, the court held that the assignee of a judgment recovered on a lien filed by the city for the nonpayment of assessments for street improvements took the assignment with the priority which the municipal lien possessed in the hands of the municipality.

And in Thompson v. First State Bank, 102 Ga. 606, 29 S. E. 610, an assignment of a judgment recovered by the payee upon one or more of a series of notes given for the purchase money of land was held to pass to the assignee the vendor's special lien as one of its incidents.

In Bolen v. Crosby, 49 N. Y. 183, it was held that the assignment of a judgment against a corporation for services rendered to it carried with it the remedy against the trustees allowed by statute when they

thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the force of a judgment against the obligors therein.

Upon demurrer to the declaration the trial court resolved that question in the negative, and rendered judgment for the defendants. Whereupon the plaintiff brings error.

The authorities are generally agreed that the assignment of a judgment carries with it "the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment and all its incidents." Freeman, Judgm. § 431.

Upon the same principle the assignment of a note carries with it all securities provided for its payment.

The doctrine is founded upon the theory that the debt is the principal thing and the security an accessory. They are not severable, and the security passes by virtue of the assignment as an inseparable dependent incident. Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313.

It will be observed that the present in-

neglect to comply with its provisions requiring a report.

In Burns v. Mangert, 16 Mo. App. 22, the assignee of a judgment took the assignor's right to enforce the judgment by supplemental proceedings.

And also in Frost v. Parker, 65 Iowa, 178, 21 N. W. 507, the court held that the assignment of a judgment on the husband's note, which was given for an organ, carried the right to subject the property of the wife to the payment of the judgment, where the organ was used in the family, and so became a "family expense," for which the wife's property was liable by statute.

Some additional cases which also pass on the same question are Griffin v. Camack, 36 Ala. 695, 76 Am. Dec. 344; Ritter v. Cost, 99 Ind. 80; Goodman v. Pence, 21 Neb. 459, 32 N. W. 219; Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180.

In 2 Freeman on Judgments, § 431, it is stated that an assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interest of the assignor in the judgment, and all its incidents. The same rule is stated in Black, Judgm. §§ 948, 951, 952, and in 17 Am. & Eng. Enc. Law, p. 882.

Cyc. Law & Proc. vol. 4, p. 72, states that, as an incident to the assignment of a judgment, the claim upon which the judgment is founded and all of the remedies incidental thereto pass by the assignment. Citing Bolen v. Crosby, 49 N. Y. 183; Hagemann's Appeal, 88 Pa. 21; Frost v. Parker, 65 Iowa, 178, 21 N. W. 507; and Barker v. Gilliam, 5 Iowa, 510.

quiry does not involve the power of the judgment creditor to assign the right of action in question, but whether that right passed to the assignee as an incident to the assignment of the judgment.

Citizens' Nat. Bank v. Loomis, 100 Iowa, 266, 62 Am. St. Rep. 571, 69 N. W. 443, is the only case to which our attention has been called which directly sustains the pretension of the plaintiff in error. In that case it was held that "the assignment of a judgment in an action in which an attachment has been allowed and property seized thereunder passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in the care of the property seized by allowing a disposition to be made of it."

The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee. Again, it is assumed that the right to sue for the previous dereliction of the officer is a necessary incident to the judgment; and therefore, under the principle adverted to, passed by the assignment.

Bouvier, in defining the word "incident," observes:

"This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hilliard, Real Prop. 243); while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant (1 Washb. Real Prop. 54). So a court baron is inseparably incident to a manor, in England. Kitch. 36; Co. Litt. 151.

"All nominate contracts and all estates known to common law have certain incidents which they draw with them, and which it is not necessary to reserve in words. So, the costs incurred in a legal proceeding are said to be incidental thereto." 1 Bouvier Law Dict. Rawle's Rev. 1006.

It will be seen from the foregoing definition and illustrations, that the distinguishing characteristic of an incident consists in the fact that it "usually or naturally and inseparably depends upon, appertains to, or follows" its principal.

The distinction as to what does and what does not pass by incidental assignment is, in some instances, nice and difficult to draw; but, in order for it to pass, the incident must, in a legal sense, constitute a security for the debt, and that can hardly be predicated of a mere collateral right of action against a

public officer for a quasi tort in failing to discharge an official duty although his misconduct may affect the value of the judgment.

Accordingly, the supreme court of Kentucky, upon a similar state of facts, held that "the assignment of a judgment could not operate to transfer the right to recover for such an injury, for a right to compensation for such injury and the right to the judgment are separate and distinct rights. They are separate and distinct, not only in their origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury may, indeed, be said to be incident to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment at the time the injury was done, but it is clearly not such an incident as must necessarily pass by the assignment of the judgment." *Com. v. Fuqua*, 3 Litt. (Ky.) 41.

In *Redmond v. Staton*, 116 N. C. 140, 21 S. E. 186, it was held that: "The clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands. The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands." The court then cites with approval the case of *Timberlake v. Powell*, 99 N. C. 233, 5 S. E. 410, as analogous authority, where the court says: "The present suit is not upon the judgment, but upon an alleged independent liability incurred by other tortfeasors. . . . This cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment."

In *Robinson v. Towns*, 30 Ga. 818, the court held that the assignment of the judgment did not pass any interest in the money which the sheriff had previously collected on the judgment. The court, at page 822, observes: "It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the sheriff had previously collected on it. The assignee acquired, and they lost, the right to enforce the judgment as it stood at the time of the assignment; that is to say, the right to collect what was still due . . . [at the time of the assignment] out of the defendants in it. Money previously collected and held by the sher-

iff would not be reached by an exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted a debt from the sheriff to the plaintiffs, to be enforced by a rule or suit against him."

While the Virginia statute has enlarged the rule of the common law so as to make choses in action assignable, and authorizes the assignee to maintain in his own name any action which the original obligee, etc., might have brought, it does not create new causes of action, and has no application to cases in which there is no assignment.

It would, in our judgment, be impolitic to extend the scope of the statute by judicial construction, so as to allow the assignment of a chose in action to invest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.

The conclusion reached in this case is not in conflict with the decision in *National Valley Bank v. Hancock*, 100 Va. 101, 57 L. R. A. 728, 93 Am. St. Rep. 933, 40 S. E. 611, where the court recognizes the established general doctrine that a mere right *in litem* is not the subject of incidental assignment, but enforces a qualification of the rule called for by the facts of the particular case. In that case the debtor, without consideration, in the interest of his children, divested himself of property, to the prejudice of creditors. The diversion as to them was void, and hence they, or their assignees, had the right to follow the property or its proceeds, and subject it to their debts in the hands of the alienee. The debtor's individual liability and diverted property were securities for the debt, and passed as incidents to the assignment.

The case under consideration is wholly different. The effect is not to hold the debtor or his property liable, but to maintain an action to recover damages on an individual liability of a third person to the judgment creditor.

The judgment complained of is without error, and must be affirmed.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON ex rel. C. M. NETTLETON, Resp't.,

v.

OTTO A. CASE, Appt.

(.... Wash.)

1. Taxation—classification of property.

Property cannot be classified according to the value of its owner's estate, so that it shall bear a greater percentage of taxation 1 L.R.A. (N.S.)

than is assessed against similar property which forms part of a smaller estate.

2. Probate court—fees of clerk.

An arbitrary standard for the measurement of the value of services of the clerk of the probate court according to the value of the estate to be administered cannot be adopted by the legislature.

3. Taxation—clerk's fees—constitutional law.

A statute requiring payment of fees upon property coming before the probate court in proportion to the value of the estate, which are to be turned into the county treasury, and become part of the public funds, provides a tax on property within the meaning of a constitutional provision that the rate shall be equal and uniform.

4. Statutes—entitling.

A title, An Act Relating to Fees of Officers, Witnesses, and Jurors, will not cover a provision exacting an *ad valorem* charge or tax from the property of estates coming before the probate courts.

(July 14, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for King County in favor of relator in a proceeding to compel defendant to receive and file papers for the administration of partnership estate. Affirmed.

The facts are stated in the opinion.

Messrs. Kenneth Mackintosh and Ernest B. Herald, for appellant:

The legislature has absolute power to determine the amount and reasonableness of an official fee.

Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

The fees herein complained of are reasonable.

27 Am. & Eng. Enc. Law, 2d ed. p. 294; 2 Bl. Com. 211.

The legislature may give or take away the whole of an estate, or may distribute it as it sees fit.

Mixter's Estate, 28 W. N. C. 182.

The rule of equality and uniformity, even in cases of taxation of property, does not forbid a liberal classification.

State v. Clark, 30 Wash. 447, 71 Pac. 20; *State v. Sharpless*, 31 Wash. 196, 96 Am. St. Rep. 803, 71 Pac. 737; 21 Am. & Eng. Enc. Law, 2d ed. p. 808.

Messrs. Allen, Allen, & Stratton, for respondent:

Fees of officers are taxes.

Manning v. Klippel, 9 Or. 369; *Harrison v. Willis*, 7 Heisk. 35, 19 Am. Rep. 604; *State v. Howran*, 8 Heisk. 824; *Cooley, Taxn* 2d ed. p. 31.

This case is ruled by *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948; *Faljo v. Pfister*, 117 Cal. 83, 48 Pac. 1012.

Hadley, J., delivered the opinion of the court:

The relator applied to the superior court for a writ of mandate directed to the county clerk of King county, requiring him to receive and file certain papers in probate proceedings. An alternative writ was issued. By the demurrer to the petition and alternative writ the following facts are admitted: D. McL. Brown died in King county on the 23d day of January, 1905, he being, at the time of his death, a member of the partnership consisting of himself, W. A. Brown, D. A. Brown, and C. M. Nettleton, doing business under the firm name of Seattle Bridge Company. Thereafter the said Nettleton was duly appointed as administrator of said partnership estate, and he qualified as such. An inventory and appraisement of the estate were duly prepared, the appraise-

ment showing the valuation of the property belonging to the partnership at \$127,655.50. The administrator presented the inventory and appraisement to the clerk for filing, whereupon the latter demanded that the administrator should pay the sum of \$225 as probate fees, and refused to file the papers until said sum should be paid to him. Thereafter the administrator also prepared a petition for an order to sell certain real estate belonging to the partnership, and thereupon tendered the petition to the clerk for filing, together with filing fees; but the clerk refused to file the same, or to accept the sum tendered otherwise than on account of part payment of said demand of \$225. The demurrer challenged the sufficiency of the above-recited facts to authorize the issuance of the writ of mandate, and the same was overruled. The clerk declined to further-

Case Note.—That an ad valorem charge imposed upon an estate in connection with probate proceedings is, in effect, a tax, has also been decided in *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, which holds that a percentage of all estates of decedents exceeding \$3,000 in value, in counties having more than 150,000 inhabitants, required by chap. 176, Laws of 1889, to be paid to the county treasurer for the use of the county, is a tax within §§ 31, 32, art. 4, Const., prohibiting special laws for assessment or collection of taxes, and providing that general laws for such purposes shall be uniform in their operation throughout the state. The decision rests on the argument that nothing prevented the money so paid from being applied to general public purposes, and that the amount of the exaction was in no way dependent upon the amount or value of the services of the judge or register of probate, but depended entirely upon the valuation of the estate.

But where a fee, although paid into the state or county treasury, is manifestly for the purpose of reimbursing the government at the expense of the persons especially benefited, it is not usually regarded as a tax within the meaning of constitutional provisions relating to taxation.

A fee imposed by statute for each original writ and execution issued out of any court, and for each certificate of record of recorded instruments is intended to reimburse the county for its expenditures in furnishing the office, registration books, etc., and is not a tax within the meaning of the constitutional requirement that all property, etc., shall be taxed ad valorem. *See County v. Abrahams*, 34 Ark. 166.

Stat. 1885, chap. 85, regulating the fees and compensation of county officers in various counties, does not violate § 20, art. 4, of the Constitution, which prohibits the enactment of local or special laws for the assessment and collection of taxes for state, county, and township purposes. *Suen prohibi* L.R.A. (N.S.)

tion "was only intended to apply to laws regulating the method of assessing and collecting taxes for the purpose of general revenue." *State ex rel. Williams v. Fogus*, 19 Nev. 247, 9 Pac. 123.

Nor is such provision violated by an act allowing larger fees to officers in one county than are allowed by the general statutes. *Comstock Mill & Min. Co. v. Allen*, 21 Nev. 325, 31 Pac. 434.

The act of February 8, 1850, providing for the payment, to a board of land commissioners appointed to investigate and report to the legislature upon titles based upon Spanish grants, of certain fees by those who should avail themselves of its provisions, does not levy a tax within the meaning of § 27, art. 7, Constitution of 1845, which provides that all taxation shall be uniform and equal. *Baldwin v. Goldfrank*, 88 Tex. 249, 31 S. W. 1064, Affirming 9 Tex. Civ. App. 269, 26 S. W. 155.

Inspection fees are regarded as an exercise, not of the taxing, but of the police, power, as a mode of making a business contribute to the expense of its proper police regulation.

It is accordingly held, in *Willis v. Standard Oil Co.* 50 Minn. 290, 52 N. W. 652, that the fees imposed by chap. 90, Laws 1876, as amended by chap. 246, Laws of 1889, for the inspection of mineral illuminating oils, which provides that the fee for inspecting oil in tanks shall, for each 50 gallons, be the same as prescribed for each barrel, which fees are collected by the inspector, and paid into the state treasury, are not taxes within the constitutional provision requiring taxes to be as near equal as may be, and to be levied on a cash valuation.

Act No. 37 of the extra session of 1877, empowering the board of health in New Orleans to collect a fee of $\frac{1}{4}$ of a cent a gallon and $12\frac{1}{2}$ cents per barrel for inspecting illuminating oils, does not contravene the provision of art. 118 of the Constitution, that "taxation shall be equal and uniform throughout the state." forbidding specific-

answer, and it was thereupon ordered that a peremptory writ of mandate should issue, commanding him to immediately file the papers mentioned. From said order he has appealed.

The appeal involves the constitutionality of an act of the legislature of 1903 relating to the fees of state and county officers, witnesses, and jurors. See Sess. Laws 1903, chap. 151, p. 290. That portion of the act particularly involved here relates to the charges in probate proceedings, and will be found at pages 293, 294, of said Session Laws. The trial court held the said provisions to be unconstitutional. It will be observed that the statute requires the payment of \$5 in probate proceedings at the time the

first paper therein shall be filed. In addition to the above amount, a graduated schedule of fees is provided. Increased amounts are chargeable to estates of \$1,000 or more. The sum to be paid increases according to the value of the estate involved, the amount to be determined by the appraisement returned into court. When the amount of the estate is \$1,000 or more, and less than \$2,000, the additional sum required is \$25. The amount is thereafter increased, based upon stated estate values, until the valuation reaches \$50,000 or more, and less than \$100,000, in which case the sum of \$125 shall be paid. It is then provided that estates exceeding \$100,000 shall pay in addition to the said \$125 the sum of \$50 for each additional

taxation, and requiring that all property shall be taxed ad valorem. *Clarke v. Board of Health*, 30 La. Ann. 1351.

And the view is sometimes taken that constitutional requirements that taxation shall be uniform and equal, or by valuation, are intended to apply only to the taxation of property, and not to fees.

So, § 26, chap. 22, General Statutes of 1873, providing for the payment, upon the commencement of any suit in the supreme court, of the sum of \$10, which is ultimately remitted to the state treasurer, is not obnoxious to § 1, art. 9, of the Constitution, providing that the mode of levying taxes shall be by valuation. *State ex rel. Atchinson & N. R. Co. v. Lancaster County*, 4 Neb. 537, 19 Am. Rep. 641.

Nor is such provision contravened by an act providing that the fees of certain county officers in excess of certain amounts shall be paid into the county treasury. *State ex rel. Hamilton County v. Ream*, 16 Neb. 681, 21 N. W. 398.

A stenographer's fee required by § 6, chap. 189, Laws of 1885, to be paid into the county treasury in each case in the district court in any county in which a stenographer shall be appointed, which is applicable whether any stenographer's services are required or not, is not a tax within the purview of § 1, art. 11, of the Constitution, which provides that the legislature shall provide for a uniform and equal rate of assessment and taxation, "it not being a burden imposed upon property, to raise money for public purposes." *Beebe v. Wells*, 37 Kan. 472, 15 Pac. 565.

In direct opposition to the view that a fee imposed for the purpose of providing a fund from which the salary of the officer whose services are required may be paid is not a tax is the case of *Manning v. Klippel*, 9 Or. 367, which holds that the act of October 25, 1880, establishing a table of fees for services performed by the salaried sheriff and clerks of certain counties, different from that established for other counties, which fees are paid into the county treasury, contravenes the provision of subd. 10, art. 23, of the Constitution, that the

legislative assembly shall not pass local or special laws for the assessment and collection of taxes for state, county, township or road purposes. The court argues that the services of these officers are public services, performed at the command of the state; that since their salaries were formerly paid out of funds raised by general taxation, the raising of money for the same purpose in another way is, of necessity, an exercise of the taxing power. The authority of this case, as is remarked in *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5, is very much impaired by subsequent decisions.

One of these is *Northern Counties Trust v. Sears*, 30 Or. 388, 35 L. R. A. 188, 41 Pac. 931, in which it was said apropos of a constitutional requirement that acts for raising revenue must originate in the lower house: "A law which requires a fee to be paid to an officer, and finally covered into the treasury, of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of a good government, which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue."

In *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5, it is held that the constitutional provision referred to in *Manning v. Klippel*, 9 Or. 367, is not violated by an act (Law 1889, p. 140) providing for the payment of certain court fees to certain officers in all counties having more than a stated population, which fees are turned into the county treasury. It is distinguished from *Manning v. Klippel* on the ground that the act makes no provision, either directly or by implication, as to the disposition of the fees required to be paid, except that they shall be paid into the county fund, and, as a consequence, become a part of the general assets of the county,—thus placing the decision that such a fee is not a tax on the very ground on which other courts have been inclined to hold that it is one.

\$20,000 valuation above \$100,000. The estate at bar, as we have seen, is valued somewhat in excess of \$127,000, and the fee demanded by the clerk was \$225. Whether the amount demanded is excessive, even under the terms of the statute, we shall neither discuss nor decide, since that matter is not discussed by counsel. The constitutionality of the statute is alone considered in the briefs.

The increased fees provided by the statute are based upon an *ad valorem* theory, and regulated according to the amount of property owned by an estate. It was the view of the trial court that charges so exacted amount to a property tax, and that the statute therefore violates our state constitutional provisions with respect to the uniformity of property taxation. Section 1 of article 7 of the Constitution provides that "all property in the state, not exempt under the laws of the United States or under this Constitution shall be taxed in proportion to its value, to be ascertained as provided by law." Section 2 of the same article also requires that "the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a uniform valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property." Section 9 of the same article also contains the following: "For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." It does not appear that the property of the estate at bar is exempt from taxation under the first constitutional provision above quoted, but it is subject to the burden thereof, and must be taxed uniformly with other property, according to its value. If, therefore, the charges imposed by the statute in question are in the nature of a tax upon the property, they would seem to impose a burden thereon in addition to that borne by property in general. Appellant argues that, even in cases of taxation, the rule of equality and uniformity does not forbid a liberal classification, and that, since this law classifies estates according to their value, all in each particular class are affected alike. He cites *State v. Clark*, 30 Wash. 439, 71 Pac. 20, and *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737. Neither of said cases relates to property taxation. The first discusses the inheritance-tax law, and expressly holds that such a tax is not a property tax, but is a mere charge for the privilege of succession

to the ownership and enjoyment of property; following *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, which expressly distinguished such a charge from property taxes, which must be uniform and equal under the state Constitutions. The second case cited discusses a license or occupation-tax statute. Such statutes do not provide for property taxes, but are usually based upon the necessity for police regulation. It is true such statutes usually contain revenue features, and some may be entirely for revenue purposes, and not for regulation; yet the exaction of revenue is not a property tax, but is in the nature of an occupation tax for the privilege of conducting a particular business. No authority has been called to our attention which holds that property itself may be so classified that it shall bear a burden greater than that of other property of like value within the same assessment jurisdiction.

If, then, the exactions from estates required by this statute amount to property taxes, we think the statute cannot be upheld. It is provided that the money thus collected shall be paid into the county treasury, and it thus becomes a part of the public funds, like that derived from ordinary taxation. Appellant further argues that the same is true of the ordinary fees collected by the clerk for services rendered; that the charge in question here may be regarded, not as a tax upon property, but as a fee for services rendered; and that the legislature has the right to fix the amount of such fee. It is true the statute calls the charge a "fee," but if it is apparent upon the face of the statute that the charge is in fact not based upon actual and necessary services rendered or to be rendered, but is based entirely upon a property valuation, thereby partaking of the nature of a tax, it would seem to be wholly immaterial by what name the statute may designate it. The statute in terms shows that the charge is based upon the value of the estate; and shall we conclude that the legislature intended to say, in effect, that the amount of actual and required services varies according to the value of the estate only? If the legislature intended to so declare, it cannot be said that the declaration is supported by experience. Can the legislature arbitrarily say that greater service is required in the settlement of an estate valued at \$1,000 than one valued at \$999.99? We think not, and yet such is the exact effect of this statute if it shall be held that these charges are fees for services only. It seems apparent to us that the legislature cannot arbitrarily adopt such a standard for measurement of the value of the services of the clerk in probate proceedings. It is true

our statutes fix the compensation of an administrator according to the value of the estates which comes into his hands, but such a measurement of value, we apprehend, is chiefly founded upon the degree of responsibility assumed,—an element of proper consideration in fixing the value of an administrator's services. No such element exists in the case of the clerk. His services in the premises are purely clerical, and the amount thereof depends upon the filings and records of each particular case, which can in no reasonable sense be said to depend in each given case upon the value of the estate. It seems clear, therefore, that this statute exacts payments regulated by property valuations alone, and that it must therefore be a tax upon property. Taxes are defined to be "burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.'" 27 Am. & Eng. Enc. Law, 2d ed. p. 578. The charges here discussed, and which are imposed by the statute in question, seem to include every element comprehended in the above definition.

Appellant has not called our attention to any decided cases bearing directly upon legislation of a character similar to that here under examination. Respondent, upon the other hand, cites decisions from two jurisdictions which are adverse to such statutes. A statute essentially similar to ours was passed in Minnesota. By the terms of that statute a charge of \$10 was exacted when the inventory valuation of the estate exceeded \$2,000, and did not exceed \$5,000. A charge of \$25 was required when the valuation exceeded \$5,000, and did not exceed \$10,000; and by similar increase the charges were greater for greater valuations. The supreme court of Minnesota held that the statute was unconstitutional in *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948. The court reasoned as follows: "But the sums required by this act to be paid into the county treasury must be regarded as taxes in the ordinary sense of that word and as it is used in the Constitution. They are not, in any proper sense, fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. There is no necessary, natural, or even probable correspondence between the sums to be paid

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(widely different in amounts with respect to estates of different values) and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court. It cannot be assumed upon any ground of probability that the proceedings or services will be different or greater in the case of an estate of the value of more than \$500,000 than in one of the value from \$35,000 to \$50,000, yet, in the former case \$5,000 must be paid; in the latter \$100. . . . The purpose for which such payments are required is strictly public in its nature, being directly 'for the use and benefit of the county,' as the law declares, and indirectly for the support of a court established by the Constitution, with exclusive original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes. In 1895 the legislature of California enacted a similar statute. It was provided that a fee of \$5 should first be paid by all estates and an additional fee of \$1 for each additional \$1,000 in excess of \$3,000 of valuation. In *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012, the statute was held unconstitutional. The court said: "It is perfectly plain that the legislature has attempted by that portion of § 1 above quoted to levy a property tax upon all estates of decedents, infants, and incompetents. The ad valorem charge for filing the inventory is in no sense a fee or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and as to the estates of decedents, it applies not to the distributable residue after payment of debts and expenses of administration, but to the whole body of the estate, and would be collectible, if the law were valid, from an insolvent estate as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is, in this particular, in-

ed for several reasons: (1) It violates § of article 13 of the Constitution in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable. (2) The object of the act is not expressed in its title, and is in no wise germane thereto,—violation of § 24 of article 4 of the Constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title." It will be observed from the closing words of the above quotation that the California statute was also held invalid for the further reason that the subject was not mentioned in its title. The title was essentially similar to that of our own statute, and was as follows: "An Act to Establish the Fees of County, Township, and other Officers, and of Jurors and Witnesses in This State." The title of our statute is as follows: "An Act in Relation to the Fees of State and County Officers, Witnesses and Jurors, and Repealing an Act Entitled 'An Act in Relation to the Fees of State and County Officers, Witnesses and Jurors, and Amending § 2086 of the Code of Washington of 1881,' the Same Being Approved March 15, 1893." Laws 1893, chap. 130, p. 421. By no reasonable exercise of the imagination can it be inferred from the above title that the act treats of the subject of exacting an ad valorem charge or tax from the property of estates. It therefore violates § 19 of article 2 of our state Constitution, which requires that "no bill shall embrace more than one subject, and that shall be expressed in the title."

For the reasons hereinbefore assigned, and also upon authority of decisions cited, we believe the act in question is unconstitutional in the particular here involved, and that the conclusion of the lower court was right. The judgment is therefore affirmed.

Mount, Ch. J., and Fullerton, Crow, and Rudkin, JJ., concur.

NORTH CAROLINA SUPREME COURT.

C. Y. WALKER et al., Appts.,

v.

W. J. MILLER.

(.... N. C.)

1. Deed—to partnership.

Naming as grantee in a deed of real estate a partnership the members of which have

Case Note.—The proposition that a deed naming a partnership as grantee, instead of the partners by their individual names, is not for that reason void, but presents a latent ambiguity which may be explained by parol, is based on the broad rule that parol evidence is admissible when, there being no defect on the face of a written instrument,

died, but the name of which has been perpetuated, and the property kept together by consent of all parties interested, after a sale of the business to strangers, for the purpose of collecting the accounts and settling up the partnership affairs, does not render the conveyance void.

2. Evidence—parol to explain deed to partnership.

Parol evidence is admissible to identify the true owners of property granted by a deed in which a partnership is named as grantee.

3. Ejectment—on equitable title.

An equitable title will support an action of ejectment.

4. Parties—bringing in necessary.

Parties necessary to the administration of substantial justice may be directed to be brought in at any time, either before or after judgment.

(November 7, 1905.)

APPEAL by plaintiffs from a judgment of the Superior Court for Orange County in favor of defendant in an action brought to recover the value of certain crops alleged to have been converted by defendant to his own use. Reversed.

Statement by Connor, J.:

Civil action for the recovery of crops, instituted in justice court, brought by appeal to the superior court, and heard by his honor, Judge Peebles, who, by consent, found the facts respecting the title to the land upon which the crops were grown. For some time prior to 1893, Jas. Webb, Jr., and Jos. C. Webb were engaged in mercantile business as copartners, under the firm name and style of Jas. Webb, Jr., & Bro. Jos. C. Webb died in the year 1893, leaving a last will and testament, properly executed and proven to pass real and personal estate, naming Jas. Webb, Jr., executor, who duly qualified. He bequeathed and devised his entire estate to his widow, Alice Webb. With the full knowledge and consent of said Alice Webb, the surviving partner and executor continued to conduct the said mercantile business under the same name and style. Mrs. Webb did not become a member of the firm, but permitted and consented that the executor should use her husband's estate to carry on the business as it was done prior to his death. James Webb, Jr., died in February, 1904, intestate, leaving as his heirs at law and distributees Mary Webb, his widow, and Brown R. Webb and J. C. Webb, his sons.

The estate of Jos. C. Webb was not settled at the time of the death of said Jas. Webb, Jr. A. J. Ruffin and H. W. Webb were appointed and duly qualified as administrators of Jas. Webb, Jr., deceased. T. N. Webb and J. Cheshire Webb were appointed administrators with the will annexed of Jos. C. Webb, deceased. On the 15th day of February, 1904, the said administrators joined in the publication of a notice to debtors of the firm of Jas. Webb, Jr., & Bro. to make prompt payment, concluding: "We take great pleasure in assuring the old friends and patrons of this firm that the business is to be continued indefinitely under the same style and management, and we earnestly solicit the continuance of your valued patronage, promising to give you at all times the best possible values, together with the most courteous treatment." Neither of the administrators put any money into the business, nor did they intend to form a new firm, but did intend to give notice that the business would be continued, under the firm name and style of Jas. Webb, Jr., & Bro., with the funds belonging to the estates of the deceased partners, which had been invested in said business. This action was taken with the full knowledge and consent of the heirs, distributees, devisees, and legatees of both of said deceased partners. On July 18, 1904, the property and assets of the firm of Jas. Webb, Jr., & Bro. were sold to H. W.

and J. C. Webb. The old firm was continued for the sole purpose of collecting the debts and settling the business. J. Cox Webb was appointed agent to collect the debts due the firm. Jas. Webb, Jr., & Bro. held a judgment against defendant, Miller, duly docketed in Orange county. D. S. Miller held a mortgage on the lands of defendant, W. J. Miller, which he duly foreclosed under power of sale therein. The crops in controversy were growing on the lands at the time of the sale. J. Cox Webb became the purchaser at the sale, paying the purchase price from money collected by him on account of the debts due Jas. Webb, Jr., & Bro., and took deed therefor to Jas. Webb, Jr., & Bro. Soon thereafter Alice H. Webb, widow of Jos. C. Webb, and B. R. Webb, J. Cox Webb, children, and Mary B. Webb, widow, of Jas. Webb, Jr., executed a deed for said land to plaintiffs. The land brought at said sale an amount in excess of the mortgage debt. In an action brought by defendant, W. J. Miller, the administrators of Jas. Webb, Jr., and Jos. C. Webb intervened. The said Miller claimed and recovered, on account of his homestead interest in said land, \$112.75; the balance, \$55, being applied to the judgment held by said administrators. His honor was of the opinion, upon the foregoing facts, that, as the title to the land did not pass by the deed from D. S. Miller to Jas. Webb, Jr., and Bro., the plaintiffs acquired none by

it becomes necessary to fit the description to the person or thing therein intended. Instances of its application are found in cases cited in *WALKER v. MILLER*, where parol evidence was held admissible to identify parties, as follows: In *North Carolina Institute v. Norwood*, 45 N. C. (Busbee, Eq.) 65, the legatee named in a will; in *Lowe v. Carter*, 55 N. C. (2 Jones, Eq.) 383, the subject of a bequest; in *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788, and *Ryan v. Martin*, 91 N. C. 464, the grantor in a deed; and in *Simmons v. Allison*, 118 N. C. 776, 24 S. E. 716, the grantee.

The case of *Murray v. Blackledge*, 71 N. C. 492, cited in *WALKER v. MILLER*, is also cited in *Grabbs v. Farmers' Mut. F. Ins. Assn.* 125 N. C. 389, 34 S. E. 503, an action for the recovery of insurance, which was resisted on the ground that plaintiffs were without insurable interests in the property, the deed to which stood in the name of an unincorporated association. Parol evidence was admitted to show that plaintiffs were members of and composed said association.

Morse v. Carpenter, 19 Vt. 614, quoted from in *WALKER v. MILLER*, has also been cited in *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788; *Menage v. Burke*, 43 Minn. 211, 19 Am. St. Rep. 235, 45 N. W. 155; *Fisk v. Hollander*, MacArthur 1 L.R.A. (N.S.)

& M. 360, holding extrinsic evidence admissible to identify assignees of a patent named in the assignment by surnames only, which constituted their firm name; *Woodward v. McAdam*, 101 Cal. 440, 35 Pac. 1016, sustaining a mortgage to Shoober, Beale, & Co., on the ground that the description of the mortgagees was not inherently uncertain, but merely imperfect, and susceptible of completion by resort to extraneous facts. *Cole v. Mette*, 65 Ark. 506, 67 Am. St. Rep. 945, 47 S. W. 407, which holds parol evidence admissible to identify the grantees in a deed to a firm, the name of which consisted of a union of their surnames; and *Lindsay v. Hoke*, 21 Ala. 542, in which the court said that though the question was not raised in such a way that it was called upon to decide it, it would probably have come to the conclusion that a deed to a firm may be aided by parol proof, showing the particular individuals of which the partnership was composed.

Menage v. Burke, *supra*, cited in the *Walker Case*, is also cited in *A. J. Dwyer Pine Land Co. v. Whiteman*, 92 Minn. 57, 99 N. W. 302, which holds that a deed to a co-partnership, designated by the surnames of the copartners, may be reformed by supplying their Christian names.

deed of Mrs. Alice Webb and others. He rendered judgment dismissing the action. The plaintiffs excepted and appealed.

Mr. John W. Graham, for appellants:

A deed to a copartnership vests the property in the concern, and not the individual members.

Donaldson v. State Bank, 16 N. C. (1 v. Eq.) 103; Murray v. Blackledge, 71 N. C. 494; Charlotte Twp. v. Piedmont Realty Co., 134 N. C. 49, 46 S. E. 723; Simmons v. Blison, 118 N. C. 776, 24 S. E. 716; Patch v. White, 117 U. S. 215, 29 L. ed. 863, 6 Sup. Ct. Rep. 617, 710; Lowe v. Carter, 55 N. C. 2 Jones, Eq.) 383; Ryan v. Martin, 91 N. C. 464; Smith v. Gray, 116 N. C. 311, 21 S. E. 200; Taylor v. Heggie, 83 N. C. 244; Tate v. Green, 100 N. C. 422, 5 S. E. 422; Moore v. Hill, 85 N. C. 218; Hoyt v. Sprague, 103 U. S. 624, 26 L. ed. 590; Franklyn v. Sprague, 121 U. S. 216, 30 L. d. 337, 7 Sup. Ct. Rep. 951.

Connor, J., delivered the opinion of the court:

His honor was of the opinion that there was no such person or partnership in existence as Jas. Webb, Jr., & Bro. at the time of the sale of the land, and upon the elementary proposition that, to constitute a valid deed of conveyance, there must be a grantor, grantee, and thing granted, the deed or paper writing having the form of a deed was inoperative. It is, of course, common learning that the death of a partner in the absence of any stipulation in the articles of copartnership to the contrary, works an immediate dissolution; that the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts, and turn over to his personal representative the share of the deceased partner. We speak only of the personality in this connection. The facts found by his honor show that, upon the death of Jos. C. Webb, his widow, sole legatee, permitted the surviving partner, who was also executor of her husband, to continue the business under the name of the old or original firm. This condition, with her consent, continued for nine years. The only persons interested in the assets, other than creditors, were Jas. Webb, Jr., and Mrs. Alice Webb. His honor finds that Mrs. Alice Webb did not become a member of said firm, so as to be personally responsible for debts incurred after her husband's death. We do not see how this is material to the questions presented upon this appeal, and we do not express any opinion regarding her liability to creditors, notwithstanding her purpose or intention. Certainly she and the executor

were the real, beneficial, and only owners, of the property and the profits accruing from the business. Upon the death of Jas. Webb, Jr., the same arrangement was made and continued by all of the parties in interest. They were all *sui juris*, and we can see no reason why, *inter sese*, it was not competent for them to permit their property, with the consent and co-operation of the administrators, to remain in common and be used for their joint benefit, adopting any name or style agreeable to them for more easily and conveniently carrying out their purpose. The fact that they chose to carry on the business under the name of the old firm does not change their rights. They could, if they had so preferred, have selected any other name. Of course, the old firm, as originally constituted, was dissolved by death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. The fact that they selected the administrators of the deceased partners to manage the business, so far as the questions presented upon this record, is immaterial. It may be that, if debts were contracted, liabilities not contemplated would have attached.

For the purpose of this appeal, the transaction consisted of an arrangement between the distributees and legatees, with the approval of the administrators, to use the property for a joint and common benefit. The widows and children of the deceased partners were the owners, and the administrators were their agents. Viewed from this standpoint, we have parties conducting business in a manner which, in a limited, if not absolute, sense, constituted a partnership adopting a name which, by a reason of being well known and enjoying the confidence of its customers, was valuable to them. It was entirely proper, and not unusual, that they should do so. There was no concealment of the personal status of the parties. They gave notice of the death of the original partners. It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value, to be conducted after their death under its original name. In such cases it is the business of the living owners, and contracts made by or with them, under the name adopted, have all the force and effect as if made in the names of the individuals to whom it belongs. A man, if he chooses, may carry on business in a name other than his own, or, as is said by Erle, Ch. J., in *Maugham v. Sharpe*, 17 C. B. N. S. 443: "It is clear that individuals

may carry on business under any name and style which they may choose to adopt." That a deed to a partnership, in which the partners are not named, is valid, is abundantly established by this and many other courts. In *Murray v. Blackledge*, 71 N. C. 492, the deed was made to "Murray, Ferris & Co." To the objection that the deed was inoperative, because there was no grantee, Rodman, J., said: "But a deed for land is not for that reason void any more than a bond for the payment of money is. It is a latent ambiguity, which may be explained by parol." *North Carolina Institute v. Norwood*, 45 N. C. (Busbee Eq.) 65. In *Morse v. Carpenter*, 19 Vt. 614, the mortgage was made to "Morse & Houghton, of Bakersfield." Parol evidence was received to show that two persons were doing business in Bakersfield under that firm name. Royce, Ch. J., referring to descriptions *ambiguities patens*, said: "There is, however, an important difference between a description which is inherently uncertain and indeterminate and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it." The distinction between a patent and a latent ambiguity is pointed out with his usual clearness by Pearson, Ch. J., in *North Carolina Institute v. Norwood*, 45 N. C. (Busbee, Eq.) 65. In *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788, it is said: "If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument or add new terms to it, but merely fixes and applies terms already contained in it." The same principle controls when the uncertainty or ambiguity is regarding the grantee. The same is held in *Blanchard v. Floyd*, 93 Ala. 53, 9 So. 418, *Coleman, J.*, saying: "If the proof shows that Blanchard & Burrus, a partnership, were the purchasers of the land, . . . they owned, as tenants in common, an equitable interest in the land." In *Menage v. Burke*, 43 Minn. 211, 19 Am. St. Rep. 235, 45 N. W. 155, a mortgage to "Farnham & Lovejoy" was held valid, *Dickinson, J.*, saying: "While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this 1 L.R.A. (N.S.)

case; resort being had, as may be done, to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described." 1 Jones, Conv. 244. In *Maugham v. Sharpe*, 17 C. B. N. S. 462, the deed was executed to "The City Investment & Advance Company." It was objected that as there was no such corporation, the deed was void. Erle, Ch. J., said: "The bill of sale under which the defendants claim purports to convey the property to the City Investment & Advance Company, and not to the defendants by name; and it was contended for the plaintiff that the goods could not pass to Sharpe & Baker. . . . It is clear that individuals may carry on business under any name and style which they may choose to adopt, and I see no reason why the defendants may not do so under the name of the City Investment & Advance Company. . . . A company are Sharpe & Baker, and consequently the conveyance in question is a conveyance to those individuals. I cannot, therefore, say that the deed was inoperative on this ground." *Williams, J.*, said: "In this case I apprehend the meaning of the grant is plain. The deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment & Advance Company. They may or may not be a corporation; but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." *Shep. Touch.* 236.

His honor, in his judgment, cites the case of *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428, in which it is held that a deed to "A. and his heirs." A being dead, is void. This decision is put upon the ground that "heirs" is a word of limitation, and not of purchase. It is said that a deed to "A. or his heirs" would be good, A. being dead, if his heirs could be ascertained. It is well settled that a deed to "A. and his children" is valid to vest the title in them as tenants in common. His honor was of the opinion that "after July 18, 1904, when the goods and store were sold to H. W. Webb and J. C. Webb, no one constituted the old firm of Jas. Webb, Jr. & Co. It then ceased to exist." He therefore concluded that the deed from D. L. Miller conveyed nothing, leaving the legal title in Miller in trust for the administrators. If it be conceded, as his honor concluded, that the old firm ceased to exist, certainly the assets belonged to some one. Jos. C. Webb was appointed agent to collect them. There were no debts to pay. The assets then belonged to the legatees and

distributors of the deceased partners. When J. Cox Webb, in executing the trust reposed in him to collect the assets, purchased the land with the money of his principals, and directed title to be made in the name of the old firm, it is manifest that it was his purpose to put the title in the persons who paid the purchase money. They ratified his act, treating the land as theirs by selling to the plaintiffs. The defendant, W. J. Miller, recognized the status of the title by suing for and receiving from the purchase money his homestead interest. We can perceive no reason why, both upon reason and authority, in the light of the fact found by his honor, the latent ambiguity in the description of the parties in the deed is not removed and the true owners ascertained to be the grantors of the plaintiffs. *Lowe v. Carter*, 55 N. C. (2 Jones, Eq.) 383; *Ryan v. Martin*, 91 N. C. 484; *Simmons v. Allison*, 118 N. C. 776, 24 S. E. 716. It is sometimes said that only an equitable title is conveyed in such cases. The better view, we think, is that which we find sustained by the authorities cited, — that the ambiguity is latent and open to explanation by which the real party is disclosed and the deed treated as if the same were inserted. If, however, the other view be adopted, the same result would follow in this case. It is well settled, under our judicial system, that a party may recover in ejectment upon an equitable title. *Clark's Code*, § 177, and cases cited at page 102. The mortgagee, D. S. Miller, has sold under the power and received the purchase money, more than sufficient to pay the mortgage debt. The mortgagor, W. J. Miller, has received his interest in the surplus. The administrators turned over the assets of the late firm of Jas. Webb, Jr., & Bro. to J. C. Webb to collect for the benefit of the owners. He has, in the discharge of his agency, applied their money to the purchase of the land, and procured a deed to be made, as he understood and intended, to them. They, acting upon the belief that the land was theirs, have sold for a valuable consideration to the plaintiffs. We cannot see how a more perfect equitable title could vest in the plaintiffs. If, as the learned judge thought, the naked legal title still remained in D. S. Miller, certainly no one, save the plaintiffs, can call for it.

There are no unadjusted questions between the administrators and the grantors of the plaintiffs, or between W. J. Miller and either of the parties to the transactions. He does not suggest any reason why the plaintiffs should not recover, save that they are not the real parties in interest. We think that they are the real and only

parties in interest, and are entitled to recover the crops. If, however, D. S. Miller was a necessary party, we can see no reason why he should not be brought in now to perfect the record. The action should not have been dismissed. The court may at any time, before or after judgment, direct other persons to be made parties, to the end that substantial justice be done. While it is true that a justice has no power to administer an equity, the owner of an equitable title may sue in the justice's court. *Lutz v. Thompson*, 87 N. C. 334. Many of the difficulties which obstructed the courts in the administration of justice and necessitated the dismissal of suits because of a divided jurisdiction between courts of law and courts of equity, or the failure to sue out the writ applicable to the right to be enforced, are avoided by the reformed Codes of Procedure. Courts now seek to ascertain the facts, and administer the right to the real party in interest. Amendments are liberally made to enable the court to so mold the judgment that substantial justice is administered.

Upon the facts found by His Honor, judgment should have been entered that the plaintiffs are the owners of the crops in controversy. Judgment will be entered accordingly in the superior court of Orange.

Error.

NEW YORK COURT OF APPEALS.

CHATFIELD LEONARD, Receiver, etc., of
Curtis A. Barnum, Appt.,

v.

CARLTON B. PIERCE, Impleaded, etc.,
Resp't.

(182 N. Y. 431.)

Pleading—action against trustee.

Naming defendant individually in the title, and stating a cause of action against him as trustee, render the complaint demurrable.

(Werner and Bartlett, JJ., dissent.)

(October 3, 1905.)

Case Note.—The case of *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262, is relied upon as an authority for the doctrine that a complaint is demurrable if it states a cause of action against the defendant in a representative capacity, and describes him in the summons in his individual capacity. This case involved a judgment creditor's action against the debtor, his wife, and his assignee, to set aside certain conveyances as fraudulent; pending the action the debtor died, and a supplemental complaint was served, alleging the death of the debtor

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County which overruled a demurrer to the complaint in an action brought to compel an accounting by an alleged trustee. Affirmed.

The facts are stated in the opinion.

Mr. Clarence L. Barber, for appellant:

The complaint alleges a good cause of action against Pierce as trustee.

Soldiers' Home v. Sage, 11 Misc. 159, 33 N. Y. Supp. 549; *Berolzheimer v. Strauss*, 19 Jones & S. 90.

In determining whether a party sues or is sued individually, the court will consider both the title and the allegations.

Collins v. Steuart, 2 App. Div. 278, 37 N. Y. Supp. 891; *Stilwell v. Carpenter*, 62 N. Y. 639; *Beers v. Shannon*, 73 N. Y. 297; *First Nat. Bank v. Shuler*, 153 N. Y. 173, 60 Am. St. Rep. 601, 47 N. E. 202; *Genet v. De Graaf*, 27 App. Div. 238, 50 N. Y. Supp. 442; *Patterson v. Copeland*, 52 How. Pr. 460; *Kley v. Higgins*, 33 Misc. 367, 68 N. Y. Supp. 453; *Wise v. Williams*, 72 Cal. 547, 14 Pac. 204; *State use of Worth County v. Patton*, 42 Mo. 530; *Collins v. Lightle*, 50 Ark. 101, 6 S. W. 596; *Bryant v. Southern R. Co.* 137 Ala. 491, 34 So. 562.

If a complaint alleges a cause of action in favor of the plaintiff or against the defendant individually, but he is described in the title "as executor," those words will be rejected.

and the appointment of his wife as executrix; but no order was entered continuing the action against her in her representative capacity. The court held the judgment fatally defective for an omission to bring in the wife in her representative capacity as a party defendant. There are some points of difference between this case and the case of *LEONARD v. PIERCE*. In the former a cause of action existed against the defendant in her individual capacity, and after her appointment as administratrix another existed against her in her representative capacity. On the other hand, in *LEONARD v. PIERCE*, it did not appear that any other cause of action existed against the defendant except in the capacity in which he was described in the complaint. The case of *First Nat. Bank v. Shuler*, 153 N. Y. 173, 60 Am. St. Rep. 601, 47 N. E. 202, has been cited frequently in other cases, but on questions unlike that involved in *LEONARD v. PIERCE*.

There is no dispute as to the right to consider the pleadings and title together to ascertain the true nature of a cause of action, or to determine the legal character of the party suing or sued. This proposition is sustained in *Beers v. Shannon*, 73 N. Y. 292, and other cases of a similar kind, cited 1 L.R.A. (N.S.)

Litchfield v. Flint, 104 N. Y. 550, 11 N. Y. 58; *Wick v. Jewett*, 26 N. Y. Week. Dig. 529 N. Y. S. R. 477; *Knox v. Metropolis Elev. R. Co.* 58 Hun, 519, 12 N. Y. Supp. 848; *Murray v. Church*, 1 Hun, 50, Affirmed 58 N. Y. 621; *Lehman v. Koch*, 18 N. Y. Civ. Proc. Rep. 301, 30 N. Y. S. R. 224, N. Y. Supp. 302; *Berford v. Barnes*, 45 Hun 255; *Albany Brewing Co. v. Barclay*, 4 App. Div. 342, 59 N. Y. Supp. 65.

Mr. Carlton B. Pierce, *in propria person*

Haight, J., delivered the opinion of the court:

The cause of action as alleged in the complaint was that Pierce, as trustee, be compelled to render an account of the trust funds in his hands, that he be enjoined from making improper investments, and that he be compelled to make restitution of such of the trust funds as had been lost through his fault. In the summons and in the title of the complaint he is named only in his individual capacity, and it is conceded that no cause of action is alleged against him in that capacity. The demurrer is "that there is a defect of parties, in that Carlton B. Pierce, as trustee under the will of Abijah Barnum, deceased, is a necessary defendant," and again, "that the complaint does not state facts sufficient to constitute a cause of action." It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or lia-

by the court in *LEONARD v. PIERCE*. The court in the *Beers* Case said: "That though there be naught in the title of the process or the complaint to give a representative character to the plaintiff, that the facts and averments and scope of the complaint may be such as to affix to him such character and standing in the litigation."

The rule as to fixing the legal character of the party suing is recognized in *Louisville & N. R. Co. v. Trammell*, 93 Ala. 352, 9 So. 870. The complaint in this case was in the name of the plaintiff as administratrix, etc., but the body of the complaint did not expressly state that she was such, although the facts alleged stated a cause of action for the death of "plaintiff's intestate," which, under the statute, could accrue to the plaintiff only in her capacity as personal representative of the deceased. The court sustained the right to recover, because it did sufficiently appear from the complaint that the plaintiff sued as personal representative of the deceased.

In *Adams v. Re Qua*, 22 Fla. 253, 1 Am. St. Rep. 191, the rule stated in *Beers v. Shannon*, 73 N. Y. 292, is applied with approval. The court allowed the record to be amended so as to show that the defendant was sued and judgment rendered

ity as an individual; and consequently former judgment concludes a party only the character in which he was sued. If the judgment was for or against an executor, administrator, assignee, or trustee, it could not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved. *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 69; *Landon v. Townsend*, 112 N. Y. 93-99, 8 Am. St. Rep. 712, 9 N. E. 424; *Rathbone v. Hooney*, 58 N. Y. 463-467. The defendant *Pierce* individually, being, in contemplation of law, a distinct party from that of *Pierce* as trustee under the will of *Barnum*, deceased, I think adopted the correct practice to relieve himself from liability personally by interposing the demurrer to the complaint. The Code of Civil Procedure provides that an action is commenced by the service of a summons; but the summons must contain the title of the action, specifying the names of the parties to the action. Sections 416, 417. It further provides that the defendant may demur when there is defect of parties plaintiff or defendant and when the complaint does not state facts sufficient to constitute a cause of action. Section 488. It thus appears that the action was commenced by the service of the summons in which the defendant was named a party individually, and that no cause of action was stated in the complaint against him in that capacity. The defendant, therefore, brings himself squarely within the express provisions of

the Code in interposing his demurrer. This practice imposes no unjust hardship upon the plaintiff. He is only called upon to determine the nature of his own cause of action, as to whether it is against the person in his individual capacity or in his representative capacity.

It is true that there are cases in which it has been said that the title and pleading may be considered together to ascertain the true nature of the action, and the cases of *Stilwell v. Carpenter*, 62 N. Y. 639; *Beers v. Shannon*, 73 N. Y. 292; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58, and *Knox v. Metropolitan Elev. R. Co.* 58 Hun, 517, 12 N. Y. Supp. 848, Affirmed in 128 N. Y. 625, 28 N. E. 485, are relied upon to sustain the plaintiff's position. But these cases are not in conflict with our views upon this subject. In the case of *Stilwell v. Carpenter* the action was entitled "*Charlotte Stilwell, Executrix, etc.*" Upon the trial the defendant moved to dismiss the complaint on the ground that the action was brought by the plaintiff in her representative capacity as an executrix. It was held that the motion was properly denied, for the reason that it did not appear that the action was brought by the plaintiff as executrix, nor did it appear what estate she was executrix of. Therefore the words "*Executrix, etc.*" were merely *descriptio personæ*. In the case of *Beers v. Shannon* it was claimed that the action was not brought by the plaintiff in his representative character. The plaintiff gave his name, and following it the words "executor of, etc., of

against him as administrator, etc., although he was described in the title and complaint by adding after his name, "administrator, etc." The court held that there was no question but that the complaint disclosed an action against the administrator in his representative capacity.

In *Burrell v. Kern*, 34 Or. 503, 56 Pac. 809, the court overruled a demurrer to a complaint in which the plaintiffs were styled "executors" in the title, and which set forth a cause of action in their individual capacity.

Boyles, Code Pleading & Practice, pp. 146, 147, states that if the complaint shows by appropriate averments that the action is brought by or against a person in a representative capacity, any defect in the title will be cured. The title and the rest of the pleading may be considered together to ascertain the true nature of the action, and that the action will be treated as brought in an individual or in a representative capacity, as determined from an inspection of the entire pleading. Citing *Beers v. Shannon*, 73 N. Y. 292; *Jennings v. Wright*, 54 Cal. 537; and *Stilwell v. Carpenter*, 2 Abb. N. C. 238.

Some other cases not cited in *LEONARD v. PIERCE*, or referred to in the authorities there mentioned, and which also pass on the I.L.R.A. (N.S.)

right to construe the title and context together to fix the legal title of the parties, are the following:

In *Lucas v. Pittman*, 94 Ala. 619, 10 So. 603, the court said that where the words in the caption are mere words of description, yet, if in the body of the complaint there is a sufficient statement or averment to show that the suit by plaintiff is in his representative character, the body of the complaint must govern the caption.

And in *Evans v. Evans*, 23 N. J. Eq. 75, the court said that when a bill, in its body, sets forth fully facts which give the complainant a right as executor, or make the defendant liable as such, so that the court, upon these allegations, can give the relief required, it is mere form, and useless form, to require that either party should be so styled in the commencement or conclusion of the bill.

In *McNeil's Succession*, 9 La. Ann. 113, the court held that when an administrator sues as such, his allegation in another capacity may be treated as surplusage.

In *Collins v. Lightle*, 50 Ark. 101, 6 S. W. 596, it was held that when a name clearly appears in the body of the complaint as that of the party plaintiff, it is not essential that it should also appear in the caption.

John Beers, deceased." He omitted the word "as" before executor. It will be observed that the Beers Case differs from that of Stilwell v. Carpenter, for in the Beers Case the estate of which he was executor is given. It was held that while without the word "as" it had frequently been held that the addition to the name of the party was *descriptio personæ*, yet, in view of the allegations of the complaint, it was apparent that he intended to sue in his representative capacity, and that the description of him was sufficient for that purpose. In the case of Litchfield v. Flint, the title was "Electus B. Litchfield, Executor, etc." The complaint alleged a cause of action in his favor in his individual capacity, and not as a representative. In the complaint there was an allegation that he was an executor of the will of a deceased person, naming him. It was held that the words "executor, etc." were merely *descriptio personæ*. In the case of Knox v. Metropolitan Elev. R. Co. it was contended that the plaintiffs could not maintain the action, because, in the caption of their complaint they styled themselves "as executors," and not "as trustees," of the last will and testament of Richard Smith Clark. In the body of the complaint, however, they set forth the testator's will, and allege the devise of the property in question to his executors in trust. Under the circumstances it was held that the plaintiffs had the right to describe themselves as "executors," and that the action was properly brought.

It will readily be seen that none of these cases reach the question involved in this case. All of these cases were considered in the case of First Nat. Bank v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 202, in which it appears to us the question involved in this case was decided and disposed of. That case was a creditor's action to set aside a general assignment and certain transfers of property as in fraud of the rights of creditors. The action was brought against one Waldron as assignee, and against Elizabeth N. Shuler individually, to whom it was claimed certain transfers of property had been made. After the action had been brought, Isaac C. Shuler, the judgment debtor, died, leaving a will in which Elizabeth N. Shuler was appointed his executrix. Subsequently, upon the application of the plaintiff, the court made an order permitting the plaintiff to serve a supplemental complaint alleging the death of Shuler and the appointment of his executrix, etc. But no order was made continuing the action against her as executrix, or directing that she be brought in and made a party in her representative capacity. Andrews, Ch. J., in delivering the opinion of the court. 1 L.R.A. (N.S.):

says: "We think the proceedings and judgment in this case are fatally defective for the omission of the plaintiff to bring in and make the defendant Elizabeth N. Shuler a party defendant in the action in her capacity as executrix of the original defendant, Isaac C. Shuler. . . . Cases are cited to support the contention that the defendant Elizabeth N. Shuler, having been in fact a party to the action in her individual name, should be regarded as a party in her representative character also." Then he refers to the cases above alluded to, and continues "But a suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in his representative capacity does not conclude him in a subsequent action brought by or against him as an individual, although the same identical issue is involved and the decision in the first action was upon the merits." The defendant Pierce may be liable as trustee, but is not liable individually. But, if he is not permitted to interpose a demurrer, how can he shield himself from the entry of a judgment against him personally? Must he appear and serve an answer? If so, what is he to answer? He may not be able to truthfully deny the allegations against him as trustee, and no fact has been alleged against him individually which call for an answer. But, assuming that he may answer and go to trial, and upon the trial, procure a ruling to the effect that he is not liable personally, it would be the adoption of a cumbersome and expensive practice, reaching a result in a roundabout way when the Code authorizes a simple remedy by demurrer.

The judgment of the Appellate Division should be affirmed, with costs.

Cullen, Ch. J., and Gray and Vann, JJ. concur.

Werner, J., dissenting:

After many vicissitudes, in the course of which there have been several demurrers amended complaints, and a severance of inconsistent causes of action, the complaint in its present form has reached this court upon a demurrer that was overruled on a special term, but sustained at the appellate division. Of the five specifications in the demurrer only two need be noticed, and they are (1) that there is a defect of parties, in that persons described in paragraph 5 of the complaint as "other devisees there named" are necessary defendants in the action, and (2) that there is a defect of parties defendant, in that Carlton B. Pierce as trustee under the will of Abijah Barnum deceased, is a necessary defendant. The plaintiff is receiver under several judgments

covered against one Curtis A. Barnum. He latter is the contingent remainderman under his father's will, subject to his mother's life estate, of certain premises in Otsego county, which have been sold. The proceeds of the sale are now in the hands of the defendant Pierce as trustee under that will, who pays the income to the life tenant. This action is brought to compel the trustee to render an account, to enjoin him from continuing or making unauthorized investments of the trust fund, and to make restitution of such part thereof as may have been lost through his fault. All this is upon the theory, of course that the receiver as a present qualified interest in the trust estate that may ripen into an unqualified title and right of possession upon the death of the *cestui que vie*. That portion of the complaint which sets forth the interest of the judgment debtor in the estate of his deceased father is to the effect that a certain house and premises in Otsego county were devised to the judgment debtor in fee simple, subject to the life use of his mother, Laura Barnum. This devise was subject to the further contingency that, if the judgment debtor and all of his descendants should die before his mother, the property devised to him should pass to other devisees named in the will. One of the questions now to be decided is whether these "other devisees" are necessary parties to this action.

It is to be observed that this complaint is not singular, in that it prays for several forms of relief which are not justified by its allegations. That is a common fault in equity pleading. It contains one statement, however, that qualifies all its allegations and limits the relief sought. In the seventeenth paragraph the pleader says that "no relief is prayed for . . . which shall affect the custody of said fund or the income thereof during the continuance of the trust estate." This allegation practically eliminates the prayer that the accounts of the trustee be judicially settled, as well as every other that is inconsistent with the main purpose of the action; and, when the complaint is viewed in that light, it is evident that what the plaintiff really wants is to have the trust fund accounted for and properly invested under the direction of the court. The present custody of the fund is not sought to be disturbed, and no direction is prayed for concerning its ultimate disposition. In short, the complaint, fairly construed, seeks nothing more than an intermediate or interlocutory accounting respecting a fund in which the plaintiff has now a contingent interest, and in which the "other

devisees" mentioned can have no interest, unless the interest of the plaintiff is annihilated by the death of the judgment debtor and his descendants pending the continuance of the trust estate. A decree directing the trustee to disclose his proceedings, and restricting his investments to legitimate channels, cannot detrimentally affect the interests of these "other devisees," and it is therefore not apparent that they are necessary parties to this action. They may be proper parties, and, if so, the supreme court may, in its discretion, direct them to be brought in. But that result is not to be accomplished by demurrer. "Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation." Pomeroy's Remedies and Remedial Rights, § 329. "If the person is a necessary defendant, a demurrer for defect of parties on account of his nonjoinder will be sustained; and, conversely, if the demurrer will be sustained, the person is a necessary party. If the person is merely a proper party, such a demurrer will not be sustained on account of his nonjoinder, although the court may undoubtedly, in the exercise of its discretion, order him to be brought in." Id. § 330. In determining who are necessary parties and who are merely proper parties to an action for an accounting, it should be borne in mind that there is a well-recognized distinction between the rendering of an account and its final settlement. 2 Woerner, Am. Law of Administration, 2d ed. §§ 501, 502; Remington v. Walker, 21 Hun, 322; Westervelt v. Gregg, 1 Barb. Ch. 469. This distinction was applied in Wood v. Brown, 34 N. Y. 337, where it was held that creditors, legatees, and next of kin are not necessary parties, except in cases of final accounting. This court there said: "The case at bar was a proper one to call on the defendant to render an account of his proceedings. If a final settlement was not contemplated, it was not necessary to make the other legatees parties. The decree does not affect them. If further proceedings are taken upon the basis of the decree, they may be brought in, if necessary. And in Re Robinson, 37 N. Y. 261, where the question was whether the *cestuis que trustent* were necessary parties upon an application for the appointment of a trustee, it was held

that disposition of such applications rests largely upon considerations of convenience, as to which the court will exercise its sound discretion. In the course of the discussion in that case the court quoted certain passages from Judge Story that are quite applicable in the case at bar. The rule relating to parties in equitable actions and proceedings, says Judge Story, "does not seem to be founded on any positive and uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test. . . . It is a rule founded partly in artificial reasoning partly in considerations of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictates of natural justice that the rights of persons ought not to be affected in any suit without giving them an opportunity to defend them." This doctrine was approved in *Harvey v. Harvey*, 4 Beav. 215, *Birdsong v. Birdsong*, 2 Head, 289, and *Wiser v. Blachly*, 1 Johns. Ch. 438; and from it there would seem to flow the logical conclusion that the persons who may be entitled to the fund here in question, in the event of the death of the judgment debtor and all of his descendants during the life of the *cestui que vie*, are not necessary parties to this action, for nothing is really asked in the complaint, and nothing can properly be done by the court, that will affect their interests. The cases of *Riggs v. Cragg*, 89 N. Y. 479, and *Re Gall*, 182 N. Y. 270, 74 N. E. 875, are not in conflict with these views. Neither of those cases came up on demurrer, and in each of them there was an effort to compel distribution of a portion of the estate.

The substance of the second ground of demurrer is that the defendant Pierce is named only in his individual capacity, while the only cause of action alleged is against him as trustee. It is true that in the title he is named without any *officia designata*, and that the complaint does not allege any cause of action against him as an individual; but it is equally true that it contains an undoubted cause of action against him as trustee, and no other. We think that the case falls within the rule laid down in *Stilwell v. Carpenter*, 62 N. Y. 639, *Beers v. Shannon*, 73 N. Y. 292, *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58, and *Knox v. Metropolitan Elev. R. Co.* 58 Hun, 517, 12 N. Y. Supp. 848, Affirmed in 128 N. Y. 625, 28 N. E. 485, to the effect that the title of the action must be read in connection with the allegations of the complaint in order to determine the capacity in which a party sues or is sued. Thus, if the pleading clear-

ly shows that the cause of action is for a against a party in his representative capacity, the mere failure to add the official designation to the name in the title may be disregarded by the court or corrected by amendment (Code Civ. Proc. § 723); and conversely, if a party is designated as representative when the cause of action is for or against him as an individual, the affidavit to his name may be treated as surplusage. This is thoroughly consonant with the liberal rules of pleading and practice enjoined by the Code of Civil Procedure and supported by numerous decisions in the supreme court. It is undoubtedly the better practice to designate in the title of the action the capacity in which a party sues or is sued, but we do not think a failure to do so renders a pleading bad on demurrer, if its context clearly and definitely fixes the legal character of the party suing or sued. There are many instances, of course, in which the neglect to properly denominate a party may prove fatal. That is the usual result when the pleading does not supply the defect in the title. The case of *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262, is an illustration in point. That was a judgment creditor's action to set aside a general assignment, as well as certain specific transfers alleged to have been fraudulent. The debtor died pending the action. His widow was appointed his executrix. She had originally been made an individual party defendant in the creditor's action. After her husband's death the plaintiff obtained leave to serve an amended complaint, setting forth the fact of the debtor's death and his widow's appointment as his executrix; but no attempt was made to bring in the executrix as a defendant in her official capacity. The case proceeded to judgment in favor of the creditor, but was reversed in this court on the ground that the executrix had not been made a party in her representative capacity, and therefore was not bound by the judgment. The reason for the decision is readily discernible in the following brief extract from the opinion of Chief Judge Andrews. He said: "The fact that the defendant Elizabeth N. Shuler was a party defendant in her individual character does not obviate the objection. She had a separate individual interest in the litigation, which was instituted in part to avoid transfers made to her by the debtor and it was during his lifetime that she was joined as defendant in the action and answered the complaint. By his death and her appointment as executrix she was invested with a new character as the representative of her husband and his creditors and

of his estate." In another part of his opinion the learned chief judge made it clear that the pleadings did not show that the executrix had been made a party in that capacity, or that her interest as such had been considered or determined. The case at bar is the complete antithesis of that case. Here the defendant Pierce is simply named in the title as a party defendant, while every line of the complaint discloses that he is sued as trustee, and in no other capacity.

It is suggested, however, that if the practice pursued by plaintiff herein is sustained, a judgment by default may be entered against a defendant in one capacity, while he may regard himself as having been sued in another. That is one of the possibilities of such a situation. But similar dangers are incurred by every defendant who fails to appear when he is sued. In every such case a plaintiff may obtain greater or different relief than he may be entitled to, but that does not make the complaint demurrable. If it should be held, for instance, that this complaint does not state a cause of action against the defendant Pierce as an individual, and the title of the action should then be amended, so as to conform to the allegations of the complaint, a personal judgment might still be rendered against him if he failed to appear. Of course, the plaintiff would have no legal right to such a judgment; but the mere fact that it was physically possible for him to obtain it would not render the complaint demurrable. We think the complaint clearly and unmistakably shows that the defendant Pierce is sued in his capacity of trustee, and no other. Therefore the mere omission to designate him as trustee in the title to the action is not such a defect of pleading as to render the complaint bad on demurrer.

We shall not discuss at length the respondent's contention that the appeal should be dismissed in accordance with the practice endorsed by a majority of this court in *Abbey v. Wheeler*, 170 N. Y. 122, 62 N. E. 1074. It is enough to say that, since it does not affirmatively appear that the final judgment herein was not entered in the appellate division, we shall assume that it was so entered; and hence there was no occasion for a second appeal to that tribunal before coming to this court.

For these reasons I dissent from the judgment about to be rendered, and advise that the judgment of the appellate division should be reversed, and that of the special term affirmed, with costs to the appellant in all the courts.

Bartlett, J., concurs with Werner, J.
O'Brien, J., not voting.
ILL. (N.S.)

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

JOHN D. JACK, Appt.

(69 Kan. 387.)

1. Anti-trust law—testimony—due process.

A proceeding before the district court, or judge thereof, upon the written application of the county attorney or attorney general, under chap. 265 § 10, b, 485, Laws 1897 (Gen. Stat. 1901, § 7873), to subpoena witnesses to testify of their knowledge of violations of provisions of the act known as the "Anti-Trust Law," is of the nature of an investigation, or preliminary proceeding, and is a valid exercise of judicial power, the procedure being "due process of law," within the meaning of the 14th Amendment to the Federal Constitution.

2. Witness—constitutional privilege.

The exemption provided by § 10, of the Bill of Rights (Gen. Stat. 1901, § 92), that "no person shall be a witness against himself," cannot be claimed by a witness when, by the terms of a statute, the immunity afforded is coextensive with the constitutional privilege of silence.

3. Same—immunity in anti-trust law.

The immunity afforded by § 10 of the anti-trust law of 1897, to a witness subpoenaed in a proceeding or inquiry, to testify of his knowledge of violations of that law, is coextensive with the constitutional privilege that "no person shall be a witness against himself."

4. Same—refusal to testify.

A witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of the anti-trust law cannot refuse to give his evidence on the ground that the immunity provided by § 10 of the act does

Headnotes by ATKINSON, J.

Case Note.—In a number of the early cases it was declared that a witness might be compelled to testify, notwithstanding the constitutional guaranty against self-incrimination, where the subsequent use of his testimony in any case against him was prohibited. *Ex parte Buskett*, 106 Mo. 602, 14 L. R. A. 407, 27 Am. St. Rep. 378, 17 S. W. 753; *La Fontaine v. Southern Underwriters' Asso.* 83 N. C. 132; *Higdon v. Heard*, 14 Ga. 255; *Ex parte Rowe*, 7 Cal. 184; *State v. Quarles*, 13 Ark. 307; *Wilkins v. Malone*, 14 Ind. 153.

People ex rel. Hackley v. Kelly, 24 N. Y. 74, even went so far as to decide that the constitutional provision that no person should "be compelled, in any criminal case, to be a witness against himself," applied only in a criminal case in which the person sought to be made a witness was also a party defendant; and that, therefore, a statute making the giving of testimony compulsory, but providing that the testimony so given should not be used in any

not afford protection against the use of his evidence in a prosecution against him for violations of the Federal anti-trust law.

5. Anti-trust law—prohibition of continued business.

The provision of § 5 of the anti-trust law of 1897, that every person, company, or corporation violating any of the provisions of the act be denied the right of, and prohibited from, doing any business within the state, contemplates the prohibiting of the continuance of, or the engagement in, business, only when such business is in violation of the act.

6. Same—defense—violation of act by prosecutor.

The provision of § 7 of the anti-trust law of 1897, that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has, within one year, been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to, and growing out of, transactions prohibited by the act.

7. Same—Federal Constitution.

The anti-trust law of 1897 is held not to be in contravention of the provisions of the 14th Amendment to the Constitution of the United States, but to be a valid exercise of legislative power.

(May 7, 1904.)

prosecution or proceeding, civil or criminal, against the witness, was sufficient protection. But this was overruled in *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

In other cases it was held that, before the constitutional privilege of silence could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of a complete amnesty to the witness—an absolute wiping out of the offense so that he could no longer be prosecuted for it—would furnish that indemnity; and that a provision merely that the testimony of a witness should not be used in evidence against him did not secure such absolute immunity. *Cullen v. Com.* 24 Gratt. 624; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22; *State v. Nowell*, 58 N. H. 314.

The rule declared in these cases was reinforced by the decision in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, where, after an extensive review of the earlier authorities, it was decided that nothing short of absolute immunity from prosecution could satisfy the constitutional guaranty, and that a statute declaring that no evidence obtained from a witness should be given in evidence, or in any manner used, against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, did not supply a complete protection from all the perils which the constitutional guaranty was designed to guard, since it would not prevent

APPEAL by defendant from a judgment of the District Court for Shawnee County convicting him of contempt of court Affirmed.

The facts are stated in the opinion.

Messrs. J. T. Pringle, R. B. Gillingly, and Rossington, Smith, & Histed, for appellant.

The court erred in denying to the plaintiff the protection claimed under § 10 of the Bill of Rights.

Stat. Edw. II., 1307-1326; *Re Nickell*, 4 Kan. 734, 27 Am. St. Rep. 315, 23 Pac. 1076; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Emery's Case* 107 Mass. 184, 9 Am. Rep. 22; *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *Boyd v. United States*, 116 U. S. 631, 29 L. ed. 751, 6 Sup. Ct. Rep. 524; *Brown v. Walker* 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The immunity furnished by the statute is insufficient to withdraw the protection claimed by the witnesses under the Bill of Rights.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Levy v. Superior Court*, 29 L. R. A. 813, note, 105 Cal. 600, 38 Pac. 965; 1 Greenl. Ev. Lewis's ed. § 453; *John-*

the use of his testimony to search out other testimony to be used against him or his property.

This ruling is, of course, binding on the Federal courts, which have since followed it (*Re Scott*, 95 Fed. 815; *Re Roaser*, 96 Fed. 305; *Re Feldstein*, 103 Fed. 269; *Re Walsh*, 104 Fed. 518; *Foot v. Buchanan*, 113 Fed. 150; *Re Shera*, 114 Fed. 207; *Re Nachman*, 114 Fed. 995), except in the case of *Mackel v. Rochester*, 42 C. C. A. 427, 106 Fed. 314, where it was held that the provision of § 7 of the bankruptcy act of July 1, 1898, that no testimony given by a witness should be offered in evidence against him in any criminal proceeding, was sufficient to satisfy the constitutional guaranty against self-incrimination. But this decision seems to be based on a misconception of the case of *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The rule laid down in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, was also adopted in *Ex parte Carter*, 106 Mo. 604, 57 L. R. A. 654, 66 S. W. 540; *Larson v. Boyden*, 160 Ill. 613, 43 N. E. 751; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230; and *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

Even where absolute immunity from punishment is provided, it was held, in *United States v. James*, 26 L. R. A. 418, 5 Inters. Com. Rep. 578, 60 Fed. 257, that a witness

a v. Donaldson, 18 Blatchf. 287, 3 Fed. Cl. 108; *Newgold v. American Electrical Novelty Mfg. Co.* 108 Fed. 342; *Snow v. Mast*, 63 Md. 623; *Boyd v. United States*, 110 U. S. 11, 29 L. ed. 751, 6 Sup. Ct. Rep. 524; *Maryland use of Washington County v. Baltimore & O. R. Co.* 3 How. 552, 11 L. ed. 2; *Atchison, T. & S. F. R. Co. v. State*, 1 Kan. 15; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The witness was further protected from answering because his testimony might subject him to a criminal prosecution and to the forfeitures and penalties prescribed by the Federal anti-trust act, as to which the immunity granted by § 10 is entirely unavailing.

The commodity dealt in by these mine operators, being the subject of interstate, as well as domestic, trade, is within the operation of the Federal statutes.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 310.

The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a wit-

ness to disclose a fact which might complete the testimony against himself.

1 Burr's Trial, 245; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Stevens v. State*, 50 Kan. 712, 32 Pac. 350; *Foot v. Buchanan*, 113 Fed. 161; *Emery's Case*, 107 Mass. 181, 9 Am. Rep. 22; *Re Nickell*, 47 Kan. 737, 27 Am. St. Rep. 315, 28 Pac. 1076.

The denial of the claim of immunity, interposed by the witnesses, was in violation of the 14th Amendment to the Constitution of the United States, and deprived them of their liberty without due process of law.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; *Hovey v. Elliott*, 167 U. S. 416, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; *Capel v. Child*, 2 Crompt. & J. 574; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Hallinger v. Davis*, 146 U. S. 320, 36 L. ed. 989, 13 Sup. Ct. Rep. 105; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 276, 15 L. ed. 373; *Bank of Columbia v. Okely*, 4 Wheat. 244, 4 L. ed. 561; *Dartmouth College v. Woodward*, 4 Wheat. 581, 4 L. ed. 645; *Ex parte Wall*, 107 U. S. 289, 27 L. ed. 562, 2 Sup. Ct. Rep. 569; *Kennard v. Louisiana*, 92 U. S. 481, 23 L. ed. 479.

Messrs. C. C. Coleman, Attorney General,

cannot be deprived of the protection of the Fifth Amendment to the Federal Constitution, the court declaring that the privilege conferred by that amendment was intended to make the secrets of memory, so far as they brought one's former acts within the definition of crime, inviolate as against judicial probe or disclosure. But this case is overthrown by the ruling in the subsequent case of *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, where it is held that exempting a witness from any prosecution, or any penalty or forfeiture, on account of any transaction to which he may testify sufficiently satisfies the guaranty against self-incrimination. The court said that the fact that a witness cannot be shielded from the personal disgrace attaching to the exposure of his crime does not render a statute exempting him from prosecution therefor unconstitutional.

In *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253, 68 N. E. 353, which was a proceeding for contempt in refusing to answer certain questions as a witness in proceedings against another as a common gambler, § 342 of the Penal Code, which provided that no person should be excused from giving testimony upon any investigation or proceeding for a violation of the chapter (relating to gambling) upon the ground that such testimony might tend to convict him of a crime; but that such testimony should not be received against him upon any criminal investigation or proceeding,—was held not to afford the witness the

protection contemplated by N. Y. Const. art. 1, § 6, as to self-incrimination. The court disapproved of the ruling in *People ex rel. Hackley v. Kelly*, 24 N. Y. 74, and followed *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 316, 12 Sup. Ct. Rep. 195.

Subsequently the Code provision was amended to provide that no person so testifying should be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction concerning which he might testify or produce evidence; and that no evidence so given or produced should be received against him upon any criminal investigation or proceeding. And in *People ex rel. Lewisohn v. Court of General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364, Affirmed without opinion in 179 N. Y. 594, 72 N. E. 1148, this provision was held to satisfy the constitutional guaranty against self-incrimination.

And in *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, a section of the Penal Code providing that a person may be compelled to testify as a witness in a prosecution for bribery, but that testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against him; and that the fact of so testifying may be pleaded in bar of an indictment or prosecution against him,—was held constitutional.

A Code provision that no person shall be excused on any prosecution from testifying touching any unlawful gambling done by himself or others, but that no discovery made

Otis E. Hungate, Edwin A. Austin, and Thomson, Springer, & Price for the State.

Atkinson, J., delivered the opinion of the court:

This is an appeal by John D. Jack from a judgment of imprisonment for contempt by the district court of Shawnee county. Appellant, as a witness, refused to answer certain questions in a proceeding, or investigation, in that court concerning the existence of unlawful combinations of coal operators, and was adjudged guilty of contempt.

On September 3, 1903, the attorney general and the county attorney of Shawnee county, proceeding under § 10, chap. 265, Laws 1897 (Gen. Stat., 1901, § 7873), filed in the district court of Shawnee county their verified application, informing the court of the existence of unlawful combinations of persons engaged in the operation of coal mines in Osage county, for the purpose of fixing the price of coal at the

mines and the price to be charged to purchasers. It was therein averred that the members of these combinations met monthly in the county of Shawnee, and fixed minimum prices to be charged for coal and agreed that they would not sell it for less than such minimum prices, and that these agreements were carried out and executed by the members. Among others named in said application as having knowledge of the existence of these combinations was appellant, and for him it was therein asked that a subpoena issue. The district judge awarded subpoenas upon the application.

The court denied the motion of appellant to quash the subpoena issued, and he thereupon appeared in court as a witness, and was asked the following questions:

Q. Do you know of any meetings of the operators of Osage county being held in this city (Topeka) at intervals during the last year?

by the witness upon such examination shall be used against him in any penal or criminal prosecution, and that he shall be altogether pardoned of the offense so done or participated in by him, was also held, in *Re Briggs*, 135 N. C. 118, 47 S. E. 403, not to violate the constitutional guaranty against being compelled to give evidence against oneself.

So, a provision that no testimony given by a witness "shall, in any prosecution, be used as evidence, either directly or indirectly, against him; nor shall he be thereafter prosecuted for any offense so disclosed by him,"—was held, in *State v. Nowell*, 58 N. H. 314, to secure him against all liability to future prosecution as effectually as if he were wholly innocent; and he was, therefore, held to have, under the statute, all the protection that the constitutional privilege would give him.

And a provision that any witness giving evidence either before the grand jury or the court, in a prosecution for unlawful gaming, shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution; and that in a criminal prosecution other than for perjury, or an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon legal examination,—was held, in *Kendrick v. Com.* 78 Va. 493, to secure to the witness the absolute immunity from punishment held necessary by the case of *Cullen v. Com.* 24 Gratt. 624.

An anti-trust act which required the making of an affidavit under oath by the officers of a corporation, upon demand of the secretary of state, as to whether or not it has all or any part of its business or interest in or with any trust, combination, or association, in violation of the act; but providing that

no corporation, firm, or individual should be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit, or truthfully disclosed in any testimony elicited in the execution thereof,—was held to afford a sufficient protection to satisfy the constitutional guaranty, in *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349.

In *Ex parte Cohen*, 104 Cal. 524, 26 L. R. A. 423, 43 Am. St. Rep. 127, 38 Pac. 364, it is held that the constitutional provision against compelling a person to be a witness against himself in a criminal action is not violated by requiring him to give testimony on the prosecution of another person, which may show that he has himself been guilty of a crime, where the statute declares that he shall not be liable to indictment or presentment by information, nor to prosecution or punishment "for an offense with reference to which his testimony was given."

That a witness who is exempted by statute from liability for any offense of which he is compelled to give evidence cannot invoke the constitutional privilege of silence, was decided in *Floyd v. State*, 7 Tex. 215, and *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

The latest ruling of the Federal Supreme Court on the subject is contained in the case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, which simply follows the case of *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, in declaring that the immunity extended by the interstate commerce act from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law, satisfies the guaranty of the 5th Amendment.

Q. I will ask you if you have any knowledge of a combine or an agreement being entered into by operators in coal of Osage county for the purpose of fixing the price of coal sold to residents and citizens of Kansas?

Q. Have you any knowledge of any meetings of coal operators of Osage county, Kansas, being held in this city on the last Saturday night of each month during the last year, the purpose of which was to fix the price of coal which was to be charged to citizens of Kansas?

Q. Do you know of any agreements having been entered into within this county within the last year between the operators in coal who operate in Osage county, Kansas, by which they attempted to fix and settle the price of coal between themselves and citizens of Kansas?

Appellant refused to answer each of the foregoing questions, assigning the following as his reason therefor: "I am engaged in operating a coal mine in Osage county, Kansas, and in dealing in the output of said mines, and am one of the persons named in the application for subpoenas in this proceeding. The product of the mines of Osage county is the subject of both domestic and interstate commerce. I respectfully decline to answer the questions, or to testify with reference to the subject of this inquiry, for the reason that, in answering the questions, and in submitting myself to an examination as a witness, I may incriminate myself, and give information as to the details of the said alleged combination and agreement, and the names of parties and witnesses which might supply the means of convicting me of a crime, and of subjecting me to imprisonment, fines, forfeitures, and penalties; and I therefore claim the privilege and immunity of § 10 of the Bill of Rights."

The anti-trust law (Laws 1897, chap. 265; Gen. Stat. 1901, §§ 7864-7874) is vigorously assailed. It is charged that the act is in violation of the 14th Amendment to the Federal Constitution, in that it deprives a person of liberty and property without due process of law, and denies him the equal protection of the law. It is also charged that the requiring of appellant to answer these questions (his refusal so to do being the cause of his imprisonment for contempt) deprives him of the rights, privileges, and immunities guaranteed by § 10 of the Bill of Rights (Gen. Stat. 1901, § 92). The motion to quash the subpoena raised the question whether the proceedings upon the application, and the issuing of subpoenas thereunder, as provided by § 10 of the act of 1897, were "due process of law," 1 L.R.A. (N.S.)

within the meaning of the 14th Amendment to the Federal Constitution. Said section reads: "The several district courts of this state and the judges thereof shall have jurisdiction, and it shall be their duty, upon good cause shown and upon written application of the county attorney or the attorney general, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application of a county attorney or the attorney general, and to cause the same to be served by the sheriff of the county where such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act, and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person subpoenaed and examined shall not be liable to criminal prosecution for any violation of this act about which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all witnesses so subpoenaed shall be taken down by the reporter of said court, and shall be transcribed and placed in the hands of the county attorney or the attorney general, and he shall, in the proper courts, at once prosecute such violator or violators of this act as the testimony so taken shall disclose. Witnesses subpoenaed as provided for in this section shall be compelled to attend from any county in the state."

It is urged by appellant that the proceeding provided by this section is not judicial in its character, and is not "due process of law," in that it is not founded upon complaint, information, or indictment. District courts are expressly created by the Constitution, and therein given such jurisdiction as may be provided by law (Const. art. 3 § 6), its extent and practice being left to the legislature. Judges of the district courts are expressly created by the Constitution, and therein given such jurisdiction at chambers as may be provided by law (Const. art. 3, § 16), its extent being left to the legislature.

The wide scope given to the states in the matter of their judicial tribunals and the character of their procedure as recognized by the Federal government, was clearly set forth in the opinion by Mr. Justice Brewer, in the case of *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77, where it was said: "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such pro-

cedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Ex parte Reggel*, 114 U. S. 642, 20 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Chicago, B. & Q. R. Co. v. Chicago*, 186 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. 'The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line, there may be a right of trial by jury, and, on the other side, no such right. Each state prescribes its own modes of judicial proceeding.' *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 31, 25 L. ed. 989, 992. . . . A perfectly satisfactory definition of due process may, perhaps, not be easily stated. In *Hurtado v. California*, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 121, 292, Mr. Justice Matthews, after reviewing previous declarations, said: 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised, in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.' In *Leeper v. Texas*, 130 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 577, 570, Chief Justice Fuller declared 'that law, in its regular course of administration through courts of justice, is due process; and, when secured by the law of the state, the constitutional requirement is satisfied.'"

Section 1923, Gen. Stat. 1901, gives to district courts general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law. Section 1924 provides that district judges "shall have and exercise such power in vacation or at chambers as may be provided by law, and shall also have power . . . to punish for contempt in open court or at chambers." The right of the district courts and district judges to punish for contempt, without a jury, is well recognized. *Re Millington*, 24 Kan. 214; *State ex rel. Curtis v. Durein*, 46 Kan. 695, 27 Pac. 148; 7 Am. & Eng. Enc. Law, 2d ed. p. 66; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 125. By § 10 of the act of 1897 the legislature conferred upon district courts and judges thereof the power to order the issue of subpoenas for witnesses, upon written application, and to compel them to attend and testify, with authority to punish as for contempt upon a refusal so to do. In 1 L.R.A. (N.S.)

the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 125, *supra*, the court upheld a somewhat analogous provision of the interstate commerce act, wherein the circuit court is given power to entertain an application of the commission, issue subpoenas, examine witnesses, and commit for contempt when a witness refuses to testify. The procedure under § 10 is an investigation, or preliminary proceeding, and can result in no final judgment, except in a proceeding for contempt against a recalcitrant witness, unless it be the result of a regular judicial trial, conducted in the manner provided by statute. It is a valid exercise of judicial power, and the procedure is "due process of law."

The case of *State v. Smiley*, 65 Kan. 240, 67 L. R. A. 903, 69 Pac. 199, was an appeal from a judgment of conviction for a violation of this law. It was there charged that the act imposed such limitations upon freedom of contract as to constitute a deprivation of the right of property, contrary to the 14th Amendment to the Federal Constitution. This court held that it did not conflict with the right to acquire property by lawful contract, the guaranty of which is secured by the Federal Constitution, and that the forbiddance of membership in combinations in restraint of trade was a valid exercise of legislative power. It is contended by appellant that compliance with the requirement to answer the foregoing questions would have deprived him of the privileges and immunities guaranteed to him by § 10 of the Bill of Rights, which provides that "no person shall be a witness against himself." This is not only a constitutional right, but it is also a fundamental principle of the common law, embodied in the maxim that "no man can be compelled to criminate himself." This proceeding before the district court was of the nature of an investigation to inquire whether there had been criminal violations of the anti-trust law. If appellant were guilty of any of the offenses of which inquiry was made by the questions which he refused to answer, he was liable to criminal prosecution under this law. He assigned as a reason for his refusal to answer the questions that in doing so he might criminate himself under the anti-trust law, he being an operator of coal mines in the state, and dealing in their output. The legislature, by § 10 of the act of 1897, provided immunity to witnesses subpoenaed to testify concerning violations of the act in the following language: "Any person subpoenaed and examined shall not be liable to criminal prosecution for any violation of this act about

which he may testify. Neither shall the evidence of any such witness be used against him in any criminal proceeding."

Was appellant, as a witness upon this investigation, entitled to invoke the protection of § 10 of the Bill of Rights? Was he entitled to plead the privilege of silence? If the immunity against prosecution, provided for by § 10 of the anti-trust law, afforded the witness upon such investigation the protection against future prosecutions that is guaranteed to him by § 10 of the Bill of Rights, then appellant was not entitled to invoke the protection of the latter provision; nor was he entitled to plead the privilege of silence. Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

It is well settled that legislative bodies possess the power to grant amnesty to witnesses, and compel them to give testimony against themselves. This power has been recognized as a public necessity in the enforcement of laws. Congress and the legislatures of many states have enacted immunity statutes for the purpose of securing convictions for such offenses as gambling, bribery, the manufacture or sale of intoxicating liquors, usury, combinations in restraint of trade, and like offenses, in which two or more persons participate to constitute the crime, the necessities of the case and the difficulty of obtaining witnesses to establish the offense, punish the offenders, and suppress the crime being deemed sufficient to warrant the extending of immunity to a participant in order to constitute him a competent witness against the other offenders. The constitutional privilege that a person shall not be required to be a witness against himself is of great value to the citizen accused. However, the authorities, state and Federal, recognize the rule that when the testimony sought cannot, by reason of an immunity statute, be used as a basis for, or in aid of, a prosecution which might result in fine or imprisonment, or involve a penalty or forfeiture, the privilege cannot be claimed. Immunity statutes must be given a reasonable construction,—not a strained and artificial one; and, when it is apparent to the court that a person is fully protected from the effect of his testimony, he should be required to testify, even though it may show him guilty of a criminal offense.

It is claimed, however, that the immunity afforded by § 10 of the anti-trust law is not sufficient to constitute a substitute for the privilege of silence, guaranteed the witness by § 10 of the Bill of Rights. The 1 L.R.A.(N.S.)

legislature determines what acts of the individual shall constitute a crime against the state, and what shall constitute the punishment of an offender, upon conviction. It determines within what period a prosecution for the commission of an offense shall be commenced, and may determine, within constitutional limitation, what shall and what shall not constitute evidence competent to be used upon the trial of an offender. The protection afforded the witness by the Constitution is that of not being a witness against himself. If the act of which inquiry is made does not constitute a crime, or, if made a crime, it has no punishment prescribed for its violation, or is no longer punishable; or if the act is barred by the statute of limitations, with no action pending, or the law has been repealed; or if the witness has been tried for the offense and acquitted, or convicted and satisfied the sentence imposed by the law,—he can claim no exemption from answering questions relating thereto. Likewise, the witness is deprived of claiming this exemption from testifying if the legislature, by the enactment of an immunity statute, has provided that he shall not be liable to criminal prosecution for any violation of the act about which he may testify, nor his evidence used against him in any criminal proceeding. As to prosecutions for those crimes to which his evidence relates, under the immunity act the witness is in the same position, in so far as there is a possibility of using his evidence against him, as though there were no such crimes provided by statute.

It is urged that the amnesty provided by § 10 is not complete, as it affords no immunity to a stockholder in any such corporation. There is nothing in the record disclosing appellant to be a stockholder, an officer, or an agent, or otherwise connected with any corporation that might, in any manner, be affected or suffer, as the result of his disclosure as a witness. The constitutional provision was intended for the protection of the witness; "the hurt must be to himself;" he himself must be included in the terms of the law before he can have just grounds for complaint. *State v. Smiley*, 65 Kan. 240, 67 L. R. A. 903, 69 Pac. 199 *supra*. However, it was never intended that the immunity afforded the witness by this act should extend to, and protect, the stockholders, officers, and agents of a corporation, as such; the immunity extends to the witness alone; it was not contemplated that it would be made use of as a pretext for securing immunity to others. That the immunity afforded the witness, to be complete, must extend to the officers, agents,

and stockholders of a corporation, as contended by appellant, is too remote.

Section 5 provides, as a punishment for one convicted of a violation of the act, a fine of not less than \$100 nor more than \$1,000, and confinement for not less than thirty days nor more than six months. Sections 5 and 6 provide a penalty of \$100 per day for each and every day such violation shall continue after conviction. It is further provided, by § 5, that every person, company, or corporation, who shall violate any of the provisions of the act, be denied the right of, and be prohibited from, doing any business within this state. The last provision contemplates the prohibiting of the continuance of, or engagement in, business in the state, only when such business is in violation of the act; it was not intended thereby to prohibit persons from continuing or engaging in any lawful business in the state, not conducted or carried on in violation of the act. Viewed in the light of the interpretation thus given it, the provision is a valid exercise of legislative power, and is not open to the charge made against it by appellant that it constitutes, in effect, banishment from the state.

The provisions of § 7, that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has within one year been guilty of a violation of any of the provisions of the act, as held in *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, under a very similar provision of the anti-trust act of 1889 (Laws 1889, chap. 257), contemplates only civil actions relating to, and growing out of, transactions prohibited by the act. It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted, the provision is a valid exercise of legislative power, and is not open to the charge of appellant that it constitutes outlawry.

It was the intention of the legislature, by § 10 of the act, to afford the witness complete immunity against criminal prosecution, fines, imprisonment, penalties, and forfeitures, for any violation of the act about which the witness might give evidence upon a proceeding or investigation by the state to acquire information as to violations of the act; and also to afford the witness complete immunity against such testimony's being used against him in any proceeding of a criminal nature. The immunity afforded by the act is coextensive with the constitutional privilege. A statute providing such immunity is sufficient; a witness, thus protected, cannot invoke the constitutional

privilege of silence. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Intern. Com. Rep. 816, 12 Sup. Ct. Rep. 195, *supra*; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Intern. Com. Rep. 369, 16 Sup. Ct. Rep. 644, *supra*; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395.

Appellant assigned as a further reason why he should not answer the questions propounded to him that the immunity afforded does not protect him against criminal prosecution, fines, and forfeitures for violations of the Federal anti-trust law: that the proceeding before the district court was an investigation to inquire whether there had been a violation of the state anti-trust law; that appellant, as a witness in the district court upon the inquiry, stated that the product of the mines of Osage county was the subject of both domestic and interstate commerce.

If the product of the mines of Osage county were the subject of interstate commerce, as stated, and appellant, as an operator of these mines, violated the provisions of the Federal anti-trust law, and thereby became liable to criminal prosecution, fines, and forfeitures thereunder, could he, in an investigation in the state courts to inquire if there had been violations of the state anti-trust law, refuse to testify, if the immunity provided did not protect him against the possibility of criminal prosecutions, fines, and forfeitures for violations of the Federal anti-trust law? It is not to be presumed that the examination, upon inquiry, will go beyond violations of the state law. If such examination be confined to its legitimate scope, it will not include, but will exclude, all acts which might connect it with interstate commerce, in violation of the Federal anti-trust law. Under its power to regulate interstate commerce, the United States may legislate upon the subject of private contracts relating to such commerce, and prohibit combinations, pools and trusts, so far as they relate to interstate commerce, but it has no jurisdiction over combinations, pools and trusts, relating to commerce wholly within the state; nor does the United States acquire jurisdiction over that part of a combination or agreement relating wholly to commerce within a state, by reason of the fact that the combination covers and regulates commerce, which is interstate. In so far as such combinations interfere with interstate commerce, they are under the control of the United States; in so far as they interfere with commerce wholly within the state, they are subject only to the jurisdiction of the state. Addys-

on *Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. There two governments like the United States and a state exercise their authority within the same territory, and over the same citizens, the legislation of that which, as to certain subjects, is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them, unless such construction be absolutely demanded. *Com. v. Gagne*, 153 Mass. 205, 10 L. R. A. 42, 26 N. E. 449.

In the case of *Brown v. Walker*, 161 U. S. 96, 40 L. ed. 821, 5 Inters. Com. Rep. 377, 4 Sup. Ct. Rep. 644, *supra*, *Brown*, who was auditor of the Alleghany Railway Company, was subpoenaed as a witness to give testimony before a Federal grand jury upon an investigation concerning alleged violations of the interstate commerce act by the railway company. He refused to testify, claiming that to answer the questions would tend to accuse and criminate him. He was adjudged to be in contempt. Proceedings in habeas corpus were instituted in the United States circuit court and he was remanded to the custody of the marshal. An appeal was had to the United States Supreme Court. It was claimed there by appellant that the immunity provided by the interstate commerce act was insufficient to satisfy the constitutional guaranty of protection against being compelled to be a witness against himself. The immunity provided by the act was, by the court, held sufficient. Mr. Justice Brown, in delivering the opinion of the court, with reference to the construction of the immunity clause of the act said: "It can only be said, in general, that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose,—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not to hold the law invalid, unless, as was observed by Mr. Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. ed. 162, 175, 'the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.'"

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It was further claimed, in this same case, that the amnesty provided by the interstate commerce act, though sufficient to grant immunity from prosecution by the Federal courts, did not afford immunity against prosecution in the state courts. In treating the proposition and the improbability of being subjected to the criminal laws of another sovereignty, after having quoted extensively, with approval, from the opinion of Lord Chief Justice Cockburn upon that subject, Mr. Justice Brown said:

"But, even granting that there was still a bare possibility that, by his disclosure, he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said, in *Queen v. Boyes*, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate. The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered; but that gives him no claim to indemnity against the state, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing."

The anti-trust act in Illinois requires corporations doing business in the state to make and file annually with the secretary of state a verified statement which is termed an "anti-trust affidavit." In *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 749, a proceeding to recover the penalty of \$50 per day for failure to make and file such affidavit, as a defense to such action it was charged that the requirement of the making of the affidavit was a violation of the constitutional provision of the state, that "no person shall

be compelled in any criminal case to give evidence against himself." The act provides immunity against criminal prosecutions for truthful disclosures of matters required to be shown by the affidavit; and, by the affidavit, a disclosure of any connection of the corporation with any combination, pools, trusts, and the like combines, in restraint of trade or commerce, was required. It was urged that the immunity was not coextensive with the constitutional privilege, and that it did not cover prosecutions under laws of other states or under laws of the United States. In passing upon the validity of the act, it was held that, while it might be broad enough to include trusts, pools, and combines formed with parties outside the state, yet, in construing the act, the court must consider it as relating to trusts, pools, and combines formed within the state. As to the sufficiency of the immunity provision challenged, it was held that it was complete as against prosecution by the Federal authorities or by the authorities of other states, as the affidavit required, to the making of which immunity was extended, need relate only to trusts, pools, and combines within the state. In making reference to the sufficiency of the immunity afforded by the act, as applied to violations of the Federal law, the court said: "The possibility that the affidavit required by § 7a of the anti-trust act of 1893 (Laws 1893, p. 90) might contain disclosures tending to show a violation of the anti-trust law of some other state or of the United States, is not a real and probable danger of criminal prosecution within the constitutional privilege against giving self-incriminating evidence."

The anti-trust law is a valid exercise of legislative power, and is not violative of the 14th Amendment to the Federal Constitution, as claimed by appellant. Section 10 of the act contemplates that, in the proceeding or investigation before the district court or the judge thereof, to discover if there have been violations of the state anti-trust law, the inquiry will be confined to violations of that law. The record discloses that the examination of appellant was confined to its legitimate scope, within which the immunity afford him by § 10 was coextensive with the constitutional privilege invoked for his protection. The possibility that his answers to the inquiries might disclose violations of the Federal law, and the evidence thus given be used against him in a criminal prosecution for a violation of that law, was not a real and probable danger.

Appellant should have answered the 1 L.R.A. (N.S.)

questions asked him upon the inquiry. The judgment of the court below is affirmed.

All the Justices concur.

Affirmed by Supreme Court of United States, November 27, 1905.

ILLINOIS SUPREME COURT.

JOSEPH T. DONOVAN, Appt.,
v.

JULIA PURTELL.

(216 Ill. 629.)

1. Agent—acting as corporation—personal liabilities.

A person who, upon receiving a security for collection and reinvestment, uses the money for his own purposes, and delivers to his customer a worthless obligation of a corporation of which he is president, and which he organized for the transaction of his personal business, is personally liable to return the amount so received.

2. Promise to pay another's debt.

A promise by one who has given the obligation of a corporation of which he is president, for his own debt, to pay the same, is not void under the statute of frauds, as a promise to pay the debt of another.

3. Fraud—evidence of confidence—of business methods.

In an action to compel the restoration of money by one to whom it was taken for investment, and who gave therefor worthless obligations of a corporation of which he was president, evidence is admissible of the confidence which the customer had in him and of his method of transacting business in the name of corporations to avoid his personal obligations.

4. Pleading—common counts.

A recovery under the common counts may be had against one to whom money has been delivered for investment, and who, after using it for his own benefit, delivers to the customer worthless obligations of a corporation of which he is president.

(October 24, 1905.)

Case Note.—The court in the DONOVAN CASE, in ignoring the corporate existence of the J. T. Donovan Real Estate Company, applied a rule which has received the recognition of text writers and the courts. In *Clark & Marshall on Private Corporations*, § 7e, it is said that a corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the guise of the fiction that a corporation is a legal entity, separate and distinct from its members. When this is attempted, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no corporation had been formed.

In *Morawetz on Private Corporations*

APPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court of St. Clair County in plaintiff's favor in an action brought to recover money delivered to defendant for investment. Affirmed.

Statement by Magruder, J.:

This is an action in assumpsit, begun by appellee against appellant on November 24, 1903, by attachment in the circuit court of St. Clair county. The writ of attachment was levied on appellant's interest in certain land situated in that county. Before the trial, to wit, on March 23, 1904, by agreement of the parties, an order was entered releasing the real estate levied upon under the writ of attachment upon the execution

and filing by appellant of an indemnity bond. The declaration consists of the common counts for money lent by appellee to defendant at his request, for money paid out and expended by appellee for the use of appellant at his request, for money received by appellant for the use of appellee, for money for interest on divers sums of money forborne by appellee to appellant at his request, etc. A bill of particulars was filed, which, besides the items for money loaned and due in 1901, contains items for money lent by appellee to appellant in the name of the Fidelity Realty Company in 1901, and for money lent to appellant by appellee, and promised to be paid by him in the name of the J. T. Donovan Real Estate Company, in 1901. The general issue was

that, in § 1, the author, in discussing a corporation as a separate or distinct entity or person, says: "In most cases, this is a just as well as convenient means of working out the rights of the real persons interested; however, it is essential to a clear understanding of many important branches of the law of corporations to bear in mind distinctly that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." In § 227 of the same work, it is said: "In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest; while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity, the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice."

The case of *First Nat. Bank v. F. C. Trebein*, Co. 59 Ohio St. 316, 52 N. E. 834, which was cited by the court in the *DONOVAN* CASE, was one where a failing debtor formed a corporation consisting of himself and members of his family, and conveyed all his property to the corporation in exchange for stock issued to him, which stock he immediately placed with his creditors as collateral security for his claims, while he retained control of the property, and managed it as president of the company. The court held the conveyance fraudulent; and, in addition to the language quoted in the *DONOVAN* CASE, said: "The transaction cannot be likened to a conveyance to a third person for a valuable consideration,—considered in the light of the facts, it was no more than a conveyance from himself to himself. The corporation was, in substance, another F. C. Trebein."

In *Chicago & G. T. R. Co. v. Miller*, 91 Mich. 166, 51 N. W. 981, it was held that the railroad company and its incorporator were one and the same person. In that

case it appeared that the receiver of two separate corporations, seeing the opportunity for constructing a connecting line, organized a company for that purpose, and was the only contributor to its capital stock; and then entered into a contract with it, by which it took all its bonds and stock and agreed to construct the railroad and bridges, but no provision was made for side tracks, turntables, station houses, etc. He also agreed, in case the company did not procure its right of way, to acquire the same at a stipulated price per mile. Subsequently the railroad company was consolidated with the two other lines referred to, and the incorporator presented a claim for securing the right of way and constructing the portion of the road not included in the contract. The court restrained his assignees from enforcing the claim, on the ground that he was the company, and that the contract which he entered into with the company, and by which he took all the property the company had, could not be enforced without the perpetration of a fraud.

In *Buffalo Loan, Trust, & S. D. Co. v. Medina Gas & E. L. Co.* 12 App. Div. 199, 42 N. Y. Supp. 781, a corporation was held liable upon a loan made to one who was an officer of a corporation which he practically owned, where he deposited bonds of the company as collateral security, although he further secured the debt by his individual note. The court said that in view of the circumstances of the case and the fact that the corporation was virtually the private property of the borrower, it "must not carry too far the legal conception that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it."

A corporation taking a conveyance of land from its directors and only stockholders, who were also its promoters and organizers, takes it charged with the same equities as existed against its grantors. *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016. In so holding, the court said: "The grantors acted not solely for themselves as individ-

filed to the declaration. A trial was had before the court and jury, resulting in a verdict in favor of appellee against appellant for the sum of \$1,430, from which the plaintiff remitted the sum of \$71.80, making the amount of the verdict \$1,358.20, which remittitur was approved by the court. Motion for new trial was overruled, and judgment rendered on the verdict in favor of appellee against appellant for \$1,358.20 and costs. An appeal was taken to the appellate court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance. Upon the trial of the cause, at the close of the evidence of appellee, plaintiff below, plaintiff's counsel tendered to the defendant the notes and trust deed, dated January 19, 1901, hereinafter referred to, and also the written guaranty hereinafter described, which counsel for the defendant refused to accept. The notes, trust deed, and guaranty were then tendered into the care of the court for the use of the appellant, the defendant below. At the close of the appellee's evidence the appellant asked the court to give a written

instruction to the jury to find the issues for the defendant below, which instruction the court refused, and such refusal was excepted to. At the close of all the evidence the defendant below again asked of the court a written instruction to the jury to find the issues for the defendant, which instruction was refused, and such refusal was excepted to.

The facts of this case, as stated by the appellate court in their opinion, are as follows:

"Appellee for many years worked for he living in St. Louis, Missouri, doing house work. Some time prior to this suit, having accumulated the sum of \$1,200, she placed it at interest on real estate security, and the note representing the loan came due in January, 1901. At that time appellant was engaged in the real estate and loan business in the city of St. Louis. He was president of the J. T. Donovan Real Estate Company, of which his son, Joseph M. Donovan, was vice president. The latter was also president of the Fidelity Realty Company, which did business in the same

ways, but also for the corporation whose capital stock they owned, and the transaction should be regarded as one in which the same parties are grantors and grantees."

Likewise, a corporation organized by a director of another corporation, and who takes most of its shares, is not a bona fide purchaser of land conveyed to it by such person, where he had purchased it of the corporation of which he was director, improperly and in violation of his trust. This is upon the ground that the organizer of the corporation and the corporation are one and the same person, and that, in conveying the property to the corporation, he was but conveying it to himself. *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311.

In *Evans v. Kingston Coal Co.* 6 Kulp, 351, it was held that the question whether a corporation is also in fact the owner of a certain store, operated in the name of its principal stockholders, within the meaning of a statute forbidding mining companies to operate "company stores," is a question of fact for the jury.

In *Pott v. Schmucker*, 84 Md. 535, 35 L. R. A. 392, 37 Am. St. Rep. 415, 36 Atl. 592, where the stock of an insolvent corporation was entirely owned by one member of a firm to which the corporation was indebted, the corporation and such member of the partnership were treated as one and the same person, and the partnership denied the right to share in the assets of the corporation until after its creditors had been paid.

In *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279, the Standard Oil Company was held to be regarded as a party, in its corporate capacity, to an illegal 1 L.R.A. (N.S.)

agreement entered into between its stockholders and the stockholders of other companies, so as to subject the corporation to proceedings in quo warranto, and that the legal fiction whereby a corporation is to be regarded as a legal entity, existing separately and apart from the natural persons composing it, is not applicable.

Where a railroad company having power to transact a general telegraph business organizes a small telegraph company, and becomes its sole stockholder, it is liable on a judgment subsequently entered against such telegraph company, where such railroad company sells out its telegraph system and leaves the telegraph company without assets. *Interstate Telegr. Co. v. Baltimore & O. Telegr. Co.* 51 Fed. 49.

In *Brundred v. Rice*, 49 Ohio St. 640, 3 Am. St. Rep. 589, 32 N. E. 169, an illegal contract had been entered into between the defendants and a railroad company, whereby the latter agreed to charge all shippers of petroleum a specified rate, and pay over one-half of the same to the defendants. The action was brought by the shipper to recover moneys so collected by the railroad company, and paid over to the defendants. The defendants contended that they had not received the money, but that it had been paid over to a corporation to which they had assigned their interest in the contract. The court held the defendants liable even though the money had been paid to such corporation, as the jury had found that the corporation was organized by the defendants simply for the purpose of consummating the illegal agreement.

In the following cases the rule has been applied where corporations were organized for the purpose of performing acts which the incorporators or principal stockholders

room with the other company, and in which appellant was likewise interested. Shortly after her note became due, appellee took it, and the trust deed by which it was secured, to appellant's place of business, for the purpose of having him collect the money due, and reinvest it for her; but at the office she made arrangements to that end with Joseph M. Donovan, whom, she testified, she considered a clerk. In June, 1901, she left the city and did not return until the following October. In the meantime she made arrangements with a friend, Miss Slaterly, to attend to her business. During her absence the note owned by her was collected, and a new one for a like amount, secured by deed of trust, was given Miss Slaterly, who afterwards turned the papers over to appellee. The new note was made by the Fidelity Realty Company, by J. M. Donovan, its president, and was payable to the order of George M. Cooper, a clerk in appellant's office, who indorsed the same without recourse. It was secured by a deed of trust upon a 25-foot lot on San Francisco avenue, in the city of St. Louis, made by

the Fidelity Realty Company to appellant, as trustee. The note and trust deed were dated January 19, 1901, but were not delivered to Miss Slaterly until the following August. With these papers there was also delivered to Miss Slaterly a written guaranty, executed by J. T. Donovan Real Estate Company, by J. T. Donovan, its president, which, after reciting the assignment to appellee of the note and securities in question, proceeded as follows: 'And whereas, there is being erected on said lot of ground certain improvements, which may not yet be fully completed and paid for: Now, therefore, in consideration of said sum of \$1,200, we hereby promise and agree to cause said improvements to be fully completed and paid for, and to hold the said Miss Julia Purtell harmless from all loss or damage on account of mechanics' liens, or on account of the failure of the said Fidelity Realty Company to fully complete said improvements, and to pay for the same. For the consideration aforesaid, we further obligate ourselves to hold Miss Julia Purtell and her assigns harmless from all loss

had contracted not to do, and the corporation was a mere cover by which they intended to violate their contracts.

In *Beal v. Chase*, 31 Mich. 490, the corporation was restrained from carrying on a particular business in violation of a contract entered into by one who subsequently became its principal stockholder and president and business manager, by the terms of which contract, such stockholder, in selling his printing and publishing establishment, agreed not to engage in the business in the state so long as the vendee should continue in business at the place of sale. The vendor took one-half of the stock in the new corporation. Some of the stockholders had known for a long time of the contract in question. The stock was in the hands of the original subscribers when the injury to the complainant was committed. The court held the corporation liable to the complainant to the full extent that the stockholder would have been. The *Beal Case* was distinguished in *American Preservers' Co. v. Norris*, 43 Fed. 711. In this case, a manufacturing corporation sold one branch of its business to its principal stockholder, and thereupon discontinued such branch of the business. Subsequently the purchasing stockholder sold such branch of the business to a third person, and entered into an agreement not to enter into the same business, directly or indirectly. The court held that the corporation was not bound by the agreement. The court distinguished the *Beal Case* largely upon the ground that the corporation there involved was organized after the agreement was made, and for the purpose of violating it; while, in the case at bar, the corporation was a going concern, and doing an extensive business when the agreement was made. The *Beal Case* was
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also distinguished in *Moore & H. Hardware Co. v. Towers Hardware Co.* 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41, where the court, while recognizing the existence of the rule, refused to apply it so as to restrain a corporation from violating a contract entered into before incorporation by its principal corporators and stockholders, where it was not averred or shown that the corporation was organized fraudulently, or as a device to evade the personal obligation of the contractors.

In *A. Booth & Co. v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776, the vendor, in selling his business, made a valid contract not to continue in the business, but subsequently he formed a corporation with other persons, who knew of the sale, and the court restrained the corporation from violating the contract. This case cited the *Beal Case* as its authority.

In *LePage Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941, it was held that where one has conveyed his business, trademarks, and good will, a corporation subsequently formed, and of which the vendor, his wife and attorney, are the original incorporators, and which he subsequently controls and manages, stands in his shoes, and has no greater right than such vendor to use his name in such business.

A corporation organized by defendants, and to which they turned over land which they had bought for a lumber plant, was held to have been organized for the purpose of evading a contract by which the corporators had made the plaintiffs the sole selling agents for lumber manufactured by them. *Hagy v. McGuire*, 147 Pa. 187, 23 Atl. 806.

on account of said investment, principal or interest.' The guaranty also contains an undertaking on the part of the maker to pay the interest notes in case of default in the payment thereof for a longer period than thirty days, and to purchase the principal at its face value, with interest added, within six months after default in the payment of the same. Some time after appellee received the last named papers she ascertained that the lot described in the deed of trust was vacant, that no improvements were being made, and that it was worth only about \$150. She thereupon called upon J. M. Donovan, the president of the Fidelity Realty Company, who offered to give her in exchange other securities, which on examination, she found to be entirely inadequate to properly secure the debt. She then made a similar demand of appellant, and he offered her to substitute some other piece of property for that which appellee had; but, upon an examination of the properties named, appellee refused to accept any of them on the ground that the security was wholly insufficient. While negotiations were pending, two of the interest notes were paid by appellant. Appellee testified that, when she asked appellant what security he could give on said notes, he said he could not give her money, but offered to pay her in eighteen months, and told her she would not be at any loss; but this appellant denies. Afterwards negotiations ceased, and this suit was brought. Upon the trial the appellant . . . introduced the evidence of himself and Joseph M. Donovan. . . . These witnesses were corroborated to some extent by the securities held by appellee, purporting to have been executed by the two corporations above named. On the contrary, appellee . . . testified that she dealt with appellant on account of the confidence she had in him; that his boys, several of whom were in the office, acted just as other clerks. She said: 'I paid all the confidence to Mr. Donovan I could. I would not pay as much to my brothers as I did to Mr. Donovan, because he was a Catholic and a member of my church and a good living man as I supposed.' The manner of transacting business at the Donovan office was fully explained by Lydia M. Cooper, who was appellant's stenographer and typewriter from October, 1897, to April, 1903. She testified that the office was a long, narrow room, about 20 feet wide and 60 to 75 feet long; that there was a partition in the front, like a banking counter, and in the rear there was a place about ten feet square, where a number of different companies, known as the J. T. Donovan Real Estate Company, the Fidelity Realty Company, the Cunliff Realty Company, the Fenimore & L.R.A. (N.S.)

Realty Company, the Cappa Realty Company, and the McKinley Company, had headquarters; that the different corporations had different presidents, but that appellant was really the man who ran the whole thing; that there were three sons of appellant in the office, and several other clerks; that J. T. Donovan controlled the business of the Fidelity Realty Company; that there was a bookkeeper and cashier in the office; that over the door there was the sign, 'J. T. Donovan Real Estate Company'; that J. M. Donovan 'never made any transaction without J. T. Donovan sanctioned it'; that the Fidelity Realty Company did not have any financial standing, but was simply gotten up to keep the property out of judgment, so that the property could be sold and transferred without the judgment being paid off; that she had heard appellant say so himself; that he said there were judgments against these different companies, and he would get up another company and put the property in the name of the new company in order that it could be transferred, so that there would be no judgment against it; that he used the property of the companies indiscriminately; that he would settle the debts of the J. T. Donovan Real Estate Company with those properties, no matter to which company they belonged; and that the stock of the J. T. Donovan Real Estate Company was all held by members of the family; that Mr. Donovan got the property named in the deed of trust in question for \$325, and put a \$1,200 loan on it. Joseph M. Donovan, when placed upon the witness stand, denied some of the statements made by Miss Cooper; but appellant, when placed upon the stand, did not see fit to deny any of them."

Messrs. Louden & Crow for appellant.

Messrs. James M. Dill and W. F. Smith for appellee.

Magruder, J., delivered the opinion of the court:

The salient facts of this case are that the appellee had a note and trust deed for \$1,200 against a man named Hayden; that they became due in January, 1901, and she took them to the office of the appellant, with directions to him, or to his son in the same office with him, to collect them for her and reinvest the money; that the money was collected by appellant, or some one of his sons in the office with him, either in his own name or in the name of one of the corporations doing business in his office, and which he controlled and managed. The evidence tends to show that the \$1,200 belonging to appellee went into appellant's hands, or into the hands of some one or more of his sons

or clerks. Appellee's money, therefore, was had and received by the appellant. Appellant turned over to Miss Slaterly, appellee's agent and friend, acting for her while she was out of the city, a note for \$1,200, payable in three years, together with certain interest notes, and a trust deed securing the same upon a 25-foot lot in St. Louis. These notes and trust deeds bore date January 19, 1901. The evidence tends strongly to show that at that time the lot was not worth more than \$125 to \$150, or from \$5 to \$6 per front foot. The principal note for \$1,200, and the interest notes, dated January 19, 1901, were signed by the Fidelity Realty Company, by J. M. Donovan, president. They were payable to the order of George N. Cooper, a clerk in appellant's office, who indorsed them without recourse. The trust deed securing them was made to appellant, as trustee. The evidence tends to show that appellant controlled and managed the Fidelity Realty Company, and, the trust deed being made to himself as trustee and the notes being made to the order of his clerk, the conclusion is almost irresistible, in the light of the facts set forth in the statement preceding this opinion, that the papers thus prepared were really the papers of the appellant, though nominally those of a corporation in this office and under his control.

The written deed of guaranty, dated January 22, 1901, was signed by the J. T. Donovan Real Estate Company, by J. T. Donovan, president. It begins as follows: "Witnesseth, that for and in consideration of the sum of \$1,200, paid to us by Miss Julia Purtell, we have assigned and transferred to her certain notes of Fidelity Realty Company, dated January 19, 1901, secured by a deed of trust," etc. Appellant signed this indenture, and in it recites that the sum of \$1,200, belonging to Miss Purtell, was paid to "us," meaning thereby the J. T. Donovan Real Estate Company, of which he was president. In this guaranty he also recites that "we have assigned and transferred to her certain notes," etc. The notes were indorsed without recourse by this clerk, Cooper; but, in view of the recital thus quoted, Cooper merely acted for the appellant or his company, the J. T. Donovan Real Estate Company. Miss Cooper swears that she drew all the deeds of trust and notes and guaranties that were executed while she was in appellant's employment from October 15, 1897, to April 7, 1903. She also swears that she drew up these notes and trust deed and the deed of guaranty, and that they were in her handwriting. She says that she drew them up at the direction of the appellant; that is to say, the appellant directed her to draw the notes to

be signed by the Fidelity Realty Company, payable to the order of his clerk Cooper, and also the trust deed to be executed to himself, as trustee. She says that she did not deliver those papers, but merely turned them over to be signed. It is quite evident that these notes and this trust deed represented no consideration whatever; that is to say, there was no note for \$1,200, owned by Cooper, but the notes and the trust deed were merely drawn up to be given to appellee in return for her \$1,200. The transaction did not by any means represent a purchase of securities amounting to \$1,200 from Cooper, the payee in the note. The fact that they were drawn up by Miss Cooper, under the direction of the appellant and at his dictation, shows that the transaction was under his control and management. The written guaranty stated that certain improvements were then in course of erection upon the property described in the trust deed of January 19, 1901; but the proof shows conclusively that this statement was false. No improvements were then in course of erection upon the premises, nor were any ever made upon the premises. The evidence also tends to show that there were judgments then existing against the Fidelity Realty Company, and that it had no financial standing whatever, but that it was, as is said by one of the witnesses, "gotten up to keep the property out of judgment." The proof shows that none of these corporations controlled by appellant paid their debts. One of the witnesses swears that, "when any adjustment was to be made, Mr. Donovan would use the property of these companies to make it, indiscriminately. He would settle the debts of the J. T. Donovan Real Estate Company with these properties, no matter to which company it [they] belonged."

When the appellee discovered that the notes and trust deed which had been turned over to her were worthless, the appellant began to offer her other property in place of that described in the trust deed, and promised he would pay her in eighteen months, and told her that she should lose nothing. If the debt was not his, but was really and bona fide the debt of the Fidelity Realty Company, it is difficult to understand why he should thus seek to substitute other securities for those held by the appellee, and promise to pay the indebtedness himself. The promise to pay the indebtedness was made as though the debt was his own, and not as though it was the indebtedness of a third person, to wit, the Fidelity Realty Company. The evidence tends to show that, although the appellant and his sons turned over to appellee these worthless securities in exchange for her

money, yet that appellant himself received the money and used it for his own private purposes, and sought to escape personal liability by covering up the transaction in the name of a corporation, which was entirely under his own control. This being so, the trial court committed no error in refusing to instruct the jury to find the issues for the defendant. It would have been improper to give such instruction, in view of the fact that the evidence tended to prove that the appellant received the money and declined to pay it over. This suit is not brought upon the notes executed by the Fidelity Realty Company. Those notes and the trust deed securing them were tendered back to the appellant upon the trial, and, upon his refusal to receive them, placed in the custody of the court for the use and benefit of appellant. The object of the suit is to recover, under the common counts, the money actually received by the appellant. The instructions given by the court to the jury on behalf of the appellee submitted to the jury the question of fact whether the affairs of the J. T. Donovan Real Estate Company and the Fidelity Realty Company were controlled by J. T. Donovan for the transaction of his private business, and whether or not he personally controlled both of these corporations when they received the appellee's money, and whether or not her money was received for appellant's own private individual uses and purposes. The instructions also left it to the jury to find whether or not the appellant was conducting his business in the name of the J. T. Donovan Real Estate Company, and through that company received appellee's money, and appropriated the same to his own use, and gave her, in payment of it, the worthless securities above referred to. The judgments of the lower courts, finding for the appellee, settle these questions of fact, so far as we are concerned, against the appellant.

Appellant was president of the J. T. Donovan Real Estate Company, and his son, Joseph M. Donovan was the vice president of that company, and Joseph M. Donovan, the appellant's son, was the president of the Fidelity Realty Company. Both of these concerns were controlled, managed, and dominated by the appellant, J. T. Donovan. The officer or controlling manager of a corporation cannot use it and its name for the transaction of his own private business, and to escape personal liability on his part. The theory upon which the appellant defends this suit is that the liability to appellee was not his liability, but that of the corporation known as the Fidelity Realty Company. In *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 210, 35 N. E. 527, it 1 L.R.A. (N.S.)

was held that the directors of a private corporation have no right, under any circumstances, to use their official position for their own individual benefit. In the case of *First Nat. Bank v. F. C. Trebein Co.* 59 Ohio St. 316, 52 N. E. 834, it was said: "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted,—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction." In *Cook on Corporations*, vol. 2, 5th ed. § 663, it is said: "A corporation is often organized to act as a 'cloak' for fraud. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud." See, also, *Lachman v. Martin*, 139 Ill. 450, 28 N. E. 795. In *1 Morse on Banks and Banking*, 4th ed. § 128, it is said: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both. . . . They may be held to account to an injured party in a court of chancery, or to any or any of their number, who shared in the wrongdoing, may be sued at law for damages." So, in the case at bar, appellant, as an officer of one or more of the corporations here involved, was guilty of such a fraud in transferring to appellee these worthless securities in payment of the money which he owed her that he can be held liable personally for the loss inflicted upon her. Even if the corporation be regarded as the real debtor, and the appellant as only its agent, yet, inasmuch as he was guilty of the fraud perpetrated upon appellee, the law will hold him liable. In *1 American and English Encyclopedia of Law*, 2d ed. p. 1135, it is said: "An agent will be held personally liable to third persons for all damages sustained by them in consequence of any fraudulent or malicious act committed by him on behalf of his principal, and in an action against the agent for

fraud the fact that he derived no personal profit or benefit therefrom is immaterial." In *Reed v. Peterson*, 91 Ill. 288, it is said: "In an action at law for damages, the fact that a defendant acted throughout in the capacity of agent in a fraud perpetrated by him will afford him no excuse." See, also, *Seddon v. Connell*, 10 Sim. 86; *Windram v. French*, 151 Mass. 549, 8 L. R. A. 750, 24 N. E. 914.

It is claimed, on the part of the appellant, that the court below erred in permitting appellee to prove that the appellant promised to repay the money to her. It is said that this was a promise to pay the debt of a third person, to wit, of the Fidelity Realty Company; and that, under the statute of frauds, the promise to pay the debt of a third person must be in writing. The statute of the state of Missouri in relation to the statute of frauds upon this subject, which is almost identical with our own, was introduced in evidence over the objection of appellee. It was not pleaded as a defense; and the general rule is that, where the statute of another state is relied upon as a defense, it must be pleaded as set out, at least in substance, and must be proved on the trial, and, if it is not pleaded, it is error to permit it to be proved. *Palmer v. Marshall*, 60 Ill. 289. But whether or not this rule applies here, where the declaration contained merely the common counts, and did not set up any contract, makes no difference under the circumstances of this case, because the proof tends to show that, when appellant received appellee's money, he was not conducting business under a bona fide corporate organization, but was using a corporate entity for the transaction of his private business, and, as he was, therefore, personally liable to the appellee for the repayment of her money, his promise was to pay his own debt, and not the debt of a third person.

It is said that the court erred in the admission of certain testimony introduced by the appellee. We are satisfied with the following statement upon this subject, made by the appellate court in their opinion deciding this case, to wit: "Appellant also claims that the court erred in permitting appellee to show the course of business pursued by him, his exercise of control over the various companies in the same office, and the indiscriminate manner in which he used the money of said companies, and in admitting evidence tending to show the reason why appellee had special confidence in him. In our opinion this evidence was all proper, as bearing upon the question whether the appellant was really conducting his own business under the name of the several corporations for his own benefit, and also whether he took advantage of appellee's special con-

fidence in him to use her money and give her securities which were practically worthless."

The objection is made that a recovery cannot be had in this kind of case under the common counts. We are unable to concur in this contention. In *Wilson v. Turner*, 164 Ill. 398, 403, 45 N. E. 820, 821, this court said: "An action for money had and received will lie whenever one person has received money which, in justice, belongs to another, and which, in justice and right, should be returned. . . . When, therefore, according to this rule, one person obtains the money of another which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery." Inasmuch as, in the case at bar, there was evidence tending to show that appellant had obtained money from appellee which it was unjust and inequitable for him to retain, she is entitled to maintain the present action for the recovery of such money. In *First Nat. Bank v. Gatton*, 172 Ill. 625, 50 N. E. 121, this court said, quoting from other cases therein referred to (page 627 of 172 Ill., page 121 of 50 N. E.): "It is the well recognized doctrine that the action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff which, in equity and conscience, he has no right to retain. . . . When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties. . . . In an action of assumpsit for money had and received, the main inquiry is whether the defendant holds money which, *ex æquo et bono*, belongs to the plaintiff." See, also, *Belden v. Perkins*, 78 Ill. 449; *Allen v. Stenger*, 74 Ill. 119; *Seeburger v. McCormick*, 178 Ill. 404, 53 N. E. 340. In *Elgin v. Joslyn*, 136 Ill. 525, 532, 26 N. E. 1090, 1092, it was said: "The act of the city may have been tortious, but the plaintiff had the right to waive the tort and sue in assumpsit, as the city applied the property to its own use and benefit. Where one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort, and charge the wrongdoer in assumpsit on the common counts as for goods sold, or money received. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378." In *Moore v. Shields*, 121 Ind. 268, 23 N. E. 89, it was held that, "where a party is induced by fraudulent representations to purchase worthless township warrants, he can recover the money paid by him to those knowingly making such representations in an action for money had and received." In *McQueen v. State Bank*, 2 Ind. 413, it was held that "an action for money had and received will

lie where one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit; and the law implies a promise from such person to return it to the lawful owner."

For the reasons above stated, we are of the opinion that the judgments of the lower courts were correct. Accordingly, the judgment of the Appellate Court, affirming that of the Circuit Court, is affirmed.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

Ex parte CHARLES E. HAYDEN.

(.... Cal.)

Constitutional law—marking fruit.

The marking of fruit packed for shipment, with the locality in which it is grown, cannot be required under the police power of the state.

(September 6. 1905.)

APPPLICATION by petitioner for a writ of habeas corpus to secure his release from custody to which he had been committed for alleged violation of a statute requiring the marking of fruit packages. Petitioner discharged.

The facts are stated in the opinion.

Messrs. Wright & Wright for petitioner.
Mr. Benjamin K. Knight for the sheriff.

Henshaw, J., delivered the opinion of the court:

Petitioner was convicted and sentenced

Case note.—The invalidity of a police regulation requiring the labeling or branding of an article of commerce, because its operation would render trade therein "so onerous, complicated, and expensive as seriously to imperil its existence," seems to be determined for the first time in *EX PARTE HAYDEN*. There appears a *dictum*, however, in *Dorsey v. State*, 38 Tex. Crim. Rep. 532, 40 L. R. A. 203, 70 Am. St. Rep. 762, 44 S. W. 514, where the court says: "A great many articles of food are mixed and combined together, and such combinations are not only harmless, but are healthy as articles of food; and to require all such articles to be labeled so as to show the constituent elements composing the same, it occurs to us, is extremely onerous legislation."

That such labeling or branding cannot be used to enhance the value of a commodity made or grown in a particular locality, or the product of a certain kind of labor, and correspondingly to depreciate the value of its competitors, is expressly held in the prevailing opinion in *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257, cited in support of the holding in *EX PARTE HAYDEN*. But the unconstitutionality of the act there in question, upon 1 L. R. A. (N. S.)

to punishment for a violation of the provisions of a state statute which provides as follows: "All fruit, green or dried, contained in boxes, barrels, or packages, which shall hereafter be shipped or offered for shipment in this state by any person, firm or corporation, shall have stamped, branded, stenciled, or labeled in a conspicuous place on the outside of every such box, barrel or package, in clearly legible letters, at least $\frac{1}{4}$ of an inch in height, a statement truly and correctly designating the count and immediate locality in which such fruit was grown." Stat. 1903, p. 338, chap. 251 § 1. For a violation of this act he was sentenced to pay a fine of \$300, with the alternative of imprisonment, and sued for an obtained a writ of habeas corpus.

He contends that the penal statute in question is violative of § 1 of the 14th Amendment of the Constitution of the United States, and of article 1, § 1, of the Constitution of this state, and that the statute in question works an unwarranted invasion of his liberty. It has come to be well recognized that the liberty and the pursuit of happiness, in which the individual is protected by the Constitution of the United States and of the state, apply as fully to his right of contract, his right to follow a legitimate vocation untrammelled by unnecessary regulations, as it does to the freedom of arrest or restraint of his person. This subject has received recent consideration by this court, and it is unnecessary to do more than refer to *Ex parte Dickey*, 144 Cal. 234, 66 L. R. A. 928, 103 Am. St. Rep. 82, 77

such ground, seems to have had the support only of the writer of the opinion; three of the judges having upheld the constitutionality of the act, and the others having concurred in the opinion to affirm upon the ground only that the law was repugnant to the commerce clause of the Constitution. In that case a statute of the state of New York required all goods made by convicts in any prison or penitentiary to be branded or labeled "Convict Made." The defendant was indicted for selling a scrub-brush made by convict labor in another state, and not labeled as the statute required. In holding the statute unconstitutional because it deprived the citizen of his property without due process of law, the limit to which the police power of the state may be exercised in respect to the regulation of trade in a harmless article of commerce is clearly set forth by O'Brien, J., as follows "A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection. The fact that legislation hostile to

Pac. 924. Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation, and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous—in other words, to regulate harmless vocations—is found in the police power alone. *Young v. Com.* 101 Va. 853, 45 S. E. 327; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals. *Cooley, Const. Lim.* 7th ed. p. 837; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41.

But the legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (*Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870): "But it is not true that, when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of a citizen to engage in such a

business or follow such a profession is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. . . . This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273, in the following language: 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' "

The propositions here enunciated have received the sanction of all the courts, and may not be gainsaid. Indeed, respondent upon this appeal does not dispute them, but undertakes to show that the act in question is a legitimate exercise of the police power, in that its object and purpose is to preserve and promote public health and public welfare. His reasoning in this regard is that from time to time the legislature has passed and this court has approved statutes providing for the quarantining of infected fruit, for the destruction of diseased fruit and fruit trees, and for the com-

the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the courts cannot permit that to be done by indirection which cannot be done directly. The guaranty against depriving the citizen of his liberty comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession, or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business, are infringements upon his fundamental rights of liberty, which are under constitutional protection." Although this statement can be regarded only as the individual opinion of the judge announcing it, it is fully sustained by the authorities. The only difference of opinion is as to its application to particular statutes.

As indicating the general principle on this subject the courts have declared that the free use and enjoyment and disposal of all of one's acquisitions, without any control or diminution, save only by the law of the land, is not only the natural but the constitutional right of citizenship; and all laws which impair or trammel this right, except as they may be necessary to safeguard the welfare of society, are invalid. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

It is said in *McKinster v. Sager*, 163 Ind. 671, 68 L. R. A. 273, 106 Am. St. Rep. 268, 72 N. E. 854: "The effect of the guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising, by any of its departments, arbitrary and capricious power over persons or property,"—citing *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The limitations upon the exercise of the police power in respect to articles of food are stated in *People v. Biesecker*, 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534,

pulsory care and preservation against disease of orchards; and it quotes this court's statement in *Los Angeles County v. Spenger*, 126 Cal. 673, 77 Am. St. Rep. 217, 59 Pac. 203, 385, to the following effect: "It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is, therefore, a proper exercise of the police power, which the legislature has, under § 1, art. 19, of the Constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state." From this respondent argues that the effect of the act is (*e. g.*) that when apples are shipped to the markets of this state, properly labeled, "Apples Grown in Santa Cruz County," because of their known cleanliness and freedom from disease, such apples are permitted to pass local boards of commissioners, while at the same time, if apples are shipped from San Mateo county

into Santa Cruz county bearing the label the county of Santa Cruz can protect itself against the diseased fruit from the neighboring county. Still further, it is argued that the act would prevent the false labeling of fruit, and that the prevention of a general fraud is legitimately within the scope of the police power.

But the difficulty with this argument is that the act clearly is not designed to accomplish any of these purposes, and is wholly inadequate to their accomplishment. The scope, the meaning, and the intent of an act must be gathered from its title and from its body. There is nothing in either the title or the body of this act which deals or pretends to deal, with many of the difficulties which respondent mentions. If it is a question, as respondent contends, of the shipping of diseased apples, it would be simple enough for the legislature, and quite within its powers, to regulate or prohibit the transportation of such diseased fruit. If it were a question merely of deception in

61 N. E. 990, as follows: "(1) That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food. (2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use, and thus imposing upon consumers or purchasers, is valid. (3) That, in the interest of public health, the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale."

Inspection or quarantine laws affecting articles of commerce are generally upheld as within the police power; and the diversity of subjects to which the power has been applied, as well as the variety of methods by which it has been exercised, is shown in a valuable note to the case of *Turner v. Maryland*, 107 U. S. 38, 51, 27 L. ed. 370, 375, 2 Sup. Ct. Rep. 44. It is there shown that not only the size and character of the box, cask, or barrel containing articles for shipment have been the subject of legislation, but that laws requiring the marking or branding of the receptacle have not been uncommon. In the *Turner Case* a Maryland statute required tobacco to be packed in hogsheads of a stated dimension, and these to be weighed, numbered, and marked with the name and address of the owner. In upholding the validity of this statute, Mr. Justice Blatchford says: "Fixing the identity and weight of tobacco alleged to have been grown in the state, and thus preserving the reputation of the article in markets outside of the state, is a legitimate part of inspection laws; and the means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the 1 L.R.A. (N.S.)

latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws."

A statute requiring fertilizers manufactured in or imported into the state, to be inspected, stamped, and certified to, is upheld in *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Renfro v. Loyd*, 64 Ala. 94. Likewise a statute requiring that there shall be attached to each package of fertilizer a tag, to be furnished by the agricultural commissioner of the state, is valid. *Campbell v. Segars*, 81 Ala. 259, 1 So. 714.

The adulteration of food has become a prolific subject of police legislation in recent years; and where the purpose of such statutes is to prevent fraud and deception, or to promote health, they are generally held to be a reasonable exercise of the power. The requirement that the counterfeit article shall be branded or labeled in such case is obviously a proper means of protecting persons seeking the genuine article.

A prohibition against the sale of any article as lard, "which contains any ingredient but the pure fat of healthy swine," unless labeled "compound lard," with the name and proportion of the ingredients, is not an unwarranted interference with trade, nor does it constitute a violation of the constitutional provision as to due process of law. *State v. Snow*, 81 Iowa, 642, 11 L. R. A. 355, 47 N. W. 777. To the same effect are *State v. Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220, and *State v. Hanson*, 84 Minn. 42, 54 L. R. A. 468, 86 N. W. 768.

Manufacturers of baking powder containing alum may be required so to mark their product as to indicate that fact. *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *State*

a label, the direct and efficacious method would be for the legislature to prohibit false labeling. None of these things, as we have said, does this act do or pretend to do. It requires merely that every shipment of every package of fruit, whether it be from small farmers with few trees or vines, whether it be from the large producer, must in every instance bear a label naming the county and immediate locality in which the fruit was grown. It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of industry. Dried fruit, such as prunes, peaches, and apricots, are gathered in establishments, in enormous quantities, from the state over. These fruits, when dried, are assorted by grade and quality, and, thus assorted and packed, are shipped to the uttermost parts of the earth. It would absolutely prohibit this industry, if these fruit driers were compelled to label each package with the names of the localities from which the fruit came, and, if it did not absolutely prohibit it,

it would render their business so onerous complicated, and expensive, as seriously to imperil its existence. It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit raisers of some well-advertised and favored localities an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257, forms no part of the police power, and is wholly beyond the prerogative of the legislature.

It follows, therefore, that the act in question works an unconstitutional invasion of the prisoner's liberty; and it is ordered that he be discharged.

We concur: *McFarland, J.; Lorigan, J.; Angellotti, J.; Van Dyke J.; Shaw, J.*

Larson, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 437, 61 S. W. 171.

And in *Dorsey v. State*, 38 Tex. Crim. Rep. 47, 40 L. R. A. 201, 70 Am. St. Rep. 762, 44 S. W. 514, a statute making criminal the mixing of any articles of food without labeling the product, is held invalid because too general, and the lengths to which courts have gone in upholding legislation under the police power is deprecated. However, the court holds that, when wholesome and nutritious foods are intermingled, the legislature may require that the product be labeled so as to show the component elements thereof, and punish a failure to so label, but that the statute should designate the particular article the adulteration of which is prohibited.

Statutes regulating or prohibiting the manufacture or sale of oleomargarine have been upheld in many of the states. To protect the public against deception the law may require oleomargarine to be colored pink, or given some other distinguishing brand. *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210; *State v. Myers*, 42 W. Va. 822, 35 L. R. A. 844, 57 Am. St. Rep. 887, 26 S. E. 539; *Pierce v. State*, 63 Md. 592; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 38, 30 N. W. 308; *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688; *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 535, 2 Inters. Com. Rep. 63, 14 Atl. 604; *State, Bayles, Prosecutor, v. Newton*, 50 N. J. L. 549, 18 Atl. 77.

Upon the right to require such coloring, it is said in *Armour Packing Co. v. Snyder*, 54 Fed. 126, by Judge Lochren: "The state has undoubtedly the power of inspection and of confiscation in respect to articles of food put upon the market which are deleterious."

And unwholesome. And I think it may go further in respect to articles of food, and take efficient measures to prevent the people from being deceived and imposed upon, not only by requiring the packages containing an imitation article of food to be so marked as to disclose its character, but may also require that the article itself shall in a designated way be so marked for the same purpose."

When oleomargarine is made to resemble butter, the state may prohibit its manufacture and sale, "unless it is done under its true name, and each vessel, package, roll, or parcel of such substance has distinctly and durably painted, stamped, stenciled, or marked thereon, the true name of such substance in ordinary bold-faced capital letters not less than five-line pica in size." In upholding the validity of such statute, the supreme court of Ohio says: "Conceding that where the pursuit rests upon natural right, and the product is not harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation, and in fostering the interests of a rival product, yet where the manufacture is conducted in such way as is calculated to deceive, lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome, and especially where the article sought to be regulated may easily be manufactured so as to be harmful, and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury." *State ex rel. Atty. Gen. v. Capital City Dairy Co.* 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62.

TENNESSEE SUPREME COURT.

BETTIE FORD

v.

H. C. BROWN et al.

and

FIRST NATIONAL BANK OF NASHVILLE, Appt.

(.... Tenn.)

Indorsement by trustee—notice of trust.

The indorsement by a trustee, describing himself as such, of interest-bearing certificates of deposit payable to him as trustee, prima facie and presumptively fixes a purchaser with actual knowledge of the trustee's want of authority to dispose of the paper for his own benefit, within the meaning of the section of the negotiable instruments law which provides that, to constitute notice of infirmity in the instrument or defect in the title, there must be actual knowledge of such infirmity or defect,—at least where the certificates are not due, and the interest is payable only at maturity.

(March 31, 1905.)

APPEAL by the defendant bank from a decree of the Court of Chancery Appeals, which affirmed a decree of the Chancery Court for Davidson County in favor of complainant in a suit to enjoin the payment of certain certificates of deposit. Affirmed.

The facts are stated in the opinion.

Case Note.—Some confusion has existed between the question of the effect of the use of the word "trustee," in describing the payee or holder of an instrument, upon its negotiability, and the other question of the effect of the use of that word to give notice to subsequent takers of the trust character of the instrument and of the rights of the beneficiaries. In some of the treatises on the subjects of trusts and of negotiable instruments there has been a failure to distinguish between these quite different questions. The question of the effect of describing a payee as a "trustee" upon the negotiability of the instrument relates to the defenses of the makers or obligors as against those to whom the trustee has transferred the instrument, while the other question relates to the rights of the beneficiaries as against such transferees.

As an authority for the proposition that the use of the word "trustee," in describing the payee of an instrument, defeats its negotiability, the case of Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304, has been repeatedly cited, and has been relied upon in some of the treatises as establishing this doctrine. But, in fact, it is not strictly an authority in support of that proposition, although the court did say: "We do not think the note in question is within the class of paper known as commercial paper. Although like it in general form, the fact that it is payable to the order of Watkins, trustee, restricts its free circula-

Mr. Walter Stokes, for the appellant bank:

Possession of a negotiable bill or note payable to bearer, or indorsed in blank, to the holder especially, is prima facie evidence of title; and the holder of such instrument is presumed to have taken it in good faith for value before maturity, in the usual course of business, and without notice.

Bearden v. Moses, 7 Lea, 459; Brooklyn City & N. R. Co. v. National Bank, 102 S. 14, 26 L. ed. 61; Cheney v. Stone, 29 N. H. 885; Wyman v. Colorado Nat. Bank, Colo. 30, 40 Am. Rep. 133; Haywood v. Lewis, 65 Ga. 221; Cook v. Norwood, 1 Ill. 558; Tescher v. Merea, 118 Ind. 586; N. E. 316; McDowell v. Goldsmith, 6 N. H. 319, 61 Am. Dec. 605; 4 Am. & Eng. Law, p. 318.

Although a negotiable instrument is in circulation through fraudulent or illegal means, a bona fide holder of such instrument without notice may recover thereon.

Long Island Loan & T. Co. v. Columbia C. & I. C. R. Co. 65 Fed. 455; Young v. Ward, 21 Ill. 223; Riggs v. Trees, 13 Ind. 402, 5 L. R. A. 696, 22 N. E. 254; Koh v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; Fearing v. Clark, 16 Gray, 74, 77 Am. Dec. 394; 7 Cyc. Law & Proc. pp. 943, 946.

A party dealing with commercial paper

and excepts it from some of the rules governing commercial paper." The question at issue, however, was not the negotiability of the instrument, strictly speaking, but the right of the beneficiaries to protection. The action was instituted by the equitable owner of the note to restrain its collection by a party to whom the trustee had transferred it wrongfully, and, while the attorneys for the respective parties argued the question as if it were one of the negotiability of the instrument and the court made the declaration above quoted on that point, this was really *obiter*. The real question decided was that respecting the protection of the beneficiary, and on this the court said: "The doctrine is better settled than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him, although him, with actual or constructive notice of the trust, can acquire no title, and it may be recovered by suitable proceeding for the benefit of the *cestui que trust*." In the case of the present note it cannot be read understandingly without seeing upon its face that it is connected with the trust and is part of the trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and, as it turns out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed."

Another case that has been cited by some

is the right to assume that the relations of every party whose name appears upon are precisely what they appear to be.

Fifth Ward Sav. Bank v. First Nat. Bank, 5 N. J. L. 513, 7 Atl. 318; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 4 L. R. A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; *Hoge v. Lansing*, 35 N. Y. 136; *Woodwin v. American Nat. Bank*, 48 Conn. 550.

The word "trustee," following the name of the payee on a negotiable instrument, does not necessarily put the purchaser for valuable consideration, without notice, in usual course of trade and before maturity, upon inquiry.

Tradesmen's Nat. Bank v. Looney, 99 Tenn. 290, 38 L. R. A. 837, 63 Am. St. Rep. 830, 42 S. W. 149; *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 678, 37 S. W. 1102.

Messrs. Wheeler & Trimble and James A. Ryan for other appellants.

Mr. John Ruhm, for appellee:

When a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence, an act of justice.

Angle v. Northwestern Mut. L. Ins. Co. 92 U. S. 342, 23 L. ed. 560; *Dan. Neg. Inst.* § 759a; *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Dec. 304; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Sturtevant v. Jaques*, 14

Allen, 523; *Bancroft v. Consen*, 13 Allen. 50; *Baxter v. First Nat. Bank*, 85 Tenn. 33, 1 S. W. 501; *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 683, 4 Am. St. Rep. 786, 4 S. W. 287; *Duncan v. Jaudon*, 15 Wall. 175, 21 L. ed. 145; *Hazeltine v. Keenan*, 54 W. Va. 600, 102 Am. St. Rep. 953, 46 S. E. 609; *Alexander v. Alexander*, 7 Baxt. 403; *Covington v. Anderson*, 16 Lea, 311; *Smith v. Nashville & D. R. Co.* 91 Tenn. 222, 18 S. W. 546.

The negotiable instrument law has made no change in the law as it stood when enacted by the legislature.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; *Crawford's Anno. Neg. Instrument Law*, p. 47; *Thurber v. Cecil Nat. Bank*, 52 Fed. 513; *Lee v. Chillicothe Branch Bank*, 1 Bond, 387, Fed. Cas. No. 8,186, 1 Biss. 325, Fed. Cas. No. 8,187; *Germania Safety-Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797; *Jackson v. Davis*, MacArth & M. 334; 1 Dan. Neg. Inst. 5th ed. § 271, p. 287; *Langdon v. Baxter Nat. Bank*, 57 Vt. 1, 52 Am. Rep. 113; *Strong v. Strauss*, 40 Ohio St. 87; *Fowler v. Brantly*, 14 Pet. 320, 10 L. ed. 475; *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 391, 29 L. ed. 432, 6 Sup. Ct. Rep. 88; *Payne v. Flournoy*, 29 Ark. 500; *Chicago Title & T. Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637; *Prather v. Weissiger*, 10 Bush, 117.

of the text writers as if it were an authority against the negotiability of an instrument payable to a trustee is *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107, but this, also, was a case which did not involve that question. It was a case of an action by the equitable owner of certificates of stock which a trustee had indorsed and transferred as collateral security for a check of a firm of brokers to which he belonged, and the action was against this firm of brokers, as well as the payee of the check given by the firm and the corporation itself. The court said that, unless the word "trustee" be regarded as mere *descriptio personarum*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description, and, that the mere use of the word "trustee" in the assignment of a mortgage and note had been held to import the existence of a trust, and to give notice thereof to all into whose hands the instrument might come, had been expressly decided by the court; citing *Sturtevant v. Jaques*, 14 Allen, 523. The court added that, "where one known to be a trustee is found pledging that which is known to be trust property to secure a debt due from a firm of which he is a member, the act is one prima facie unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it." 1 L.R.A. (N.S.)

An authority directly in point on this question, and which explicitly holds that the negotiability of an instrument is not destroyed by adding the word "trustee" to the name of the payee, is the case of *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 678, 37 S. W. 1102. The opinion in the Fox Case cites the Lange Case, but says: "We take it that the decided weight of authority, and it seems to us of sound reason, supports the position that the addition of the word 'trustee' to the name of the payee of a note, of itself, does not destroy its negotiability." This conclusion as to the weight of authority on the question is unquestionably correct, as shown by *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Downer v. Read*, 17 Minn. 493, Gil. 470; *Bush v. Peckard*, 3 Harr. (Del.) 385; *Westmoreland v. Foster*, 60 Ala. 448; *Chadsey v. McCreery*, 27 Ill. 253.

In *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 38 L. R. A. 841, 63 Am. St. Rep. 830, 42 S. W. 149, which was a case involving the defenses of the maker of an instrument made payable to a person as "trustee" and indorsed by him, the court says that, while the rule is that he who takes a security from a trustee with his fiduciary character displayed upon its face is bound to inquire as to his right to dispose of it, "if,

Anything appearing on the face of the paper, which shows that the rights of the parties are not absolute, puts a purchaser on notice.

Isom v. First Nat. Bank, 52 Miss. 902; *Renshaw v. Wills*, 38 Mo. 201; *Ranney v. Brooks*, 20 Mo. 105; *Powell v. Morrison*, 35 Mo. 244; *McBain v. Seligman*, 58 Mich. 204, 25 N. W. 197; *Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Central Bank v. Hammett*, 50 N. Y. 158; *Norton, Bills & Notes*, § 127, p. 304; *Colson v. Arnot*, 57 N. Y. 253, 15 Am. Rep. 496; *Angle v. Northwestern Mut. L. Ins. Co.* 92 U. S. 342, 23 L. ed. 556; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75, 34 Am. Rep. 345; *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678; *Dunn v. National Bank*, 15 S. D. 454, 90 N. W. 1045; *Pelton v. Spider Lake Sawmill & Lumber Co.* 117 Wis. 569, 98 Am. St. Rep. 946, 94 N. W. 293; *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. ed. 490; *First Nat. Bank v. Farmers' & M. Bank*, 2 Herdman (Neb.) 104, 95 N. W. 1062.

McAlister, J., delivered the opinion of the court:

Complainant exhibited this bill against

the defendants, Henry C. Brown, Fred La tenberger, and Jesse Trinum, as individuals and as a partnership using the firm name of H. C. Brown & Company, against the First National Bank of Nashville, Tennessee, and the Chattanooga Savings Bank. The principal object of the bill was to enjoin the Chattanooga Savings Bank against the payment of two certificates of deposit which that bank had issued to Woodworth a trustee for complainant Betty Ford, and which certificates of deposit had been indorsed and transferred by Woodworth to H. C. Brown & Company, in payment of gambling indebtedness. H. C. Brown & Company indorsed said certificates of deposit to the First National Bank of Nashville, and that bank had forwarded the certificates to Chattanooga, and was seeking to collect them from the Chattanooga Savings Bank at the time the original bill herein was filed. It is alleged that these two certificates of deposit represented the earnings of the complainant Betty Ford as a domestic in the family of D. Woodworth, Jr., of Chattanooga, during a period of eighteen or twenty years. D. Woodworth, Jr., had died.

on inquiry, it is found that there is no restriction upon the trustee's power of disposition, or . . . there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith, for value and before maturing, will be protected."

The question of the rights of beneficiaries in an instrument which is payable to a person named as trustee, and indorsed by him, is a question quite distinct from that involved in the preceding cases. On this question the doctrine is well stated in 1 Perry on Trusts, § 225, as follows: "If a purchaser takes securities from a trustee with the word 'trustee' upon their face, . . . the sale may be avoided by the *cestui que trust*, or the purchaser may be held as a trustee." This doctrine is expressly approved in the case of *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 38 L. R. A. 841, 63 Am. St. Rep. 830, 42 S. W. 149.

In *Eaton & Gilbert on Commercial Paper*, § 75d, p. 370, it is said: "The fact that the instrument, on its face, is made payable to a person in his fiduciary capacity, is notice that the payee is acting in such capacity, and that he can only give title or deal with such instrument for the benefit of the person whom he represents."

Substantially the same doctrine is stated by Tiedeman on Commercial Paper, § 300, p. 578.

This doctrine, which is clearly stated in *Ford v. Brown* and the leading cases cited in the opinion, is well supported by other authorities.
1 L.R.A. (N.S.)

In the case of the use of the word "trustee" in certificates of stock substantially the same doctrine is applied to protect the rights of beneficiaries where transfers are made by the trustee. Among the cases of this kind are *Duncan v. Jaudon*, 15 Wall. 165, 21 L. ed. 142; *Geyser-Marion Gold Min. Co. v. Stark*, 53 L. R. A. 684, 45 C. C. A. 467, 106 Fed. 558; *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369; *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467, 19 Atl. 648.

In *Lang v. Metzger*, 86 Ill. App. 117, 124, it is held that, where the word "trustee" is added to the name of the payee of a note, the form of the note itself is sufficient notice that the note is part of a trust fund.

In *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L. R. A. 84, 63 Am. St. Rep. 513, 38 Atl. 983, it was held that a check stating that it is for deposit to the credit of the person named, with the word "trustee" added to his name, is an explicit notice to the bank in which he deposits it that he is not an actual owner of the money, and that, if the bank credits it to his individual account, and loss ensues to the trust estate by reason of his drawing out the fund by checks on his personal account, the bank is liable for participation in the breach of trust.

In *Sturtevant v. Jaques*, 14 Allen, 523, it is said that the assignment of a mortgage, and a note secured thereby, to a person as trustee, and the indorsement of the note by him as such, were notice that he took the note and mortgage in trust.

and the certificates of deposit which had been issued to him were changed, and issued in the name of C. N. Woodworth, trustee.

These certificates of deposit were as follows:

Chattanooga Savings Bank.
No. 13,493. Chattanooga, Tenn.,
Oct. 7th, 1902.

C. N. Woodworth, trustee, has deposited in this bank \$994.97, payable to the order of same, twelve months after date, with interest to maturity only at the rate of 4½ per cent per annum, upon the return of his certificate properly indorsed. Not subject to check. R. W. Barr, Cashier.

Chattanooga Savings Bank.
No. 13,704. Chattanooga, Tenn.,
March 21st, 1903.

C. N. Woodworth, trustee for Betty Ford, has deposited in this bank thirteen hundred and seventy-five & 55/100 dollars (\$1,375.55), payable to the order of same twelve months after date, with interest to maturity only at the rate of 4½ per cent per annum upon the return of this certificate properly indorsed. Not subject to check.

R. W. Barr, Cashier.

The Chattanooga Savings Bank answered the bill, and averred that it had issued the certificates, but had refused to pay the same, because they were not due, and because it had received notice from Betty Ford not to pay them; that it had no interest in the controversy, but was willing to pay the certificates to whomsoever the court might adjudicate they should belong.

The defendants H. C. Brown & Company also answered the bill, denying all of its material allegations.

The First National Bank of Nashville also answered, denying all knowledge upon its part of the gambling transactions, and all knowledge of the relations between Woodworth and Betty Ford, and denied any knowledge that its codefendants had conducted any gambling establishment or rooms; denied all knowledge of the intoxication of Woodworth, or of his transaction with H. C. Brown & Company with regard to said certificate. It admitted, however, that on April 24, 1903, these certificates of deposit were presented by H. C. Brown & Company, to the First National Bank at Nashville for discount, and avers that it purchased said certificates from H. C. Brown & Company, and paid their face value in cash, and then sent the certificates to Chattanooga for collection. It avers that it took these certificates in due

course of trade for a valuable consideration, and without any notice of the rights and equities of Betty Ford, or of anyone else, and avers that it is an innocent holder for value in due course of trade and without notice.

The court of chancery appeals finds that C. N. Woodworth, having possession of those certificates, brought them to Nashville, Tennessee, and on or about the 22d or 23d, or, possibly, the 24th or 25th, of April, 1903, he went to the gambling house located over the Climax saloon on Cherry street, in Nashville, Tennessee, and there engaged in gambling. It is shown he drank heavily and lost large sums. While thus drinking and gambling, he not only lost a large amount of his own money, but he also indorsed and transferred these certificates of deposit belonging to the complainant, upon which he obtained money and chips to be used in gambling. He lost and gambled away all of the money and chips so obtained, except about the sum of \$600 or \$700, which the gamblers in charge of the place offered to repay him, but which he at the time declined.

That court further finds that H. C. Brown & Company came into possession of these certificates, and on the 25th of April, 1903, took them to the First National Bank of Nashville, and there sold and disposed of them to the First National Bank for cash. The bank, overlooking the fact that the certificates were not due, took them for cash, as H. C. Brown & Company were among their regular customers. They paid cash for them, and sent them to Chattanooga, through their correspondent at that place, for collection. In the meantime, C. N. Woodworth, having become to some extent rational, telegraphed the Chattanooga Savings Bank at Chattanooga not to pay these certificates. The bank at once notified the mother of C. N. Woodworth and Betty Ford, who immediately advised the bank not to pay or recognize these certificates.

It further appears that when these certificates were first presented to the First National Bank, they bore the indorsement of complainant C. N. Woodworth and the indorsement of H. C. Brown & Company, but at that time the First National Bank refused to take the certificates, because one of them was not properly indorsed; that is to say, it was simply indorsed by C. N. Woodworth, when it should have been indorsed, as it was payable on its face, by "C. N. Woodworth, Trustee for Betty Ford." Thereupon H. C. Brown & Company took the certificates back, and returned with them in a short time properly indorsed.

The court of chancery appeals finds as a

matter of fact that this new indorsement was made by C. N. Woodworth. After the indorsement was corrected, the certificates were taken back to the First National Bank, and on the 25th of April the teller of the bank bought the certificates in question from H. C. Brown or H. C. Brown & Company, paying cash therefor, overlooking the fact that the certificates were not due. The officers of the First National Bank denied all knowledge as to how H. C. Brown & Company acquired these certificates, and all knowledge of the transaction between Woodworth and H. C. Brown & Company and their employees, or of any person who obtained these certificates of C. N. Woodworth, and the court of chancery appeals finds there is nothing in the record to indicate that these officers had any knowledge of the transactions mentioned.

The court of chancery appeals further finds there is no evidence in the record from which we are justified in finding that the officers of the bank had any knowledge in regard to the gambling carried on over the Climax saloon.

The court of chancery appeals finds that H. C. Brown & Company was affected with full notice and had knowledge of this embezzlement on the part of Mr. Woodworth, and of this violation of his trust, and had full knowledge of his want of legal right and capacity to transfer this property. They must have known, and did know, that they were taking the certificates in violation of this trust, and taking funds which Woodworth was practically embezzling. As to the First National Bank, there is no proof to show that the officers of the bank had any knowledge of these transactions, or even that H. C. Brown & Company conducted gambling rooms over the Climax saloon, and hence the rights of the First National Bank must depend upon the facts disclosed upon the face of the paper itself and the indorsements thereon.

As already stated, one of these certificates was payable to C. N. Woodworth, trustee for Betty Ford, and the other simply to C. N. Woodworth, trustee. One of them was dated March 21, 1903, due twelve months after date, and the other was dated October 7, 1902, and due twelve months after that date. Each of them bears interest to maturity only at the rate of $4\frac{1}{2}$ per cent per annum. It is disclosed on the face of each certificate that it is not subject to check, but is an interest-bearing certificate of deposit. The first certificate, which was made payable to C. N. Woodworth, Trustee for Betty Ford, was indorsed by C. N. Woodworth, Trustee, and afterwards the words, "for Betty Ford" were added by him. 1 L.R.A. (N.S.)

The other certificate was simply indorsed "C. N. Woodworth, Trustee."

That court further finds that these certificates were sold and transferred by H. C. Brown to the First National Bank of Nashville on the 25th day of April, 1903. On the 24th of April, 1903, at 7:45 A. M., C. N. Woodworth had telegraphed the cashier of the Chattanooga Savings Bank, which had issued these certificates, not to pay them. So when the certificates were sent to Chattanooga for collection, the Chattanooga Savings Bank refused to pay them, on the ground that they were not due, and on the further ground that Betty Ford contested the right of the First National Bank to them. It appears, therefore, that, before the First National Bank took these certificates, all the authority which C. N. Woodworth had, if any, to transfer them had been revoked by Mrs. Ford. It does not, of course, appear that he ever had authority to transfer them, especially for his own benefit.

The court of chancery appeals was of opinion that these certificates, not being due, and being made payable to C. N. Woodworth, Trustee, in the one instance, and to C. N. Woodworth, Trustee for Betty Ford, in the other, and so indorsed, destroyed the negotiability of the paper to the extent of giving notice that they constituted trust funds, and that the purchaser must inquire into the right of the trustee to dispose of them.

We have no doubt of the correctness of the conclusion of law reached by the court of chancery appeals upon the predicate of facts found by them.

In the case of *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 38 L. R. A. 837, 61 Am. St. Rep. 830, 42 S. W. 149, this question was considered by this court, and it was said by the chief justice, who delivered the opinion, that, in a controversy between a beneficiary of a trust fund and the holder of a paper disposed of by a trustee in violation of his trust, the word "trustee," appearing upon the face of the paper, is sufficient to put any taker upon notice. The court in that case referred to the authority of *Duncan v. Jaudon*, 15 Wall. 175, 21 L. ed. 145, in which it was held that the word "trustee" gave notice of the existence of a trust, and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed upon the trustee.

The court also cited the case of *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304.

This court further remarked that the correctness of these holdings is now conceded by the courts with practical unanimity. The

effect of them is that, if the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert anyone who so obtained it into a constructive trustee at the instance of the *cæui que trust*.

To the same effect is *Fox v. Citizens' Bank & T. Co.*, decided by the court of chancery appeals, and reported in 35 L. R. A. 678, 37 S. W. 1102, in which Judge Wilson stated as follows: "In a contest between the beneficiaries of these notes assuming that Anderson was not their real owner, and the transferee of Anderson, the fact that the notes appeared on their face, to be payable to him as trustee, would put the transferee on notice, and the claim of the beneficiaries would be superior." *Alexander v. Alderson*, 7 Baxt. 403; *Covington v. Anderson*, 16 Lea, 310; *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 684, 4 Am. St. Rep. 786, 4 S. W. 287.

It is insisted, however, on behalf of the appellants, that the rule announced in *Tradesmen's Nat. Bank v. Looney* and the other Tennessee cases on this subject has been modified and entirely superseded by what is known as the "negotiable instrument law," which provides, in § 56, as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Acts 1899, chap. 94, p. 150.

This section of the negotiable instrument law was construed by this court in the case of *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655. The court held that the effect of this section of the statute was to embody the majority rule upon the subject of notice as it has been held and administered by the courts of New York and other states and the Federal courts for many years, and to discard the doctrine of constructive notice, which had prevailed for many years in this state. The rule as administered in this state was that, if a purchaser of negotiable paper had implied notice of prior equities or infirmities of any nature whatever in the title of the holder from whom he purchased,—that is, if anything appeared upon the face of the paper, or from the facts and circumstances attending its possession or sale, which would put one of ordinary prudence upon inquiry that would lead to actual knowledge of the equities or infirmities,—he was bound to pursue such inquiries, and was charged with notice of the facts he could have learned; citing the Tennessee cases on the subject. 1 L.R.A. (N.S.)

It is then stated in the opinion that the rule of constructive or implied notice had been abrogated by the negotiable instrument law, enacted in April, 1899, and what may be called the majority rule was adopted by the enactment of § 56, which has already been quoted.

It will be observed that this section provides that a party "must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655, the court was dealing with a check which did not carry on its face any notice of defective title, but notice of the infirmity was sought to be fixed by the surrounding facts and circumstances. It will be observed that in the present case each of these certificates of deposit was indorsed by C. N. Woodworth as trustee, and we are of opinion that such an indorsement prima facie and presumptively fixed the purchaser with actual knowledge of want of authority in the trustee to dispose of the paper for his own benefit.

In *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304, the note was payable to a trustee, and indorsed in the same style by the trustee. The court said: "In the case of the present note, it cannot be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank before purchasing it to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and, as it turns out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed."

In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, the court, in speaking of the effect of the word "trustee," says it means trustee for someone whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cæui que trust* than the property of one who is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word "trustee" alone has no meaning or legal effect.

It has already been seen that one of the certificates of deposit in the case at bar was payable to C. N. Woodworth, Trustee for Betty Ford, and indorsed in the same style, but actual notice to a purchaser of the

fiduciary character of a paper is no more effective in the one case than in the other.

In the case of *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193, it is said: "There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note nor anything in the indorsement thereon to notify him that it did not belong to Jackson both legally and equitably. It was mercantile paper, and not due. . . . It is true that, if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be bona fide."

These authorities sustain our position that the word "trustee" in an indorsement of this character is express notice to a purchaser that there is a *cestui que trust* or beneficiary, and that his rights may not be sacrificed by the trustee in the sale or pledge of the note for his own benefit; in other words, our holding distinctly is that such an indorsement is actual knowledge to the purchaser of such paper, within the meaning of § 56 of the negotiable instrument law, *supra*.

Now it is very true, as said by Mr. Perry in his work on Trusts (vol. 1. § 225): "The mere fact that the word 'trustee' is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the purchaser may be held as a trustee."

As stated in *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 38 L. R. A. 837, 63 Am. St. Rep. 830, 42 S. W. 149, the rule is that he who takes a security from a trustee with the fiduciary character displayed upon its face is bound to inquire of his right to dispose of it; but if, upon inquiry, it is found that there is no restriction upon the trustee's power of disposition, or, it may be added, there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith for value and before maturity will be protected.

It appears that our negotiable instrument law is a substantial reproduction of a similar law enacted by the state of New York in the year 1896. In the year 1903, with that law on the statute books, the court of appeals of New York decided the case of *Cohn-*

feld v. Tanenbaum, 176 N. Y. 126, 98 Am. St. Rep. 653, 68 N. E. 141. The court said, in the midst of the opinion, that the signature to the check, "Isidore Cohnfeld, Guardian," gave the defendant notice that presumptively the funds being paid to him were not those either of the Cohnfeld Manufacturing Company or of Isidore Cohnfeld personally, and he was put upon inquiry to ascertain the authority of Cohnfeld to apply the money in payment of the company's debts. This proposition is conceded by both the courts below. Had he made the inquiry, he would have learned the facts which have already been stated. He is therefore chargeable with all that those facts import, or which is fairly to be inferred from them.

Again, in West Virginia, where a negotiable instrument law similar to our own prevails, the supreme court of that state held, in the case of *Hazeltine v. Keenan*, 54 W. Va. 600, 102 Am. St. Rep. 953, 46 S. E. 609, that a negotiable note, payable on its face to a payee, with the word "attorney" suffixed to his name, indicates an interest in other parties, and puts the purchaser upon inquiry as to their rights and the right of the payee to sell the note.

In addition to all this, the certificates show on their face that they bear interest at maturity only at the rate of 4½ per cent per annum, and further, that they are not subject to check, but are interest-bearing certificates of deposit; one of them having almost twelve months to run and the other six months at the time they were transferred. It is admitted by the officers of the First National Bank that they overlooked this fact when they bought these certificates for cash, but we agree with the court of chancery appeals that the fact that the bank overlooked these things will not relieve them of responsibility as to any notice the paper itself gives.

All these facts disclosed on the face of the paper, including the express indorsement of C. N. Woodworth, Trustee, etc., gave actual notice to the bank that this paper represented a trust fund, and obliged the bank to inquire into the right of the trustee to dispose of it. If the bank had made such inquiry, it could easily have ascertained that the paper had been embezzled and the money lost in a gambling transaction by the trustee; and further, the bank would have discovered that, before the paper had been purchased by it, all right and authority of the trustee to act had been withdrawn.

We are therefore of opinion that the indorsements and recitals of these certificates communicated actual knowledge to the bank that they represented a trust fund, and, even under the negotiable instrument act, no title was acquired by the bank to the paper.

WEST VIRGINIA SUPREME COURT OF APPEALS.

NATIONAL TUBE COMPANY, Appt.,
v.
GEORGE O. SMITH.

(..... W. Va.)

1. Exemption law of other state.

The exemption law of another state pertains to remedy, and will not be enforced in this state.

2. Injunction—garnishment—nonresident.

Injunction does not lie against a garnishment in an action before a justice, of money owing by the garnishee to a nonresident debtor, on the ground that such money is exempt by the law of the state of residence of such debtor.

3. Injunction—multiplicity of suits.

The fact that a person is sued or garnished by different persons on distinct and separate demands having no connection, or the fact that the same question of law may arise in all the cases, does not give equity jurisdiction to enjoin the suits on the principle that equity takes jurisdiction to avoid multiplicity of suits.

4. Disqualification of justice.

Equity has no jurisdiction to enjoin a justice of the peace from acting in an action before him, because of his interest in the result.

5. Injunction—pendency of other suit.

Injunction will not lie to restrain the prosecution of a garnishment in an action for debt before a justice of this state on the ground that, in another state, an injunction is later sued out, and is pending, enjoining the garnishee from paying the money under any judgment of such justice.

(February 14, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Ohio County in favor of defendant in a suit to enjoin the prosecution of certain garnishment proceedings. Affirmed.

The facts are stated in the opinion.

Mr. William H. Hearne for appellant.

Mr. Henry M. Russell, for appellee:

There was no equitable jurisdiction.

Evans v. Taylor, 28 W. Va. 184; Shay v. Nolan, 46 W. Va. 209, 33 S. E. 225; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173.

A debt is merely an obligation or liability of the debtor. It can hardly be properly

but the question in the latter case was merely as to the jurisdiction in garnishment, and not as to the law governing exemption. The Drake Case is also referred to in 2 Parmele's Wharton on Conflict of Laws, § 791a, as contrary to the weight of authority which the text declares is to the effect that exemptions pertain to the remedy, and that the exemption granted by the law of the debtor's domicile, or by the substantive law of the contract or other transaction out of which the claim arises, will not be allowed by the court of another jurisdiction, unless a statute of the latter jurisdiction expressly so provides. Many cases are cited in support of the text, including, among others, Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 402, 3 Am. St. Rep. 755, 3 So. 852; Baltimore & O. S. W. R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136; Lyon v. Callopy, 87 Iowa, 567, 43 Am. St. Rep. 396, 54 N. W. 476; Stewart v. Thomson, 97 Ky. 575, 36 L. R. A. 582, 53 Am. St. Rep. 431, 31 S. W. 133; Balk v. Harris, 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318; Carson v. Memphis & C. R. Co. 88 Tenn. 646, 8 L. R. A. 412, 17 Am. St. Rep. 921, 13 S. W. 588; La Selle v. Woolery, 11 Wash. 337, 32 L. R. A. 73, 39 Pac. 663.

The question as to the law by which the right to exemption is to be determined has frequently arisen in connection with the question as to the situs of a debt for purposes of garnishment, which, it will be observed, is an entirely distinct question.

Headnotes by BRANNON, P.

Case Note.—The case of Drake v. Lake Shore & M. S. R. Co. 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70, which is cited in the opinion in the NATIONAL TUBE COMPANY CASE as opposed to the position taken in the latter case, that exemption laws pertain to the remedy, and that the exemption law of one state will not be enforced in another, was cited with apparent approval in Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 8 L. R. A. 385, 19 Am. St. Rep. 143, 23 Pac. 430. In the latter case, however, the debt sought to be garnished was exempt both according to the foreign law and the law of the forum, and that was also true in Kestler v. Kern, 2 Ind. App. 488, 28 N. E. 726, which cites the Drake Case with apparent approval. The Drake Case was disapproved in Atchison, T. & S. F. R. Co. v. Maggard, 6 Colo. App. 55, 39 Pac. 985, holding that the exemption laws of a state have no extraterritorial force; and the court, in Wabash R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594, declined to follow the authority of the Drake Case in a case arising before the passage of Ill. act July 1, 1891, the 3d section of which in effect allows a nonresident debtor the exemption of wages to which he would be entitled by the law of the state of his residence. The Drake Case is referred to with approval in Baltimore & O. S. W. R. Co. v. McDonald, 112 Ill. App. 20, but this case was governed by the statute just referred to. The position of the Drake Case on this point was referred to in Chicago, B. & Q. R. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534, 48 N. W. 475, 1 L.R.A. (N.S.)

said that the debt itself has a situs. The debtor owes the debt. The creditor can proceed against him wherever he may be found and wherever he can be reached by judicial process. If he is personally in this state, although he may not reside here, the creditor may institute an action against him, and may compel him, through the court, to pay the debt. If the creditor has assigned the debt to some other person, the assignee may take like proceedings against the debtor.

If the creditor owes the debt to another in this state, and if the creditor is a non-resident of the state, and if the debtor comes into the state, the person in this state to whom the creditor owes the debt can institute attachment proceedings and attach the debt by garnishee process against the debtor.

Mahany v. Kephart, 15 W. Va. 609; *Stevens v. Brown*, 20 W. Va. 450; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300; *Rece v. Newport News & M. Valley Co.* 32 W. Va. 164, 3 L. R. A. 572, 9 S. E. 212; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538.

Messrs. Stentz & Hitchins also for appellee.

Brannon, P., delivered the opinion of the court:

The National Tube Company filed a bill in equity in Ohio county against George O. Smith, stating that it is a New Jersey corporation doing business in this state in the manufacture of steel and iron tubing, and employing many thousands of men in this and other states; that said Smith, a resident of West Virginia, had brought 142 suits before justices of the peace of Ohio county against employees of the company residing in Pennsylvania on claims assigned to Smith, contracted in Pennsylvania with residents of Pennsylvania and still residing in it; that no process in the suits had been served on the nonresident debtors, but that attachments had been issued in them and served on the company as garnishee; that said suits were a great burden and annoyance to the company; that Smith had been long engaged in the pretended buying of claims arising in other states against employees of foreign corporations, and suing on them in Ohio county, and garnishing foreign corporations doing business there, either paying small value for claims, or on agreement for half the recovery; that the claims thus purchased were debts against persons who became debtors in Pennsylvania, and that they, as employees of said company, had earned wages in that state for which the company was garnished, and 1 L.R.A. (N.S.)

the purpose of said assignment and suit in West Virginia was to evade the statute of Pennsylvania which entitled those employees to exempt such wages from subjection to the debts sued on; that not only were those employees entitled to the exemption but a Pennsylvania statute made the assignments of the claim illegal and void. The bill charged that the purchase of the claims by Smith was champertous; also, that an arrangement had been made between Smith and the justices that no justices' fees were to be charged Smith unless the company should answer that it had funds of the debtors, and that this is contrary to public policy; that one of the debtors sued before the justice (Javens) had obtained from a court in Pennsylvania an injunction restraining the company from paying Smith the money owed by the company to Javens, and that others were about to enjoin; that, if judgments should be given by the justices in Ohio county, the company would likely be sued for the same money in Pennsylvania, and be compelled to pay over again these same debts, and thus lose a large sum. The bill asked an injunction against Smith to forbid him from prosecuting said pending suits or instituting other suits on like claims, and injunction was awarded, but afterwards on demurrer the bill was dismissed and the injunction dissolved, and the company appealed.

The defendant contests the jurisdiction of equity to entertain this suit. One ground on which the plaintiff rests such jurisdiction is that the debts due from the defendant are for wages of laboring men in the service of the company, and that those laborers earned the wages in the state of Pennsylvania, and reside there, and by its laws such wages are exempt from the debts to which it is sought by the garnishment of the defendant in this state to subject them to debts there made, and that those debts were assigned and sued upon in this state with purpose to evade the exemption law of Pennsylvania. To sustain this ground for jurisdiction we must practically enforce the law of another state, in contradiction of the rule that the laws of a state have no force beyond its territorial limits, and therefore exemption laws of another state, which pertain to remedy merely, will not be enforced in this state. *Stevens v. Brown*, 20 W. Va. 450; 12 Am. & Eng. Enc. Law, 2d ed. p. 78. But we are told that jurisdiction under this head is sustained by 12 Am. & Eng. Enc. Law, 2d ed. p. 80, saying "that the rule of comity between states will not permit a creditor residing in one state, or his assignee, to avail himself of the process of the courts of another state for the purpose of evading the exemption laws of his own

state, and, if he attempts to do so, such laws should be recognized, and effect given to them." It may be safely asserted that this is not the sound rule, as appears from the same volume (p. 78). We find in that volume (p. 256): "It may be regarded as settled that a court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another state for the purpose of evading the exemption laws of his state, and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the state. And in such a case an injunction should generally be granted."

This means that injunction lies in one state to enforce its own exemption law. It means that an injunction will go against a person resident in a state, to operate in person on him, to prevent his suing in another state, to subject in that other state wages exempt in favor of a person residing in the former state, which would be exempt if he were sued there. This is not enforcing the law of another state. It seems both creditor and debtor must reside in the same state for such injunction. The case of *Kansas City, Ft. S. & M. R. Co. v. Cunningham*, 7 Kan. App. 47, 51 Pac. 972, holds that Kansas will execute the exemption law of another state, and protect wages of employees earned in another, exempt by its laws. Say the same of *Missouri P. R. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235. Without disregarding *Stevens v. Brown*, 20 W. Va. 450, and the current of authority, we cannot so hold. I add that the *Maltby* Case says that the wages were exempt under the exemption law of both states. Further, they were not injunctions. They were contests in the garnishee cases. They do not aid equity jurisdiction. *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70, was not injunction, but appeal in garnishment case. It holds that assignment of a debt to assist the creditor to evade the exemption law of a state by suit in another state is invalid. That is a matter contestable in the garnishment suit. So with the holding that such wages cannot be attached. These cases are not our question, which is equity jurisdiction in this case. *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90, only holds that Nebraska's exemption law applies to nonresidents. It was in the same action, also, and does not touch jurisdiction of equity. *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629, 28 Am. St. Rep. 534, 48 N. W. 475, does not touch our question, because it simply holds that a valid judgment on garnishment is good in Ill. R. A. (N.S.)

another state, and payment of it protects the garnishee. *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594, involved the right to garnish in another state, the right being tried in same suit. It does touch equity jurisdiction. *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283, touches what the garnishee must do in defense, the force of a judgment against him, and the presumption that the exemption laws of the two states are the same. *Martin v. Central Vermont R. Co.* 50 Hun, 347, 3 N. Y. Supp. 82, is upon the force of a judgment on garnishment in another state, arising in an action to compel payment over again of wages, in which, also, it was said it seems such wages are not attachable. It does not touch equity jurisdiction. The law above last quoted does not mean, for illustration, that injunction lies in West Virginia to enjoin garnishment here of wages earned in another state, payable there to a person there resident, though exempt by the law of that other state.

Pennsylvania could thus enjoin the owners of debts there resident from suing in West Virginia to subject wages going to persons resident in Pennsylvania and exempt by its law. Injunction is given in the case above supposed, where it lies, as there is no other remedy, as the state where the suit is will not enforce the law of the other state under which exemption is claimed. I think the cases will show this to be the case. *Allen v. Buchanan*, 97 Ala. 399, 38 Am. St. Rep. 187, 11 So. 777; *Mumper v. Wilson*, 72 Iowa, 163, 2 Am. St. Rep. 238, and note, 33 N. W. 449; *Stewart v. Thomson*, 97 Ky. 575, 36 L. R. A. 582, 53 Am. St. Rep. 431, 31 S. W. 133; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Freeman, Executions*, § 209. Injunction can prevent one in a state from carrying on a suit in another state. *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 163.

Jurisdiction in equity cannot be on the ground of avoiding multiplicity of suits. These demands are in favor of different persons, against different persons, having no connection with each other, not at all upon a common demand, the demand resting on and involving different facts. The mere fact that the garnishment is of one debtor will not give jurisdiction, though there is a legal question common to all,—that is, whether wages earned in Pennsylvania by persons resident there, payable there, exempt by its laws, can be assigned or garnished in West Virginia at all against a foreign corporation. There is no fund common to, or in contest between, divers persons,—no community of interest. The statement of equity jurisdiction to

avoid multiplicity of suits in Hogg's Equity Principles, 469, will not justify this case: "Injunction will not lie to prevent multiplicity of suits which would lie between different parties, though the issue in each case must be determined on the same state of facts." "Equity will not stay a creditor in his efforts to secure the money which his debtor owes him, from the fact that there are many other creditors pursuing the same debtor, and that therefore there will be a multiplicity of suits. Attachment creditors, whose debts are distinct, and arise out of separate transactions, who had no common interests, cannot be joined by the debtor in one suit in equity, in order to avoid multiplicity of suits. And generally actions by different persons on distinct and separate grounds do not constitute a multiplicity of suits which a court of equity will enjoin." Beach, *Inj.* § 539; *High, Inj.* § 65. The fact that the same question of law arises as to the several debts does not give such jurisdiction. *Murphy v. Wilmington*, 6 *Houst. (Del.)* 108, 22 *Am. St. Rep.* 345; *Tribette v. Illinois C. R. Co.* 70 *Miss.* 182, 19 *L. R. A.* 660, 35 *Am. St. Rep.* 642, 12 *So.* 32.

Equity jurisdiction cannot stand on the theory that the justices have an illegal arrangement with Smith touching fees. If the justices have such interest as renders them unjust, partial judges, the remedy is not injunction, but prohibition. 16 *Enc. Pl. & Prac.* p. 1124; *Forest Coal Co. v. Doolittle*, 54 *W. Va.* 210, 46 *S. E.* 238.

Equity jurisdiction cannot be sustained on the ground that injunctions are, or will be, instituted in Pennsylvania against payment to Smith under a West Virginia recovery against the company. The plea of another suit pending will not be good if the suit is pending in a court of another state. 1 *Cyc. Law & Proc.* p. 36; *Fletcher, Eq. Pl. & Pr.* § 258; *Stanton v. Embrey*, 93 *U. S.* 548, 23 *L. ed.* 983; *Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris)* 96 *U. S.* 588, 24 *L. ed.* 737; *Davis v. Morriss*, 76 *Va.* 27. It is true that there is an exception to the above rule, namely, that when there is garnishment in one state, and an action in another state for the same debt garnished, the garnishment suit, if prior in date, may be pleaded to abate or suspend the latter suit, because the garnishment fastens the debt, and the garnishee may be compelled to pay the debt twice, if the action is not abated or suspended until the decision of the garnishment suit. 1 *Cyc. Law & Proc.* p. 37; 9 *Enc. Pl. & Pr.* p. 857. But the two suits must involve the recovery of the same demand. The Pennsylvania suit is not to recover the

debt, but is only an injunction prohibiting the company from paying under the garnishment, and, besides is later in date. 1 *Cyc. Law & Proc.* p. 38. Rather might we say that the West Virginia suit could be pleaded in the Pennsylvania suit. The law adverted to would say that the pendency of the garnishment could be pleaded in an action at law by the creditor to recover the debt garnished from the garnishee; but this state of things is not before us. It is claimed that we issue an injunction.

There being no jurisdiction in equity, we do not discuss the assignability of the demands on which the actions before the justices were brought, whether the claims were assigned, whether there was jurisdiction in the justices to garnish the plaintiff company, whether the assignment was void or any question involved in the merits. Those questions are cognizable in the actions before the justices and on appeal.

Therefore, we affirm the decree simply for want of jurisdiction for the injunction.

Petition for rehearing overruled.

TEXAS SUPREME COURT.

CAMERON MILL & ELEVATOR COMPANY, *Plff. in Err.*,

v.

F. M. ANDERSON, by Next Friend.

(.... TEX.)

1. Contractor's negligence—highway excavation.

Letting work which involves a dangerous excavation in a public highway to an independent contractor will not absolve the principal from liability for injuries to a traveler, caused by the contractor's negligence in failing to maintain proper guards and lights.

2. Evidence—of character of injured person.

Evidence that a boy injured by another's negligence was obedient and economical is admissible upon the question of damages, in an action by him to recover for the injuries.

(June 13, 1904.)

Case Note.—Thompson on Negligence, p. 1290, states that in actions for wrongfully causing death the jury may take into consideration the decedent's habits of industry and sobriety. And *Pierce, Railroads*, p. 396, states that evidence of his habits of industry, sobriety, and economy has been admitted upon the question of measure of damages. These are the principal authorities relied upon in *CAMERON MILL & ELEVATOR CO. v. ANDERSON* to show that

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Tarrant County in a plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Messrs. **R. W. Flournoy and George Thompson**, for plaintiff in error:

Defendant was not liable for the acts of the independent contractor.

Taylor v. Dunn, 80 Tex. 652, 16 S. W. 332; **Fulton County Street R. Co. v. McConnell**, 87 Ga. 756, 13 S. E. 828; **Independence v. Slack**, 134 Mo. 66, 34 S. W. 1094; **Clark v. Fry**, 8 Ohio St. 358, 72 Am. Dec. 590; **Blake v. Ferris**, 5 N. Y. 48; 65 Am. Dec. 304; **Chartiers Valley Gas Co. v. Waters**, 123 Pa. 220, 16 Atl. 423; **Ryan v. Curran**, 64 Ind. 345, 31 Am. Rep. 123; **Eby v. Lebanon County**, 166 Pa. 632, 31 Atl. 332; **Fuller v. Citizens' Nat. Bank**, 15 Fed. 575; **Kepperly v. Ramsden**, 83 Ill. 354; **DuPratt v. Lick**, 38 Cal. 691; **O'Hale v. Sacramento**, 48 Cal. 212; **Blumb v. Kansas City**, 84 Mo. 112, 54 Am. Rep. 87; **Clapp v. Kemp**, 122 Mass. 481; **Carter v. Berlin**

Mills Co. 58 N. H. 52, 42 Am. Rep. 572; **Tibbetts v. Knox & L. R. Co.** 62 Ma. 437.

Recovery for injuries to develop or continue in the future should not be left to the speculation of the jury, induced by the evidence, but should be limited to the results reasonably certain to ensue according to the ordinary course of nature, and the common experience of mankind.

Missouri P. R. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810; **Strohm v. New York, L. E. & W. R. Co.** 96 N. Y. 306; **Smith v. Milwaukee Builders' & T. Exchange**, 91 Wis. 360, 30 L. R. A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; **Raymond v. Keseberg**, 91 Wis. 191, 64 N. W. 861; **Cleveland C. C. & I. R. Co. v. Newell**, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; **Heddles v. Chicago & N. W. R. Co.** 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115.

In a suit for personal injuries, testimony as to the moral qualities of the injured person is inadmissible, and tends to mislead and confuse the jury; it is speculative and remote, and prejudicial to the rights of the defendant.

Lipscomb v. Houston & T. C. R. Co. 95 Tex. 5, 55 L. R. A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; **Missouri, K. & T. R. Co. v.**

such evidence is admissible in favor of a person suing for personal injuries to himself. The statements of those text-books are based upon a long line of authorities of which those in point hold that, in an action for death, evidence of the habits of the deceased may be considered.—**Denver, S. P. & P. R. Co. v. Woodward**, 4 Colo. 1; **Kansas P. R. Co. v. Lundin**, 3 Colo. 94; **Donaldson v. Mississippi & M. R. Co.** 18 Iowa, 280, 87 Am. Dec. 391; **Pennsylvania R. Co. v. Butler**, 57 Pa. 335; **Kealer v. Smith**, 66 N. C. 154; **Baltimore & O. R. Co. v. Neell**, 32 Gratt. 394; **Baltimore & O. R. Co. v. Wightman**, 29 Gratt. 431, 26 Am. Rep. 384; **Macon & W. R. Co. v. Johnson**, 38 Ga. 410; that in such cases the industry of decedent may be considered.—**David v. Southwestern R. Co.** 41 Ga. 223; **Burton v. Wilmington & W. R. Co.** 82 N. C. 505; that his habits of industry and sobriety may be considered.—**Chicago v. Scholten**, 75 Ill. 472; and that his habits of sobriety and economy may be considered.—**Taylor v. Western P. R. Co.** 45 Cal. 323; the court in the latter case stating that it tends to prove that his earnings, if he had lived, would have been more valuable to his family than if he had been a drunken spendthrift.

On the other hand, **Nashville & C. R. Co. v. Prince**, 2 Heisk. 580, cited by the text writers, holds that in such an action evidence may be considered that decedent was a drunken and worthless man.

The case of **Houston & T. C. R. Co. v. Conner**, 57 Tex. 304, also relied upon by 1 L.R.A. (N.S.)

CAMERON MILL & ELEVATOR CO. v. ANDERSON, was also an action for damages for injuries resulting in death; but that case was cited, and its rule followed, in the subsequent case of **Texas Mexican R. Co. v. Douglas**, 73 Tex. 330, 11 S. W. 333, which held that such evidence was admissible in actions by the person injured for his own benefit; the court stating: We can see no reason why they should not be considered in a case like the present to enable the jury to determine the pecuniary loss, if any, sustained by injuries not resulting in death.

In distinction from the above cases admitting evidence of character of the person killed, to show the amount of damages caused by his death, it is held, in **Lipscomb v. Houston & T. C. R. Co.** 95 Tex. 5, 55 L. R. A. 869, 93 Am. St. Rep. 804, 64 S. W. 923, that in such a case evidence that deceased was a member of the church, and did not use profane language, was too remote to be of value in determining the pecuniary loss resulting from his death.

The Pennsylvania case unsuccessfully relied on by defendant to show that, in case of actions by persons injured, such evidence was not admissible in their own favor, does not seem to have been cited upon the point in question in any subsequent case. Although in **Mansfield Coal & Coke Co. v. McEnery**, 37 Phila. Leg. Int. 28, the case was cited as authority for the proposition that habits of carelessness on the part of one killed by accident, shortly before his death, might be admitted in an action brought to recover damages for his death.

Hannig, 91 Tex. 347, 43 S. W. 508; Texas & P. R. Co. v. Harrington, 62 Tex. 597; Missouri P. R. Co. v. Lyde, 57 Tex. 505; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229.

Messrs. W. R. Parker, Capps & Canty, and Theodore Mack for defendant in error.

Gaines, Ch. J., delivered the opinion of the court:

The following statement of this case is taken from the opinion of the court of civil appeals: "By permission of the city council, appellant caused to be dug in one of the streets of the city of Ft. Worth, adjacent to its elevator plant, a hole some 34 feet long, 28 feet wide, and 12 or 14 feet deep. The excavation was made for the purpose of putting in some underground storage tanks for fuel oil. Into this pit appellee, a boy of thirteen years, fell, and was seriously injured. The accident occurred about 9 o'clock at night, at a time when none of the workmen engaged in digging the pit were in or about the place. There were no lights or barricades or signals about it, and the street was dark. Appellee, who had no previous notice of the excavation, had either just mounted, or was in the act of mounting, his bicycle, to proceed up the street, when he was precipitated into the pit and injured as aforesaid. The actual work of making the excavation was being done by one McFadden under a contract with appellant by the terms of which he had exclusive control of the work. Appellant did not know that the pit was not guarded or protected at night, and had never given the contractor any instructions upon that point, but understood that the contractor was competent and experienced, and took it for granted that he would do what was necessary to make the work safe. The appellee had a judgment for \$10,500, from which this appeal is prosecuted." [78 S. W. 8.]

The question which goes to the foundation of the action is, Was the defendant company liable, under the circumstances, for the acts and omissions of McFadden, whom it had employed to do the work under an independent contract? We were of the opinion when we granted the writ of error that the company was liable for McFadden's negligence, and that the court of civil appeals did not err in so holding. We are still of that opinion. The question is ably discussed in the opinion of Mr. Justice Speer, who spoke for the court in the case, and the conclusion is amply supported by the numerous authorities cited by him. It would therefore be a profitless task to enter

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upon any extended discussion of the question. As we understand, the general rule is that one who is having a piece of work done by an independent contractor is not liable for the negligence of the latter, but to this rule there is a well-marked exception. So far as we have seen, the limitation of the rule has been by no means better expressed than by Judge Dillon. He says: "The general rule is stated in the preceding section, but it is important to bear in mind that it does not apply when the contract directly requires the performance of a work intrinsically dangerous however skilfully performed. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." 2 Dill. Mun. Corp. ¶ 1029. In our opinion, the present case falls strictly within the exception.

During the course of the trial, the court over the objection of the defendant, permitted the introduction of testimony on behalf of the plaintiff to the effect that he was an industrious boy, was obedient to his mother, did not use tobacco or intoxicating liquors, and was industrious and economical in his habits. It was for the admission of the testimony as to his obedience to his mother and his habit of economy that we granted the writ of error. But we now think we erred in so doing. In the case of *Houster & T. C. R. Co. v. Cowser*, 57 Tex. 293, which was a suit to recover damages for injuries resulting in death, the court states the rule in regard to the proper evidence to be introduced to show the amount of damages as follows: "The damages being for the pecuniary loss only, the party claiming them should then, as a general rule, at least be required to prove such facts and circumstances as will enable the jury to return a verdict, based upon this evidence, which would approximate reasonable certainty, and the court to pass advisedly, in reviewing this evidence, upon motion for a new trial. This testimony would include the circumstances of the deceased; his occupation, age, health, habits of industry, sobriety, and economy; his skill and capacity for business; the amount of his property; his annual earnings; and the probable duration of life;" citing *Pierce, Railroads*, 396; 2 *Thomp. Neg.* 1290. If this be a correct rule as applied to such a case, for a stronger reason it should also be applicable to the ordinary action for personal injuries, when permanent in their nature; for, in cases of the former class, the beneficiaries are not entitled to recover all that the deceased might have earned, had he lived, but only

so much thereof as they would probably have received, whereas, in cases of the latter class, the plaintiff is entitled to recover for all that he has probably been deprived of earning by the infliction of the injury. If the plaintiff be afflicted in mind or body, or if he be indolent, drunken, and thriftless, the defendant ought to be permitted to prove the fact, so as to show that his earning capacity is not that of a person of ordinary endowments, mental or physical, and of ordinary habits. So, if he be strong of mind and body, and sober, industrious, and economical in the use of his money, these facts throw light upon his earning capacity, and he ought to be allowed to establish them by evidence. It may be true that the proof of like facts in case of a boy thirteen years of age may not be so potent as in case of a man, but that should affect the weight, and not the character, of the evidence. It is a difference of degree, and not of kind. We may be unwilling to follow the poet who said, "The child is father to the man," yet no one would venture to assert that the characteristics developed by a boy thirteen years old are not some evidence of what his character as a man will probably be.

As to proof of habits of economy, it seems to us they tend in some degree to show additional earning capacity. As a rule, a careful business man would employ a man of economical habits, rather than a spendthrift. Besides, an economical man may add to the direct earnings from his labor by a profitable use of his savings. Why should not this be considered in estimating his damage in a case of this character? The fact that the plaintiff was obedient to his mother is a shade more remote, but it seems to us that the testimony is not wholly without value as tending to throw some light upon his probable earning capacity after he should arrive at manhood. Let us suppose that this boy had applied for employment, and brought testimonials showing that he was an industrious, obedient, and economical boy. Can it be said that either of these elements of character would not have had some weight with the person to whom application was made, in determining the question whether he should be given the place? If not, then it follows that each bears upon the question of his earning capacity. Therefore why should not a jury be permitted to look to these facts in determining what the future earning capacity of an injured boy would probably have been, had the injury not been inflicted? It is the only light that can be thrown upon the question.

We have held that it was improper, in a death case, to permit the plaintiff to introduce evidence to prove that the deceased

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was a member of a church, and did not use profane language. *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L. R. A. 869, 93 Am. St. Rep. 804, 64 S. W. 923. And also, in a personal injury case, it was held (following other cases in our court) that it was error to admit testimony on behalf of the plaintiff that he was a married man, and that his wife had no means of support except her own labor. *Missouri, K. & T. R. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508. We think the questions there decided are different from that presented in the case before us.

In support of their assignments upon the introduction of the evidence in question, counsel for the plaintiff in error cite the case of *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229, and quote as follows from the opinion in that case: "It is difficult, also, to see what bearing the plaintiff's habits, industry, and economy could legitimately have on the damages. . . . In an action by the injured party himself, they were irrelevant, and tended only to excite feelings of commiseration and sympathy in the breasts of the jurors." That habits of industry may be proved is the established rule in this court, and is a rule very generally recognized. So that in one respect, at least, the proposition stated in the opinion is too broad. It seems to us that the question was not very carefully considered by the able court who made that ruling. It is not without significance that the able counsel, who have expended great industry and research in briefing this case, have cited no other case which sustains their position.

The other points in the case were, in our opinion, properly disposed of by the court of civil appeals, and require no discussion by us.

We are of the opinion that the judgment should be affirmed, and it is accordingly so ordered.

Petition for rehearing denied.

VIRGINIA SUPREME COURT OF APPEALS.

W. B. WINFREE, Plff. in Err.,

v.

M. B. JONES.

(.... Va.)

1. Bankruptcy—unliquidated liability.

A discharge in bankruptcy does not release an unliquidated liability for damages for abandoning a leased house without locking the doors, so that it was entered and injured by a stranger.

2. Proximate cause—of loss by fire.

Abandoning a leased house without locking the doors is not the proximate cause of its destruction by fire two or three weeks later by a trespasser,—at least where the owner is notified of the condition of affairs, and takes no steps to protect his property.

(June 15, 1905.)

ERROR to the Corporation Court of Newport News to review a judgment in favor of plaintiff in an action brought to recover damages for the destruction of plaintiff's property, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. John W. Friend, for plaintiff in error:

The declaration does not allege a wilful and malicious injury. In fact no such allegation is justified, unless the injury was wilful and malicious, and the plea of discharge in bankruptcy was a complete bar to it.

Bailey, Master's Liability for Injuries to Servant, 415; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

The plea of discharge in bankruptcy was a bar to any other than a malicious and wilful act.

Bankruptcy Act 1898, § 17, ¶¶ 2, 4; Morse & Rogers v. Kaufman, 100 Va. 218, 40 S. E. 916.

At common law, a tenant, in the absence of a covenant or agreement, is not liable for the accidental and incendiary burning of the rented premises; and no such covenant or agreement was pretended to have been made by the defendant.

Maggott v. Hansbarger, 8 Leigh, 532; Taylor, Land. & T. § 688; 2 Rob. New Pr.

631; 2 Minor, Inst. 4th and last ed. 113, 197, 617, 618.

Neither the declaration nor the proceedings tend to show that the negligence of Winfree was the proximate cause of the burning of the house.

Chesapeake & O. R. Co. v. Sparrow, 8 Va. 641, 37 S. E. 302.

Messrs. Charles C. Berkeley and C. O. Mitchell, for defendant in error:

As to the proximate cause of the injury and resulting damage, each case must rest on its own merits, to a great extent, and it is a question for the jury.

Moses v. Old Dominion Iron & Nail Works Co. 75 Va. 103; 1 Shearm. & Redf. Neg. 3d ed. pp. 67, 68.

The jury have determined, from all the evidence, that Winfree's conduct in failing properly to care for the premises was negligent and unreasonable, and that, by reason of such negligence and lack of reasonable care of the premises, the house was destroyed. This is conclusive.

In an action on the case the reversioner, or remainder-man in fee, for life or for years, may recover damages, against either the tenant or a stranger, for an injury to the reversion.

Taylor, Land. & T. § 687; Moses v. Old Dominion Iron & Nail Works Co. 75 Va. 95; 18 Am. & Eng. Enc. Law, p. 247.

The tenant must use reasonable care in the use of the premises.

Consolidated Coal Co. v. Savitz, 57 Ill. App. 659; Carlin v. Ritter, 68 Md. 473; 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301; Chalmers v. Smith, 152 Mass. 561, 11 L. R. A. 769, 26 N. E. 95; Warder v. Henry, 117

Case Note.—The principal authority upon which WINFREE v. JONES rests is Re Hirschman, 104 Fed. 69. That case has been cited with approval in McDonald v. Brown, 23 R. I. 552, 58 L. R. A. 768, 91 Am. St. Rep. 659, 51 Atl. 213, holding that liability for publication of a libel is not released by bankruptcy proceedings; in Re Bemis, 104 Fed. 672, refusing to discharge because of concealment of property; in Re Yates, 114 Fed. 365, to the effect that the object of subdivision b of the statutes was simply to provide that only unliquidated claims which fall within the scope of subdivision a are to be brought into the proceedings; also in Re Marcus, 5 Am. Bankr. Rep. 19, and Re Yates, 8 Am. Bankr. Rep. 71, which apply the same rule; and in Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, holding that an unliquidated claim of a principal against his broker for fraudulently selling stocks carried on margin is not within the exception of § 17 of the act of 1898. Re Hirschman is also cited in Brandenburg on Bankruptcy, § 1005, to the effect that a creditor who has 1 L.R.A. (N.S.)

been permitted to rescind a sale on account of fraud on the part of the bankrupt in the purchase, and has secured a return of the goods not sold, may have his claim for the proceeds of the goods sold liquidated and proved the same as a debt, and the author cites, in addition, the case of Re Heinsfurter, 3 Am. Bankr. Rep. 113; Loveland on Law and Proceedings in Bankruptcy, § 118, also relies on the Hirschman Case and states that a claim arising *ex delicto*, and also of such a character as to constitute a claim on the theory of a quasi contract, is provable under § 63, cl. 4, and, for this point, also cites Re Filer, 125 Fed. 262; Re Hildebrandt, 10 Am. Bankr. Rep. 184; Collier on Bankruptcy, 4th ed. p. 443; also relying on the Hirschman Case, states that it would seem that liabilities for torts *per se*, and not merely those provable on the theory of a quasi contract, may now be liquidated and proved and allowed. The case has also been approved by other decisions, which have no bearing upon the point in controversy in WINFREE v. JONES.

a. 530, 23 S. W. 776; Powell v. Dayton, 4 G. R. Co. 16 Or. 33, 8 Am. St. Rep. 257, 1 Pac. 863; Southern Oil Works v. Bickard, 14 Lea, 651.

And is liable for the negligent destruction of the buildings.

Moses v. Old Dominion Iron & Nail Works, 75 Va. 95; Duer v. Allen, 96 Iowa, 1, 64 N. W. 682; Carter v. George, 30 Kan. 1, 1 Pac. 58; Machen v. Hooper, 73 Md. 12, 21 Atl. 67; Wilcox v. Cate, 65 Vt. 478, 1 Atl. 1105; 18 Am. & Eng. Enc. Law, p. 17: 2 Minor, Inst. pp. 619 et seq.; Tiedeman, Real Prop. 2d ed. §§ 78, 79.

The 2d subdivision of § 63 of the bankruptcy act does not add to the debts provable under subdivision a, but merely provides for the liquidation of such as are unliquidated.

Brandenburg, Bankr. p. 598, ¶ 26; Re Hirschman, 104 Fed. 69; Re Yates, 114 Fed. 65; Re Marcus, 104 Fed. 331.

Subdivision 2 does not except from the operation of a discharge claims created by fraud, or by obtaining property by false statements, or by wilful or malicious injury to the person or property of another.

Morse & Rogers v. Kaufman, 100 Va. 218, 10 S. E. 910; Re Hirschman, 104 Fed. 69.

Jones could not have waived the tort and sued *ex contractu*. There was no contract of renting and covenant thereunder upon which he could base an action *ex contractu*. 2 Minor, Inst. p. 634.

Harrison, J., delivered the opinion of the court:

M. B. Jones, the plaintiff in the court below, brought this action to recover damages of the defendant, W. B. Winfree, for having, as alleged, negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, by abandoning it and leaving it unlocked, so that it was wrongfully entered, burned, and destroyed. There was a verdict of \$300 for the plaintiff, upon which judgment was entered by the lower court, and thereupon this writ of error was awarded.

The first error assigned is the action of the lower court in rejecting a plea of bankruptcy tendered by the defendant. The discharge, which was obtained October 23, 1903, on its face releases the defendant from liability for all claims which are made provable by the acts of Congress relating to bankruptcy. The question presented, therefore, is whether the claim here asserted was provable under the acts of Congress relating to bankruptcy. It is to be observed that the claim is for unliquidated damages, and arises *ex delicto*. The act of Congress (Act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418) has been interpreted by the Supreme Court (11 U. S. 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

construed, with respect to such claims, by the Federal courts, adversely to the right to prove them. Beers v. Hanlin, 99 Fed. 695; Re Hirschman, 104 Fed. 69.

In the case last cited, after a well-considered discussion of the entire subject, pointing out the several classes of claims that are provable under the act of Congress, the court says: "The care used to particularize various provable debts in subsection a [§ 63, 30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447] negatives the extended construction of subsection b urged by petitioners. If the latter subsection authorizes the liquidation and subsequent proof of damages *ex delicto*, the whole subject could have been covered in very general language. Assuming petitioners' construction of § 63, subsec. b, it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably." After showing the necessity for the petitioners bringing themselves under § 63, subsec. b, in order to prove their claims, the court says: "Section 63, subsec. a, does not authorize the proof of any claim arising *ex delicto*, unless a recovery may be had quasi *ex contractu*."

This case is conclusive of the question at bar. The plaintiff could not have waived the tort and sued *ex contractu*. His claim rested entirely in tort. There was no contract of renting with covenant thereunder upon which he could have based an action *ex contractu*.

In the view we take of the merits of this case, the only remaining assignment of error necessary to be considered is that which relates to the action of the court in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

It appears from the record that early in July, 1901, the plaintiff rented the house in question, situated in a negro community known as "Klondike," to the defendant for one year from July 10, 1901; that the defendant remained in the house until the 8th or 9th of December, 1901, when he moved out, leaving the door of the upstairs, which opened on a porch connected by steps with the street below, unlocked and insecure; that, when the defendant moved out, the plaintiff, on the 10th of December, 1901, sued out an attachment against him, and recovered, December 26, 1901, judgment for \$280 and costs, covering the rent to accrue for the whole year up to July 10, 1902,

which judgment was subsequently paid by the defendant; that on the 30th or 31st of December, 1901, about midnight, the house was burned and totally destroyed, the fire breaking out in the rear part of the second floor of the building, the entrance to which was through the door opening on the upper porch, which had been left unlocked. It was agreed that two negroes would testify that several times prior to the fire a negro known as "Big Jim" was seen passing in and out of the upstairs of the house, and loafing about a barroom on the opposite side of the street during the afternoon of the day preceding the fire; that one witness would testify that a large man—whether white or black, not known—was seen running down the steps from the upstairs of the house just after the fire appeared in the part of the building where the door and windows entered. It is proper to say that that record furnishes no pretense or suggestion that the defendant had anything to do with the burning of the building, other than the alleged negligence of leaving the door unlocked. The record shows that the plaintiff knew that the defendant had abandoned the house. Indeed, as already seen, he took steps the next day to recover the rent for the entire year. So that the case presented by the plaintiff is that it was negligent in the defendant to leave the upstairs door of the house unlocked when he abandoned it on the 8th or 9th of December, 1901, thereby making it possible for anyone to enter the house and set it on fire, and that for such negligence the defendant must respond in damages for the loss of the house by fire on the 30th or 31st of December, 1901.

In considering the liability of the defendant under the circumstances mentioned, the question arises upon the threshold of that inquiry, Was the act of the defendant in leaving the door of the house unlocked on the 9th of December the proximate cause of the fire which destroyed the house on the 30th of that month?

"The rule of law excluding a recovery for remote consequences has been attributed by some to the 'difficulty of unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause.' It has also been said that the law considers only proximate causes, for the reason that remote or speculative considerations would not afford a sufficient degree of certainty for judicial action. But in addition to this, considerations of fairness and justice require that no one should be held liable for the consequences of an act innocent in itself, and conceived without mischievous intent, which, by the concurrence of some event that could not by any possibility have been foreseen, 1 L.R.A. (N.S.)

has produced hurtful consequences to another." *Watson, Damages for Personal Injuries*, § 35.

The same author says that the injury must have been the proximate and natural consequence of such act, and that in this connection the term "proximate" excludes the notion of the intervention of any other culpable and efficient agency between the defendant's dereliction and the loss. Section 33 of the same work is as follows: "A natural consequence is one which has followed from the original act complained of, in the usual, ordinary, and experienced course of events, a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from."

These principles have been fully sustained and applied by this court. *Connell v. Chesapeake & O. R. Co.* 93 Va. 57, 32 L. R. A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; *Fowlkes v. Southern R. Co.* 96 Va. 742, 3 S. E. 464; *Watts v. Southern Bell Telephone & Telegraph Co.* 100 Va. 45, 40 S. E. 107; *Standard Oil Co. v. Wakefield*, 102 Va. 824, 66 L. R. A. 792, 47 S. E. 830.

In *Connell v. Chesapeake & O. R. Co.* 93 Va. 57, 32 L. R. A. 792, 57 Am. St. Rep. 786, 24 S. E. 467, it is said (quoting from an opinion of Justice Miller of the supreme court) that, "to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

And in the case of *Fowlkes v. Southern R. Co.* 96 Va. 742, 32 S. E. 464, where the subject is quite fully considered, this court says: "It is not only requisite that damage actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. . . . In other words, the law always refers the injury to the proximate, not to the remote, cause. . . . If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate conse-

nence, the law will refer the damage to the most proximate cause, and refuse to trace it to that which was more remote. . . . On the proximate cause we may usually trace the consequences with some degree of assurance, but beyond that we enter a field of conjecture, where the uncertainty renders any attempt at exact conclusions futile.

. . . If the wrong and the resulting damages are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The case at bar comes clearly within the influence of the principles to which we have adverted, and, when they are applied to the facts here shown, it would seem to be manifest that the alleged negligence and the damage complained of are not sufficiently conjoined to support the plaintiff's action. To the credit of the civilization in which we live, it cannot be maintained that the natural and expected result of leaving the upstairs door of an empty house unlocked is that someone who has no legal right there will enter the house and burn it, even though the house be located in a negro community. The house was entered and burned by someone unknown to the plaintiff three weeks after it was vacated,—a result which cannot be said to have followed the act of alleged negligence, in the usual, ordinary, and experienced course of events. On the contrary, such a result could not reasonably have been anticipated or expected.

This act was clearly the culpable and efficient intervening and proximate cause of the damage, and such damage cannot be said to be the legitimate sequence of the alleged negligence of the defendant. The injury complained of was the direct and immediate consequence of the act of the unknown party in setting fire to the house, and the damage cannot, under the law, be traced to the remote negligence of leaving the door unlocked. Considerations of fairness and justice required that no one should be held liable for the consequences of an act innocent in itself, and committed without malicious intent, which, by the concurrence of some event that could not reasonably have been anticipated, has produced hurtful consequences to another.

It is often difficult to determine what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, and where there is doubt it is a question for the jury. In the case at bar, however, the question is so entirely free from doubt that the court can, as a matter of law, declare that the negligence al-

leged was not the proximate cause of the injury, reparation for which is here sought in damages. It is therefore unnecessary to consider the instructions and the questions discussed in connection therewith, for under no instructions would a recovery by the plaintiff be justified under the facts of this case.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings not in conflict with the views expressed in this opinion.

MARYLAND COURT OF APPEALS.

JOHN W. KENNEY, Appt.,

v.

BALTIMORE & OHIO RAILROAD COMPANY.

(.... Md.)

Enticement—hiring boy without father's consent.

Hiring, at his own request, without notice of the father's objection, a minor who has been hired out by the father to work for another, for wages which the father is to receive, will not support an action for enticing the minor out of the father's service.

(June 20, 1905.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Washington County in defendant's favor in an action brought to recover damages for alleged wrongfully enticing plaintiff's son out of his service. Affirmed.

The facts are stated in the opinion.

Mr. J. W. S. Cochran, for appellant:

The Baltimore & Ohio Railroad Company knew that the boy was a minor, and that fact put the company upon inquiry as to all the facts concerning his relationship to his father.

Wade, Notice, § 11.

Whatever induces the child to leave the

Case Note.—The court, in holding, in the above case, that there must be some affirmative act of solicitation on the part of the defendant in order to render him liable, cited a group of cases which are generally relied upon by text-books and the courts as representing the law on the question. Of these cases, the Butterfield, Caughey, and Stuart Cases are all cited by Wood on Master and Servant, p. 24, where that author lays down the rule that, in order to maintain an action for enticing away, the burden is upon the father to show that the child was really induced to leave the service or control at the request of the de-

parent, or, after leaving, to remain away from him, may, in law, constitute enticement.

Hare v. Dean, 90 Me. 308, 38 Atl. 228.

The very act of defendant in employing the boy was, under the circumstances, the exertion of an improper influence over him, by which he was induced to quit his father's work, and, if the father was injured by this course of conduct an action will lie.

Loomis v. Deets (Md.) 30 Atl. 613; Ferguson v. Tucker, 2 Harr. & G. 190; Blake v. Lanyon, 6 T. R. 221.

Mr. A. J. Long also for appellant.

Messrs. John G. Wilson and Pearre & Lewis, for appellee:

In order to support this suit, the plaintiff must prove: (1) Actual subsisting state of service by the son to the father to the knowledge of defendant; (2) actual solicitation of the minor, by the defendant, to leave that service; (3) wrongful intent, in said solicitation, to deprive the father of parental control, and of the son's services.

Caughy v. Smith, 47 N. Y. 244; Ferguson v. Tucker, 2 Harr. & G. 182; Loomis v. Deets (Md.) 30 Atl. 613; Butterfield v. Ashley, 6 Cush, 249, 2 Gray, 254; Nash v. Douglass, 12 Abb. Pr. N. S. 187; Stuart v.

defendant; and that, if he left voluntarily or of his own accord, the action will not lie. An examination of these cases, together with other cases which have cited them, shows that:

In Butterfield v. Ashley, 6 Cush. 249, the action, like that in KENNEY v. BALTIMORE & O. R. Co., was one brought by the father for enticing away his son from service, and the court there held that defendant was not liable, unless he knew, at the time of enticing or employing the son, that he was the servant of the plaintiff, or he afterward had notice thereof, and continued to employ him after such notice. In this case the son left his father's service in another state without his father's consent, and offered his services to the defendant, who, knowing him to be a minor, at first refused to employ him, and did employ him only at his urgent solicitation, and upon his representation that he had his father's consent. The court there said that the gist of the action is, "that the defendant has enticed away a man who stood in the relation of servant to the plaintiff;" and cited Fawcett v. Beavres, 2 Lev. 63; Blake v. Lanyon, 6 T. R. 221; Sherwood v. Hall, 3 Sumn. 127, Fed. Cas. No. 12,777; Ferguson v. Tucker, 2 Harr. & G. 182; Conant v. Raymond, 2 Aik. (Vt.) 243; Fores v. Wilson, Peake, N. P. Cas. 55; Hart v. Aldrige, 1 Cowp. 54, 56. The court, in defining the word "entice," said: "So far as we know, the word 'entice' has no technical meaning. But, in a declaration like that in this case, it must mean something quite different from a reluctant employment of another's servant, under a

Simpson, 1 Wend. 378; Sargent v. Matheson, 38 N. H. 57.

Mere employment, by a railroad company of a minor without the consent of his parents, gives them no right of action against the company.

Arnold v. St. Louis & S. F. R. Co. 100 Mo. App. 470, 74 S. W. 5.

Mr. J. Clarence Lane also for appellee.

Schmucker, J., delivered the opinion of the court:

The appellant sued the appellee in the circuit court for Allegany county for damages for an alleged enticement out of his services of his minor son, George R. Kenney. The declaration contained two counts, of which the first was for fraudulently and maliciously enticing the son away from the service of the father, and the second was for so enticing the son, who was inexperienced in working on machinery, and employing him, "in the face of the objection of the father, as a helper in repairing engines and machinery in a roundhouse or machine shop, where he was crushed between an engine and the roundhouse door jamb, and killed whereby the plaintiff lost his son and the services thereof, as well as his heir." The

belief that the master has consented to that employment." The Butterfield Case has been cited to the proposition that the defendant must have had knowledge that the person employed or harbored was a servant of the plaintiff, in Cutting v. Seabury, 1 Sprague, 522, Fed. Cas. No. 3,521, where it was held that a father could not maintain an action for the loss of the services of his son, who went to a port and shipped, as of full age, for a whaling voyage, where the person who shipped him did not know that he was a minor. It was also cited in Gulf, C. & S. F. R. Co. v. Redeker, 67 Tex. 190, 60 Am. Rep. 20, 2 S. W. 527, where it was also held that the defendant is not liable, unless he knew of the minority of the servant. It was also cited in Hare v. Dean, 90 Me. 308, 38 Atl. 227, where the court, in overruling a demurrer to the declaration, held that it is immaterial that, at the time of the alleged wrongful act of the defendant, the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service. The question as to the defendant's knowledge was not involved.

In Caughy v. Smith, 47 N. Y. 244, it was held that the defendant was not liable for enticing the plaintiff's son from service where it appeared that the son had deserted his father's home and service several days before seeing or communicating with the defendant, so that the desertion was the act of the son, and was not induced or solicited by the defendant. Folger, J., writing the opinion, cited in support of the opinion, Butterfield v. Ashley, 6 Cush. 249, and

defendant pleaded *non cul.* to the first count, and demurred to the second, and the court sustained the demurrer. The case was then moved, on the affidavit of the defendant, to be circuit court for Washington county, where the issue made upon the first count of the declaration was tried before a jury. At the trial of the case the defendant, at the close of the plaintiff's testimony, presented no prayers, asking the court to instruct the jury that the plaintiff had offered no legally sufficient evidence to entitle him to recover in the case, and that their verdict must be for the defendant. The court granted the prayers, and, the verdict and judgment being for the defendant, the plaintiff appealed. There is but one exception in the record, and that is to the granting of these prayers.

The action of the lower court in granting the defendant's prayers was clearly correct, as the record furnishes no evidence of the practice of any solicitation, persuasion, or enticement by the defendant or its agents upon the plaintiff's son. It appears from the record that the son had, several years prior to the time of the alleged enticement, been in the defendant's employment with the consent of the father, who had himself procured the situation for the son. The son left his first situation with the defendant,

and went along with his father into the employment of the West Virginia Central Railroad Company, where they were engaged in repairing railway tracks in the state of West Virginia. The father subsequently gave up the railway service and went to farming for an occupation, leaving the son in the employ of the West Virginia Central Railroad Company, where he continued to perform the same kind of labor for about a year longer. During this time the son gave the checks which he received in payment for his work to his father, who supported him. Some time prior to September 3, 1902, the son, together with a friend who was working with him, abandoned the work on the railroad track in West Virginia, and went to the home of his brother, who resided in Cumberland, Maryland. Both the son and his friend, about September 3, 1902, made application to the Baltimore & Ohio Railroad Company at Cumberland for work, and were employed by that company and put to work repairing engines and machinery in the roundhouse, where they continued to labor together until the appellant's son was fatally injured on the 25th of September, 1902. The friend, who was working with the appellant's son, was a relative of the brother's wife, and they boarded together at the brother's house in Cumberland. The

Blake v. Lanyon, 6 T. R. 221. The Caughey Case was cited to the proposition that, to entitle the plaintiff to recover, the moving cause of the desertion must have been the inducement held out by the defendant, in Reynolds v. Everett, 67 Hun, 302, 22 N. Y. Supp. 306, but that question was not directly passed upon, as the only question before the court was whether the remedy of the employer was by injunction or action for damages; the court holding that an action at law for damages was the proper remedy.

In Stuart v. Simpson, 1 Wend. 376, which was an action for enticing and harboring apprentices, it was held that the defendant was not liable, unless he knew the boys to be the plaintiff's apprentices, and he actually solicited their services. There was no evidence in the case that the defendant knew that the boys were apprentices of the plaintiff. The plaintiff was a cabinet maker, and the boys were employed by the defendant as supernumeraries at his theater. The court held that the youthful appearance of the boys, and the fact that mahogany dust was plainly visible on their clothing at the time they went to the dressing room of the defendant, were not sufficient to send the case to the jury on the question of knowledge.

In Nash v. Douglass, 12 Abb. Pr. N. S. 187, which was an action against the Children's Aid Society, by the parents of a boy who had deceived the society by giving a false name and representing that he was

an orphan, and who had been sent to a home in the west by the society, the court held that the society had not been guilty of an unlawful enticing or solicitation, and was not liable.

In Arnold v. St. Louis & S. F. R. Co. 100 Mo. App. 470, 74 S. W. 5, it was held that the defendant did not solicit her son to leave his mother's service, and was not liable, where, from the facts, it appeared that the son, with his mother's consent, had started for a neighboring town to look for work, but, instead of going there, met an acquaintance, who told him of a man getting up a gang of men to go away to work, and the son joined the gang and went with them.

In Loomis v. Deets (Md.) 30 Atl. 612, which was an action by the father for depriving him of the services of his son, from the facts of the case it appeared that the father had hired the son to the defendant; that on one occasion, when he went to the defendant to get some money due the son, he was told that he paid the money to the son, whereupon the father commanded the boy to go home with him, and the latter refused. The defendant refused to allow the plaintiff to go into the house to get the boy's money and clothes, and the boy subsequently disappeared. The boy testified that the defendant never advised him to go away, or as to how he should act with regard to his father. It was held that the defendant was not guilty of harboring, or of intending to deprive the father of the services of, his son.

appellant's son, when applying for a place in the service of the Baltimore & Ohio Railroad Company, as a condition of his employment, signed a formal written application for membership in the relief association of that company, such as is usually signed by minors, containing a clause of assent, to be signed by his father. He was given the application to procure his father's signature to the assent, and in the meantime was permitted to go to work. He sent the application to his father, who declined to sign it, and sent it back to him; but that fact was not disclosed to the railroad company, nor does it appear that the appellant ever declared or intimated to that company that he had any objection to the employment by it of his son, or even informed it that his son was, or had been, employed on his behalf by the West Virginia Railroad Company. The record thus completely fails to show any of the essential elements of an actionable enticement by the appellee of the appellant's son; for it does not appear that at the time of his employment there was an actual subsisting state of service by him to his father of which the appellee had knowledge, or that the appellee or its agents persuaded, procured, or enticed him to leave any service at all. To maintain this action, the evidence must show an actual service of the parent by the minor child, and some active or affirmative effort by the defendant to detract the child from that service. It is not enough to show that the child has left the father's service without the father's consent and entered into the employment of the defendant. There must be some affirmative solicitation by act or conduct by the latter, in order to make him liable in an action like the present one. After the child has voluntarily left the father's service, and is out of it, he cannot be induced from it. *Butterfield v. Ashley*, 6 Cush. 249; *Stuart v. Simpson*, 1 Wend. 379; *Caughy v. Smith*, 47 N. Y. 249, 250; *Loomis v. Deets* (Md.) 30 Atl. 613; *Nash v. Douglass*, 12 Abb. Pr. N. S. 190; *Arnold v. St. Louis & S. F. R. Co.* 100 Mo. App. 470, 74 S. W. 5.

No notice was taken on the briefs, or in the argument in this court, of the action of the circuit court for Allegany county upon the demurrer to the second count of the declaration, and we therefore deem it unnecessary to notice that action, further than to say that we find no error in the court's ruling upon that pleading. No error appearing in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed, with costs.
1 L.R.A. (N.S.)

UTAH SUPREME COURT.

E. J. NASH, Respt.,

v.

LEE CLARK et al., Appts.

(27 Utah, 158)

Eminent domain—for irrigation.

The reclamation of land by irrigation is such a public purpose that the legislature may rightfully authorize the condemnation of rights of way over private property, or through the ditches of private individuals, to convey water for that purpose onto land belonging to a private individual.

(Baskin, Ch. J., dissents.)

(January 23, 1904.)

APPEAL by defendants from a judgment of the District Court for Utah County in plaintiff's favor in a proceeding to condemn a right of way for the carriage of water. Affirmed.

Statement by McCarty, J.:

Plaintiff brought this action to condemn a right of way in a ditch owned by the defendants. The provisions of the statute upon which he bases his right of action, so far as material to this case, are as follows: Rev. Stat. 1898, § 3588, in part provides: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: . . . (5) Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable. (6) Roads, railroads, tram-

Case Note.—*NASH v. CLARK* pushes the doctrine of the right to exercise the power of eminent domain for the benefit of a private individual further than it has ever before been pushed for the purpose of draining or irrigating private property. The court upholds a statute providing that any person shall have a right of way across any private lands for the construction of necessary ditches for conveying water for irrigation or drainage upon payment of just compensation therefor. The decision was affirmed by the Supreme Court of the United States, 198 U. S. 361, 49 L. ed. 1985, 25 Sup. Ct. Rep. 676. In that court the defendant contended that no individual had the right to condemn land for the purpose of conveying water in ditches across his neighbor's land for the purpose of irrigating his land alone. The court said, in some states, probably in most of them, the proposition contended for would be sound. But the

ways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines; milldams: . . . also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter. . . .

(10) Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or

court says: "Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon, or is the result of, some peculiar condition of the soil or climate, or other peculiarity of the state where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation." Further on in the opinion the court says: "We do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state;" and then suggests that other landowners might share in the use of the water by taking the benefit of the proceeding which the plaintiff had undertaken; and that, to hold the use a public one, it was not necessary that all should join in the proceeding at one time. This latter suggestion would appear to place a forced interpretation on the statute for the purpose of saving it, which would bring it within sound doctrine, but was entirely unnecessary in view of the position that the court would follow the interpretation as to what is a public use which has been placed by the state court upon its own Constitution and statutes. In view of that attitude by the Supreme Court of the United States, the affirmation of the decision adds little weight to its authority.

Farnham on Waters, § 179, states that the government cannot authorize the construction of a drainage ditch under the power of eminent domain over the land of a private citizen for the benefit of another citizen; nor can it authorize such right of way when it furthers private interests only. The decisions are unanimous to this effect, as appears from the cases cited in that section, and in the note to *Re Tuthill*, 49 L. R. A. 781.

Farnham on Waters, p. 1964 says, with respect to the condemnation of a right of way for an irrigation ditch, that the power

heat." Section 1277, Rev. Stat. 1898, is as follows: "Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor; but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law

of eminent domain may be exercised for the irrigation of a single farm if the irrigation of the particular farm is but a part of an entire scheme which will eventually result in the reclamation of all the arid land which can be reclaimed from the source from which the water is taken. "In order to come within this principle, however, the statutory machinery must not be limited to individual landowners, or deal with single farms, but a scheme must be provided which will eventually include all the land which is to be reclaimed from the one source, and then the individuals may be permitted to make use of the machinery as their needs arise."

It will be noticed that the Utah statute does not come within this principle although the Supreme Court of the United States suggests the possibility of its application to the statute for the purpose of saving it from invalidity. The cases relied upon by the Utah court to support its decision are distinguishable, and do not support the decision to its full extent.

Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394, involved the right to condemn a right of way to a mining claim.

Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376, was a decision by a territorial court with respect to the statutes of which the application of constitutional provisions is somewhat problematical. Moreover, in that case the ditch was owned by a joint-stock association and was intended to serve about 8,000 acres of land.

Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, involved the right to enforce an assessment under an act incorporating an irrigation district, the assessment being attacked on the ground that the irrigation law was unconstitutional.

The Montana Constitution provided that "the right of way over the lands of others for all ditches necessarily used in connection with the appropriation of water should be held to be a public use." Under this provision, *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757, upheld a proceeding for con-

for the taking of private property for public use." Section 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement: Provided, that said enlargement is to be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch." The complaint herein in substance alleges that plaintiff is the owner of 80 acres of land situated in Utah county, this state, which land, without irrigation, is arid, barren, and unproductive, but with irrigation would produce in abundance hay, grain, and other agricultural crops; that Ft. Canyon creek is a natural stream of

water in Utah county, flowing from the mountains north of plaintiff's land in a southerly direction to and near plaintiff's land; that the defendants own a tract of land contiguous to and adjoining plaintiff's land on the north, and are also the owners of a certain ditch leading from Ft. Canyon creek over and across their land to a point within 100 feet of plaintiff's land, which ditch is $1\frac{1}{4}$ miles in length, 18 inches wide, and 12 inches deep; that plaintiff owns water in Ft. Canyon creek sufficient to irrigate his land above mentioned; that there is no other convenient or practicable way in which to divert the waters of said creek and convey the same onto plaintiff's land except by and through the ditch of defendants: that, in order to irrigate his land, it is necessary that plaintiff have a right of way through defendants' ditch; that for plaintiff to enter upon defendants' land to enlarge their ditch will not injure them; that plaintiff requested of defendants that they allow him to go onto their land and enlarge their ditch, and use it for conducting his water to and on his land, and offered to contribute his share of the expense of maintaining the ditch and all damages:

demnation of a right of way across private land for the benefit of a single farm, under the provisions of a statute authorizing such procedure. The case involved a construction of the constitutional provision, rather than the legality of the statute, but, in its opinion, the court said: "What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation, by artificial irrigation, of 160 acres of agricultural land owned by one or two persons, and the reclamation, by the same means, of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development, and adds to the taxable wealth, of the state, as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit." But this distinction which the Montana court fails to perceive is the very one upon which the cases, as indicated above, have turned, in holding that the right of eminent domain cannot be exercised for the benefit of single farms.

In *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, the court for the reasons indicated in the portion of the opinion quoted in the *NASH CASE*, upheld the constitutionality of a statute declaring that mining, milling, smelting, or other reduction of ores is a public use, and that the right of eminent domain may be exercised therefor. The *Dayton Case* was followed in *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147, affirming an order condemning

land for the erection of machinery and sinking of a shaft for the development of the petitioner's mine; and in *Byrnes v. Douglass*, 27 C. C. A. 399, 48 U. S. App. 526, 83 Fed. 45, holding that a mining company might condemn a right of way for a tunnel for the development of its mine; in *Butte A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232, holding that the connection of mines and ore houses with a market is a public use in Montana which will authorize a railroad company to acquire a right of way for that purpose by right of eminent domain; and was cited in *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 161 Mo. 288, 51 L. R. A. 936, 84 Am. St. Rep. 717, 61 S. W. 684, holding that a regularly organized and chartered railroad company might condemn land for a right of way, notwithstanding the fact that the road was short and built chiefly for the purpose of conveying the product of a coal company composed of substantially the same persons that organized the railroad company. The decision in the last two cases, however, were largely influenced by the consideration that the petitioner was a common carrier and would owe a duty to the public as such, though the actual use of the road would, for the present at least, be confined to the particular mining company. The *Dayton Case* was also cited with approval in *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376, referred to in the opinion in the *NASH CASE*. The *Dayton Case* was disapproved in *Healy Lumber Co. v. Morris*, 33 Wash. 490, 53 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac.

that the defendants refused to permit him to do so. Plaintiff asks that he be permitted to enlarge defendants' ditch to the extent of widening it 1 foot more; that he have a perpetual right of way through said ditch when so widened and constructed for the purpose of diverting and carrying his water from Ft. Canyon creek to his land for irrigation purposes; that the damages for such right of way and use of the ditch by plaintiff be fixed and determined, and that upon payment by the plaintiff of such damages he have such ditch condemned to the extent of and to the use and for the purposes above set forth, and that defendants be enjoined from in any way or manner asserting any right antagonistic to this right of plaintiff; that, if plaintiff is permitted by decree of this court to enlarge and use the ditch as aforesaid, his land can be made productive, and the use of the water to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose. Defendants interposed a general demurrer to plaintiff's complaint, alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The

defendants elected to stand upon their demurrer, and the plaintiff introduced evidence in support of the allegations of his complaint, and the court entered judgment and decree in favor of plaintiff, condemning defendants' land as prayed for in the complaint; and for a reversal of this judgment the defendants have appealed to this court.

Mr. J. W. N. Whitecotton, for appellants:

The court takes the private property of these defendants, and, entirely without their consent, and against their protest, turns it over to the plaintiff in the case. There is not the slightest pretense that anyone else is to make use of whatever the plaintiff gets from the defendants. This is nothing but a private use.

Lewis, Em. Dom. § 157.

The Constitution prohibits the taking of private property for private use.

Bankhead v. Brown, 25 Iowa, 540; Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Re Albany Street, 11 Wend. 151, 25 Am. Dec. 618; Concord R. Co. v. Greely, 17 N. H. 47; Bloodgood v. Mohawk & H. R. R. Co. 18 Wend. 9, 31 Am. Dec. 313; Beekman v. Saratoga & S. R. Co. 3 Paige, 73, 22 Am.

681, holding that the acquisition of an easement over land for the transportation to market of the logs of a private owner was not a public use justifying the exercise of eminent domain. The court, referring especially to the Dayton Case, said: "It must be conceded, however, that there are quite a number of decisions to the effect that the phrase 'public use' should be construed to be synonymous with 'public benefit,' and that, when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state, or through any of its agencies. . . . It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the Constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business." The Dayton Case was also disapproved in Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765, where it is stated that the better reasoned cases hold that land cannot be condemned for use of a private mining corporation. The decision in the last case was to the effect that a right of way cannot be condemned for a gas-pipe line, unless the petition shows that the petitioner is engaged in furnishing gas for public use.

In Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757, cited in NASH v. CLARK, the court distinguished the case of Lorenz v. Jacob, 63 Cal. 73, holding that the right of

eminent domain could not be exercised in favor of the owners of mining claims to enable them to obtain water for their own use in working such claims, upon the ground that the California Constitution did not contain the phrase, "other beneficial use," employed in the Montana Constitution; though it said that, even if that phrase had been omitted from the Montana Constitution, it would not have been disposed to follow the California construction, but would have felt justified, by reason of the phrase "appropriation of water for distribution," in declaring the use of water for one or two tracts of land or mines a "public use." The Ellinghouse Case was cited in Helena v. Rogan, 26 Mont. 452, 68 Pac. 798, as authority for the proposition that the use of water to irrigate a farm under the water-right law is a public use, though the point in the latter case was as to the right of a city to appropriate for the public water supply water already appropriated for irrigation purposes. The Ellinghouse Case was cited with approval in Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 770, holding that the construction of ditches for drainage of land, otherwise useless for agricultural purposes, was a public use, and that it was not necessary, in order to justify the exercise of eminent domain, that the public at large should be benefited, but only that part of the public affected by want of proper drainage. In the Lewis County Case, however, the benefit does not seem to have been confined to a single individual or tract of land.

Dec. 679; *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Hepburn's Case*, 3 Bland, Ch. 95; *Hoye v. Swan*, 5 Md. 237; *Dunn v. Charleston*, Harp. L. 189; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Tyler v. Beach-er*, 44 Vt. 648, 8 Am. Rep. 398; *Dickey v. Tennyson*, 27 Mo. 373; *Clack v. White*, 2 Swan, 540; *Sadler v. Langham*, 34 Ala. 311; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; *Varner v. Martin*, 21 W. Va. 534; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *McCandless's Appeal*, 70 Pa. 210; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Robinson v. Swope*, 12 Bush, 21; *Harding v. Funk*, 8 Kan. 315; *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547; *Waddell's Appeal*, 84 Pa. 90; *Brown v. Beatty*, 34 Miss. 227; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Lorenz v. Jacob*, 63 Cal. 73; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *McQuillen v. Hatton*, 42 Ohio St. 202.

The extent of the taking does not affect the principle.

Cooley, Const. Lim. 5th ed. p. 657; *Re Albany Street*, 11 Wend. 161, 25 Am. Dec. 618; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; *Nesbitt v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199.

There is nothing to compel plaintiff to use the right after it is condemned, and enlargement of a ditch without use inflicts serious injury on the owner.

The reclamation of a private claim is not a public purpose.

Lorenz v. Jacob, 63 Cal. 73; *Lindsay Irrig. Co. v. Mehrstens*, 97 Cal. 680, 32 Pac. 802; *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757; *Prescott Irrig. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635; *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Messrs. Warner, Houtz, Prentiss, & Warner, for respondent:

If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance 1 L.R.A. (N.S.)

to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private right of individuals for that purpose.

2 *Cooley*, Const. Lim. 532; *Hazen v. Essex Co.* 12 Cush. 475; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Yunker v. Nichols*, 1 Colo. 551; *Oury v. Goodwin*, Ariz. 255, 26 Pac. 377; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 4 L. ed. 369, 17 Sup. Ct. Rep. 56; *Schilling v. Rominger*, 4 Colo. 109.

McCarthy, J., delivered the opinion of the court:

Appellants contend that the order of the district court overruling the demurrer was erroneous for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use. Both the Constitution of the United States and the Constitution of this state provide that "private property shall not be taken or damaged for public use without just compensation." This provision is construed to mean that private property can not be taken for strictly a private use which counsel for respondent concede to be the true and proper construction. This brings us to the only question presented by this appeal, to wit: Was the condemnation of appellants' land in this case in law and in fact for a public use? There is no fixed rule of law by which this question can be determined. In other words what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempts to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies, — that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use without the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in harmony with enlightened public policy, and the liberal interpretation given the term "public use" which the legislature has, in effect, declared shall be followed in this state, is far more conducive to individual and public advancement than the restricted construction

adopted and followed by the line of decisions first referred to.

The question of the manner of appropriation and use of water for domestic, irrigation, mining, and manufacturing purposes is, and ever since the advent of the early pioneers has been, the most important and vital of all industrial questions with which the people within this arid region have been confronted. Their requirements, and, we might add, their absolute necessities, impelled the legislatures and courts at an early date in the history of the states and territories strictly arid in character to depart from and lay aside as impracticable some legal doctrines and rules relating to the control and use of water which had theretofore been adhered to and followed for ages, and to adopt and put in operation a new system of acquiring title in and to the streams which are within the arid belt, the use of which was found to be indispensable in agricultural pursuits, in mining, in the establishment of industries, and in the general development of the arid states and territories. By an examination of the records of the early cases in this state (then territory) wherein the courts declined to follow and be governed by the common-law doctrine of riparian rights in its entirety, the same arguments were advanced by those claiming title to water under and by virtue of this doctrine as are advanced by appellants in this case, to wit, that fundamental rights were being interfered with, and the property of one citizen was being taken and given to another. We very much doubt whether either advocate or layman, who has witnessed the magnificent results wrought by the change, would now contend that the Constitution was overridden, or any natural or legal right of the citizens invaded, and their property confiscated, when the common-law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating and acquiring title to water adopted that made it possible for populous and flourishing commonwealths to grow up where the country otherwise would have remained a desert, uninhabited, with the possible exception, perhaps, of an occasional cattle or sheep ranch. The question of how to increase the water supply in the arid region has steadily grown in magnitude and importance until it has become national as well as local. Congress, realizing the great public necessity for an increased water supply, and appreciating the great possibilities that may be accomplished in this and other states and territories within the arid belt by conserving and storing the high and surplus waters caused by the melting snows

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which in the spring months come down from the mountains in torrents, and are either wasted in the deserts or find their way into box canyons, where they can never be made available for irrigation or other useful purposes, by a provision in the enabling act (§ 12) granted to this state 500,000 acres of the public lands lying within the state, with which to create a fund to be used for the purpose of building reservoirs; and later on, by an act known as the "irrigation bill," created a fund from the public revenues, which is swelling into the millions of dollars, for the purpose of aiding in this most important of all enterprises of a public character in the arid west, and upon the success of which its future growth and prosperity largely depend. The large expenditure of public funds in this direction is not to be made for the purpose of enabling the states and territories directly benefited thereby, in their sovereign capacity, to engage in farming and other lines of industry which are dependent upon the water supply, but to ultimately enable the citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds. These questions, which are the most important with which the arid states and territories have had to deal, and the successive steps that have been taken in advancing our system of irrigation, are referred to for the purpose of showing the interest that the public have always had, and must of necessity continue to have, in the question of irrigation. The natural physical conditions of this state are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, upbuilding, and industrial expansion of the state not only depend upon the storing and holding back the high and surplus waters so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available; and it is entirely within the prov-

ince of the legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. Experience has shown that, the greater the amount of water flowing in a ditch of a given size and grade, the less the percentage of seepage and evaporation. Therefore, as a general rule, the owners of canals and ditches, instead of being damaged by their enlargement and the turning therein of an additional quantity of water, as is proposed in this case, will at least in times of scarcity during the hot summer months, and especially during the periods of protracted drouths, which have become so common of late years in this state, be benefited thereby, besides receiving the market value of the land condemned. In view of the physical and climatic conditions in this state, and in the light of the history of the arid west, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state, would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution.

The foregoing conclusions are supported by abundant authority. 10 Am. & Eng. Enc. Law, 2d ed. p. 1064, and cases cited. In the case of *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, the plaintiff sought to condemn a right of way over certain lands to a mining claim owned by plaintiff, to be used for the purpose of transporting wood, lumber, timbers, and other material to enable it to conduct and carry on its business of mining. The claim was made in that case, as it is in this, that the statute under which the action was brought was unconstitutional for the same reasons as are urged in the case before us. Mr. Chief Justice Hawley, speaking for the court, says: "That mining is the paramount interest of the state is not questioned. That anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition. Hence it necessarily follows that, if the position contended for by petitioner is correct, and I believe it is, then the act is constitutional, and should be upheld. Although other and weaker reasons have more frequently been assigned, it seems to me that this is the true interpretation upon 1 L.R.A. (N.S.)

which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given. . . . Now, it so happens, or at least is liable to happen, that individuals, by securing a title to the barren lands adjacent to the mines, mills, or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, . . . to greatly embarrass, if not entirely defeat, the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for . . . any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this state many of the advantages which other states possess, but by way of compensation to her citizens has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." In the case of *Oury v. Goodwin*, 1 Ariz. 255, 26 Pac. 376, practically the same question was involved as is presented here, and the supreme court of Arizona, in an elaborate and exhaustive opinion, in which many cases are cited and reviewed, held that the use of water for irrigation is a public use, and that an act of the Arizona legislature, providing for the condemnation of lands for canal purposes, was constitutional. *De Graffenried v. Savage*, 9 Colo. App. 13, 47 Pac. 902; *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100. In the case of *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56, the court, in the course of the opinion, says: "On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. . . . To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the land owners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation." In conclusion the court on this point further says: "We have no doubt that the irrigation of really arid lands is a public pur-

pose, and the water thus used is put to a public use." *Ellinghouse v. Taylor*, 10 Mont. 462, 48 Pac. 757. There are many other well-considered cases which declare the same general doctrine as those referred to, but we deem it unnecessary to make further citations.

The judgment of the District Court is affirmed: the costs of this appeal to be taxed against the appellants.

Bartch, J., concurs. Baskin, Ch. J., dissents.

Affirmed by Supreme Court of United States May 15, 1905.

ILLINOIS SUPREME COURT.

GEORGE W. CHRISTY, Appt.,

v.

PARKER ELLIOTT.

(216 Ill. 31.)

1. Exception to instructions—attacking statute.

Exception to instructions stating the law to be as established by a statute raises the question of the constitutionality of the statute,—at least, if the instructions are expressly challenged on that ground on the motion for new trial.—so as to bring the appeal within the jurisdiction of the court

taking cognizance of appeals involving constitutional questions.

2. Limiting speed of automobiles—constitutionality.

That a statute limiting speed on the highways applies only to horseless vehicles does not render it void under a constitutional provision that no one shall be deprived of liberty or property without due process of law, as making an unjust discrimination against the manufacturers and owners of such vehicles.

3. Requiring automobile to stop—title of statute.

A provision of a statute requiring automobiles to come to a stop upon meeting a horse frightened by their presence is within the title "An Act to Regulate the Speed of Automobiles."

4. Stopping automobile for frightened horse—due diligence.

A statutory requirement that the driver of an automobile shall stop it upon approaching a horse which appears to be frightened will apply in case, "by the exercise of reasonable diligence on the part of the driver," it would have appeared that a horse was frightened.

5. Charge to jury—as to wealth or poverty of parties.

The right to consider the wealth or poverty of the parties is not included in an instruction, in an action to recover damages for injuries caused by the fright of a horse

Subject Note.—The law governing automobiles.

called forth a considerable amount of legislation, and a number of judicial decisions with respect to the rights, duties, and liabilities of the owners or users of this class of vehicles. Except so far as these decisions have turned upon statutes or ordinances expressly directed to the use of automobiles, they are the mere results of the application of common-law principles to this novel class of vehicles; and they are not as yet sufficiently numerous, nor sufficiently specific, to form the basis of a distinct code of rules by which the respective rights and duties of the owners or users of automobiles and other persons may be determined without referring to the fundamental common-law principles which have been developed by the cases dealing with other means of locomotion upon the public streets and highways. The particular applications that have been made of these principles in automobile cases are, however, of especial value as precedents for later automobile cases, and this consideration, in connection with the fact that there are quite a number of decisions dealing with the validity, construction, or effect of statutes or ordinances expressly relating to automobiles, suggests the advisability of collecting the decisions that have thus far been rendered with respect to them.

II. Regulation and control by public.

a. Registration; numbering; license; tax.

Mass. Stat. 1903, chap. 473, requiring

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II. Regulation and control by public.

a. Registration; numbering; license; tax, 215.

b. Regulations as to speed and safety appliances, 219.

c. Prohibited hours and places, 221.

d. Regulation of automobiles used for hire, 222.

e. Restrictions as to transportation of gasoline carried by automobiles, 223.

III. Statutory duty of operator of automobile, 223.

IV. Common-law duty and liability of operator of automobile, 224.

V. Questions of negligence and contributory negligence upon particular state of facts, 228.

VI. Instructions with respect to particular state of facts, 234.

VII. Responsibility of owner when automobile in charge of another, or when put in operation by another, 235.

VIII. Duty and liability to operator of automobile, 237.

IX. Pleading; evidence; judicial notice, 239.

X. Right of owner of garage to a lien, 240.

XI. Miscellaneous, 241.

I. In general.

The increasing use of automobiles has
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by an automobile, to the effect that the jury might, in determining whether defendant was exercising reasonable care and diligence, take into consideration the situation and condition of the parties, where there is no evidence of the financial condition of the parties in the case.

6. Charge as to negligence—question for jury.

The court may explain to the jury what constitutes ordinary care as matter of law, and instruct them that, to recover for alleged negligent injury, plaintiff must show that he was exercising reasonable care and diligence for his own safety, "as explained in the instructions;" and such instruction cannot be regarded as making the question of negligence one of law.

7. Contributory negligence of driver.

That the driver of the vehicle in which plaintiff was riding was negligent at a time when plaintiff received personal injuries of which defendant's negligent handling of an automobile was the efficient cause will not defeat an action against defendant to recover for the injury.

8. Damages—for injury to leg.

In fixing the damages for a personal in-

jury, the jury may consider the testimony of plaintiff and some of his witnesses that his leg was injured, although there is evidence in the case that there was no injury to the leg further than an enlargement of glands in the groin.

9. Common-law negligence—as affected by statute.

There may be a recovery for common-law negligence in handling an automobile on a highway if properly pleaded, although the use of such vehicles has become a matter of statutory regulation.

10. Refusal to charge—cured by other charge.

A person cannot complain of the refusal of an instruction, if the court, at his instance, gives another which embodies all that is material in the one refused.

11. Horse frightened by automobile—signal.

No signal from the persons in a carriage drawn by a horse, that the animal is about to be frightened by an approaching automobile, is necessary to charge the driver of the latter with the statutory duty to stop the machine, if it appears that a horse approaching on the highway is about to become frightened by the machine.

automobiles to be registered, and that each have displayed thereon, in Arabic numerals not less than 4 inches long, its registered number and mark, and exacting a registration fee of \$2 for each automobile, is not unconstitutional. *Com. v. Boyd*, 188 Mass. 79, 74 N. E. 255. The court said that there could be no question as to the right of the legislature, in the exercise of the police power, to regulate the driving of automobiles and motor cycles on the public ways of the commonwealth; that they are capable of being driven, and are apt to be driven, at a high rate of speed, and when not properly driven are so dangerous as to make some regulation necessary for the safety of other persons on the public highways. The court further said that the registration fee is plainly a license fee, and not a tax; and that, the act being passed by the general court, it was not necessary to consider whether a similar act can be passed by a city. The case of *Chicago v. Banker*, 112 Ill. App. 94, *infra*, was distinguished upon the ground that the act there involved was passed by a city, and not by the legislature.

In *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357, § 166 of the New York highway law (as amended by chap. 625 of the laws of 1903), providing for the registration of automobiles by their owners, was attacked as unconstitutional and void, and it was urged that, in consequence, the requirement of § 169a, that a number corresponding to the number of the certificate obtained on registering the automobile shall be conspicuously attached to the rear of the vehicle so as to be plainly visible, is inoperative, and that a failure to comply therewith can constitute no crime. Section 166 was challenged as class legislation violating L.R.A. (N.S.)

relative of the 14th Amendment of the Federal Constitution by reason of the provision therein: "This section shall not apply to a person manufacturing or dealing in automobiles or motor vehicles, except those for his own private use, and except those hired out." The court said that it was unnecessary to decide whether it would be competent for the legislature thus to discriminate between dealers and manufacturers on the one hand, and private owners upon the other, in using automobiles and motor vehicles upon the public road, since the statute, properly construed, does not exempt a manufacturer or dealer who wishes to take a vehicle which he has in stock for sale or for repairs or on storage out upon the public street, and operate it by its own power, from the duty of having the same registered and attaching to it a tag with a number corresponding to the certificate.

An automobile is a carriage, within Pa. act April 1, 1868 (P. L. 565, § 7), which empowers the city of Pittsburg "to regulate and license all cars, wagons, drays, coaches, omnibuses, and every description of carriages;" and the city may, therefore, impose a license upon automobiles, notwithstanding that they were unknown when the act was passed. *Com. v. Hawkins*, 14 Pa. Dist. R. 592.

The power conferred upon the city of Pittsburg by the special act of April 1, 1868 (P. L. 565), to impose a license upon automobiles used in the city streets, was not repealed by the act of April 23, 1903 (P. L. 268), regulating the use of automobiles throughout the state, as the later act contains no repealing clause, and by the provision of the 7th section, to the effect that the amount of license prescribed by the act shall not apply to any city or other mu-

1. Charge on evidence—undue emphasis on part.

The court cannot, in instructing the jury, single out and give undue emphasis to particular evidence upon a matter in controversy, where there is as much testimony on one side of the question as on the other.

3. Taking case from jury.

A case cannot be taken from the jury if there is evidence which would warrant a recovery on the part of plaintiff.

4. Abstract of record—declaration.

An abstract of the declaration is included in a rule of court requiring an appellant to furnish the court with a complete abstract of the record.

(June 23, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Mercer County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Magruder, J.:

This is an action of trespass on the case, brought in the circuit court of Mercer coun-

ty on June 30, 1904, by the appellee against the appellant to recover damages resulting to plaintiff from an injury inflicted upon him by being thrown from a wagon drawn by mules upon a public highway, by reason of said mules becoming frightened and turning over said wagon, because of the alleged negligence of appellant in running an automobile, in which he was riding, in violation of the statute of Illinois in regard to automobiles, and in driving and managing said automobile in a careless, negligent, and improper manner. The plea of the general issue was filed to the declaration, and the case was tried before the court and a jury. The jury returned a verdict in favor of appellee and against appellant for \$1,250. Motion for new trial was made and overruled, and judgment rendered upon the verdict. The present appeal from the judgment so entered by the circuit court is prosecuted to this court upon the ground that the constitutionality or validity of the act herein-after referred to, to regulate the speed of automobiles, etc., is involved in this case. The declaration consists of six counts. The first

municipality in which the authorities have imposed a license fee for the same purpose, indicates an intention to preserve to the municipalities any authority previously conferred upon them authorizing the licensing of vehicles. *Ibid.*

In *Com. v. Hawkins*, 14 Pa. Dist. R. 592, the court upheld the validity of an ordinance (passed by the city of Pittsburg under the power conferred by the special act of April 1, 1868 [P. L. 565, § 7], to regulate and license every description of carriages) which makes it unlawful for any person to operate, or cause to be operated, upon the streets of the city, an automobile, motor vehicle, or other conveyance or wagon, the motor power of which shall be electricity, steam, gasoline, or any source of energy other than human and animal power, except upon the conditions, *inter alia*, of the payment by the owner of an annual license fee of \$6 if the vehicle is intended to carry one or two persons, and a fee of \$10 if intended to carry more than two persons. The court said that the license imposed was not unreasonable, and was uniform upon different kinds of the several classes of vehicles named; and that that was all the law required in that respect.

Pa. act April 23, 1903 (P. L. 268), requiring the registration of automobiles, is not unconstitutional for lack of uniformity, because of the provision of § 13 that the act shall not apply "to any of the motor vehicles which any manufacturer or vendor of automobiles may have in stock for sale, and not for his private use or for hire."

Com. v. Densmore, 29 Pa. Co. Ct. 217.

The provision of Pa. act April 23, 1903 (P. L. 268), requiring the registration of automobiles, is a valid exercise of the police power. *Ibid.*

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The power conferred upon the city of Detroit by § 170 of its charter to "control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, and public grounds and spaces within said city shall be used and enjoyed," includes the power to enact an ordinance requiring the registering and numbering of automobiles or other motor vehicles as a condition of their use upon the city streets, and exacting a fee of \$1 from the owner to pay the cost of aluminium figures to be furnished by the city to make up the number to be affixed to the automobile. *People v. Schneider* (Mich.) 12 Det. L. N. 32, 69 L. R. A. 345, 103 N. W. 172. In reply to the objection that the provision for registering and numbering amounts to a license, and that the grant of authority to regulate gave the city no power to license, the court said that the provision, if a license at all, is a license as a mere means of regulation; and, if the speed of automobiles cannot be effectually regulated without licensing them, the grant of the power to regulate confers upon the city the power to license, unless some other provision of law forbids the exercise of that power.

In the last case the court, without approving the decision in *Chicago v. Banker*, 112 Ill. App. 94, *infra*, said that the ordinance in question in that case went further than the ordinance in the case at bar.

A provision in a municipal ordinance, requiring one operating an automobile on the city streets to display thereon a number furnished by the municipality corresponding to a number entered upon the record kept by the city, does not provide an unreasonable search within Mich. Constr. art. 6, § 26, forbidding unreasonable searches. *Peo-*

and third counts are based upon the statute prohibiting a greater rate of speed than 15 miles an hour. The second and fourth counts are based upon that provision of the statute which provides that automobiles should come to a full stop when "it shall appear" that any horse or team approaching them in the highway is frightened. The fifth and sixth counts are based on the common-law grounds of negligence.

The material facts are substantially as follows: On June 23, 1904, appellee, in company with one William Parker, who was driving, and three old ladies, to wit, Mary Parker, the mother of William Parker, the driver, and Jane McMullen and Elizabeth McMullen, were driving south upon a highway leading into the village or town of New

Windsor, which highway extended in northerly and southerly direction on the line between Mercer and Henry counties. Appellee was riding on the front seat with Parker, the driver, and the three women were sitting on the back seat. The vehicle was an open spring wagon, and was drawn by a team of mules. Appellee and his companions were coming up over the brow of a hill about a mile and a half north of New Windsor, when they first saw the appellant coming north toward them in a seven-horse power gasoline automobile, about 50 rods away. From the point where appellee and his companions first saw appellant to the point where appellant was then approaching them, there was a level road to the south for over 200 rods. North of the place

ple v. Schneider (Mich.) 12 Det. L. N. 32, 69 L. R. A. 345, 103 N. W. 172.

A municipal ordinance requiring the registering and numbering of automobiles as a condition of their use upon the city streets, and imposing a pecuniary penalty for its violation, and imprisonment in default of payment, does not violate Mich. Const. art. 6, § 32, providing that no person shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property without due process of law. *Ibid.*

One must procure a license from the county clerk of each and every county over whose public roads he may desire to run an automobile, and a license granted by the clerk of the county of his residence is of no effect in another county, under Mo. Laws 1903, p. 162, § 4, providing that every person desiring to operate any automobile propelled by steam, gasoline, electricity, or any other motive power, shall obtain a license from the license commissioner, if in a city having such commissioner, or, if desired to operate the same in any county outside the incorporated limits of any such city, or upon any of the public highways, streets, or roads of this state, shall obtain a license from the county clerk of such county. *State v. Cobb* (Mo. App.) 87 S. W. 551.

It was held in *Chicago v. Banker*, 112 Ill. App. 94, that an ordinance of the city of Chicago which requires one who uses an automobile for his private business and pleasure only to submit to an examination and to be licensed as an "automobile operator" (if the examining board sees fit to grant him a license) imposes a burden upon one class of citizens in the use of streets not imposed upon the others, and is, therefore, beyond the power of the city council, and void. The court said that, conceding that what is fairly implied is as much granted as what is expressed, nevertheless the charter of a municipal corporation is the measure of its powers, and the enumeration of those powers implies the exclusion of all others. Among other powers enumerated in the 1 L.R.A. (N.S.)

charter of the city, are that of regulating the use of streets and the speed of vehicles within the limits of the corporation, and the power to license and regulate certain occupations. The opinion purports to put the decision upon the broad ground that the ordinance wrongfully discriminates between different classes of citizens. The actual decision, however, is upon the ground that the charter does not confer requisite power upon the city council to enact the ordinance.

Defendant, in *State v. Cobb* (Mo. App.) 87 S. W. 551, attempted to raise a question as to the constitutionality of the automobile act passed in 1903 (Laws 1903, p. 162) requiring persons desiring to run automobiles to take out a license; but the court refused to consider the question, because neither the article, nor the section of the Constitution thought to be violated by the act, was pointed out or referred to in the defendant's motions or briefs.

An indictment otherwise substantially following the language of Mo. Laws 1903, p. 162, § 4, requiring every person "desiring" to operate an automobile to obtain a license from the officers therein designated, is not bad because the word "desire" is not used. *State v. Cobb* (Mo. App.) 87 S. W. 551.

In *Com. v. Densmore*, 29 Pa. Co. Ct. 217, the court held that the provision of Pa. act April 23, 1903 (P. L. 268), requiring the owners of automobiles to take out licenses, was so uncertain that a conviction for its violation could not be sustained in view of the fact that there is nothing in the act as to what the license shall contain, and that the title of the act refers to the licensing of "operators," and not "owners," of automobiles.

The power of a municipal corporation to classify vehicles for the purpose of a vehicle tax ordinance includes the power to exclude automobiles from its scheme of taxation. *Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027.

A municipal corporation may exclude from its scheme of taxation vehicles of non-residents who habitually use the streets of

where the accident happened, the view was unobstructed for half a mile, except that there was a small hill opposite what is called in the evidence the "Hoogner place," where there was a depression about 25 rods long. In the automobile were appellant, with his son and daughter, and a friend of theirs, named Spivey. When the automobile came up to where the wagon was, the mules became unmanageable; the wheels of the spring wagon went into a ditch on the right or west side of the road; the mules reared sharply to the east and upset the wagon, throwing the occupants out, and ran away. Appellee's arm was broken by the fall, and it was claimed by him that one of his legs was injured. There is evidence tending to show that, as a result of the

breakage of his arm, appellee had an enlarged joint and permanent deformity. When he first fell from the wagon, he was unconscious, and lay in the road an hour, while waiting for a physician, who had been sent for. For some seventeen days he was confined to his bed, and for two and one-half months thereafter could not walk without a cane or chair. There is testimony tending to show that his leg was so severely injured that he could not bear the weight of his body upon it. Although the physicians testify that they could detect no broken bone in the leg, they state that they detected enlarged glands in the groin, but whether this enlargement of the glands in the groin proceeded from the accident, or from some other cause, is a matter about which the witnesses

the city, although the vehicles are of the same class as those which are subject to the tax if owned by residents. *Ibid.*

The class of vehicles in question in the last case was not automobiles, but the rule laid down doubtless applies to automobiles.

b. Regulations as to speed and safety appliances.

Various constitutional objections to statutes regulating the speed of automobiles are considered and disposed of in *CHRISTY v. ELLIOTT*.

A municipal corporation has power to regulate the speed of automobiles, and to require reasonable safety appliances, such as gongs and brakes. *Chicago v. Banker*, 112 Ill. App. 94.

The power conferred upon the board of park commissioners of the city of Boston by Mass. Stat. 1875, chap. 185, § 3, p. 778, to make rules for the use and government of the parks and streets under their control, includes the right to make a reasonable regulation as to the speed at which a person shall "ride or drive" in such park or street. *Com. v. Crowninshield*, 187 Mass. 221, 68 L. R. A. 245, 72 N. E. 963.

Regulations by the board of park commissioners of the city of Boston as to the rate of speed of automobiles in parks and streets under their control, were not abrogated by Mass. Stat. 1902, chap. 315, p. 235, limiting the speed of automobiles throughout the state on public highways, streets, and ways. *Ibid.*

The general power conferred upon townships of the first class by Pa. act April 28, 1899 (P. L. 104), includes the power to enact an ordinance fixing a maximum rate of speed for automobiles and bicycles of 10 miles an hour, and such power is not suspended by act April 23, 1903 (P. L. 268), which provides, *inter alia*, that no person shall be allowed to operate any motor vehicle upon any of the public highways of the cities or boroughs at a speed greater than 8 miles an hour, and that outside of cities or boroughs the rate of speed shall not exceed 1 L.R.A. (N.S.)

ceed 1 mile in three minutes, in view of the proviso to the 5th section that nothing in the section shall permit any person to drive an automobile at a greater rate of speed than is reasonable regarding traffic, danger, or injury to property, at any time or at any place. *Radnor Twp. v. Bell*, 27 Pa. Super. Ct. 1.

N. Y. Laws 1893, chap. 625, § 163, providing that no ordinance, rule, or regulation adopted by the authorities of any city in pursuance of such section, or of any other law, shall require an automobile or motor vehicle to travel at a slower rate than 8 miles per hour within the closely built up portions of such city, nor at a slower rate of speed than 15 miles per hour where the houses in such city upon any highway are more than 100 feet apart; and § 169a, providing that any person violating any of the provisions of the statute, or of any speed ordinance adopted pursuant to the statute, shall, upon conviction, in addition to the penalties provided in § 169b, be further punished for a first offense by a suspension of his right to run an automobile for a period of not less than two weeks,—do not fix any rate of speed at which an automobile may be run, nor do they confer upon the municipal authorities power to pass ordinances with reference thereto; on the contrary, they merely limit the right which the authorities now have, under existing laws, to regulate the speed. *People v. Ellis*, 88 App. Div. 471, 85 N. Y. Supp. 120. It was accordingly held in this case that, as the complaint on which the prosecution was based did not allege any ordinance fixing the rate of speed, it did not state an offense under the statute.

Regulations by the board of park commissioners as to the rate of speed of automobiles and other vehicles upon streets within their control need not, in order to be effective, be posted at the points where the streets under their control join with other streets or roads, under Mass. Stat. 1893, chap. 473, § 14, p. 511, permitting boards of aldermen of cities and selectmen of towns to make special regulations as to the speed

differ. The testimony of the appellee tends to show that when Parker, the driver, saw the machine coming, he tried to urge his team forward and around the head of the ditch to the west, so that he could leave the beaten track and get out to the extreme west side of the highway, next to the hedge; that the team began to show signs of fright about as soon as they saw the automobile at the Wilcox place, about 59 rods away; that they began to jump and twist about as the driver tried to urge them on, and when the automobile was about 6 rods away they "flew back" in their harness, and then lunged forward and to one side just as the machine came up to them, throwing the wheels of the vehicle into the ditch. On the other hand, the witnesses of appellant, who were the parties riding in the automobile, say that the team was standing still as the automobile passed them, and showed no signs of fright. After the accident, appellant did not lessen the speed of his automobile, but went on, without taking notice of the fact that the parties were thrown from the wagon, although Gertrude Christy, the daughter of the appellant, who was in the automobile with him, says that she looked back, and "saw the people out of the rig. I did not say anything to anyone about what I had seen. I did not tell my brother,

George, that the people were out of the rig." The first count of the declaration alleges that the appellant was negligently and willfully driving and running said automobile upon the highway in a northerly direction at a rate of speed greatly in excess of 15 miles an hour, contrary to the statutes in such cases made and provided. The second count of the declaration alleges that, while the appellant was approaching the vehicle in which the appellee was traveling, it then and there appeared to the appellant that the horses attached to the vehicle were about to become frightened by the approach of the automobile, and that it was the duty of the appellant, as was then and there provided by law, to cause the automobile so driven by the appellant to come to a full stop until the horses had passed it.

On May 13, 1903, the legislature passed an act entitled "An Act to Regulate the Speed of Automobiles and Other Horseless Conveyances upon the Public Streets, Roads, and Highways of the State of Illinois." The 1st section of the act provides as follows: "That it shall be unlawful for any person or persons to drive, run, conduct, or propel any automobile or any other conveyance of a similar type or kind used for the purpose of transporting or conveying passengers or freight, or any other purposes, whether said

of automobiles and motor cycles, but providing that no such special regulation shall be effective until notice of the same is posted conspicuously at the points where any road affected thereby joins other roads. *Com. v. Crowninshield*, 187 Mass. 221, 68 L. R. A. 245, 72 N. E. 963.

One in control of the motive power of an automobile may be said to be driving the automobile, within the meaning of a regulation of a board of park commissioners as to the speed at which a person shall "ride or drive" in a park or street within the control of the commissioners. *Ibid.*

An ordinance of a town of the first class, which provides that all automobiles shall be propelled upon the public highways of the township at a speed not exceeding 10 miles an hour, is not void because insensible in form and wording, as it is manifest that the meaning of the ordinance is that it shall be unlawful to propel an automobile upon the highways of the township at a speed exceeding 10 miles an hour. *Radnor Twp. v. Bell*, 27 Pa. Super. Ct. 1.

It is within the province of a city council to prescribe different rates of speed for automobiles in different portions of the city according to the width of the streets, their use, and the density of population. *Chittenden v. Columbus*, 26 Ohio C. C. 531.

A rule limiting the speed of vehicles, including automobiles, in streets under control of the park commissioners, to 8 miles an hour, is reasonable. *Com. v. Crownin-*
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shield, 187 Mass. 221, 68 L. R. A. 245, 72 N. E. 963.

An ordinance of a township of the first class, limiting the speed of automobiles to 10 miles an hour, is not unreasonable. *Radnor Twp. v. Bell*, 27 Pa. Super. Ct. 1.

A municipal ordinance which limits the speed of automobiles within certain city limits to seven miles an hour is not so unreasonable as to require the court to hold it invalid. *Chittenden v. Columbus*, 26 Ohio C. C. 531.

A municipal ordinance limiting the speed of automobiles within certain city limits to 7 miles an hour is not invalid because another ordinance allows street cars to run at a greater rate of speed. *Ibid.*

A conviction of violating § 666 of the Penal Code, providing that one who drives or operates an automobile or motor vehicle upon a public highway within a city at a greater rate of speed than 8 miles an hour, except where a greater rate of speed is permitted by an ordinance of the city, is guilty of a misdemeanor, and shall be fined, for the first offense, not exceeding the sum of \$50, cannot be sustained under a complaint which merely attempted to charge the defendant with a violation of N. Y. Laws 1903, p. 1418, § 625, for driving an automobile at a greater rate of speed than 8 miles an hour while passing houses less than 100 feet apart. *People v. Ellis*, 88 App. Div. 471, 85 N. Y. Supp. 120.

A municipal ordinance, whose purpose as stated in the title is to regulate the speed

automobile or conveyance or such other vehicle is propelled by steam, gasoline, or electricity,—or any other mechanical power, at a rate of speed in excess of 15 miles per hour upon any road or highway in the state of Illinois 'or any other rate of speed established by ordinance of any city or village of said state, upon any street within such city [or] village.' Provided, that nothing in this section contained shall prohibit or prevent the running of such automobiles, or vehicles at a greater rate of speed than 15 miles per hour upon such streets within incorporated cities or villages, as may be set apart for use of such automobiles and other conveyances, and upon which said cities or villages may, by ordinance, permit a greater or require a less rate of speed than herein specified." The 2nd section of the act is as follows: "Whenever it shall appear that any horse driven or ridden by any person upon any of said streets, roads, or highways is about to become frightened by the approach of any such automobile or vehicle, it shall be the duty of the person driving or conducting such automobile or vehicle to cause the same to come to a full stop until such horse or horses have passed." The 3d section of the act provides that "any person or persons violating the provision of the foregoing section one (1) or two (2)

of automobiles, motor cars, and other vehicles, which in its 1st section merely regulates the speed, and in the 2d section provides that automobiles shall carry lighted lamps between sunset and sunrise, and give warning of imminent danger by sounding a bell, whistle, horn, or gong, does not violate a statute providing that no ordinance shall contain more than one subject, which shall be clearly expressed in its title, since the provisions of the 2d section are germane to the subject of speed. *Chittenden v. Columbus*, 26 Ohio C. C. 531. The court said that the purpose of regulating the speed is to reduce the probability of accident in the streets of the city, and that but for the regulation as to lamps and gongs automobiles could run with more impunity at night than in the daytime because in such case their location and speed could not well be observed by the officers of the law. The court relied, in part, upon a decision in *Bergman v. St. Louis*, 1. M. & S. R. Co. 88 Mo. 678, where it was held that an ordinance purporting to regulate the speed of trains in city limits was not invalidated because the 2d section had reference to their equipment.

It is not essential to a conviction under an information charging the defendant with driving a motor tricycle at a greater speed than was reasonable and proper having regard to traffic, in violation of art. IV. § 1, of the order of 1896, providing that the driver of a light locomotive when used on a highway shall not drive "at any speed

shall, upon conviction, be sentenced to pay a fine of not less than twenty-five (25) dollars nor more than two hundred (200) dollars, and may be confined in the county jail not to exceed three (3) months, or both, in the discretion of the court." The 4th section of the act provides that "in any action brought to recover any damages, either to person or property, caused by running such automobiles or vehicles at a greater rate of speed than designated in § one (1), the plaintiff or plaintiffs shall be deemed to have made out a prima facie case, by showing the fact of such injury, and that such person or persons driving such automobiles or vehicles was, at the time of the injury, running the same at a speed in excess of that mentioned in § one (1)." Sess. Laws 1903, pp. 301, 302.

Messrs. George Shumway and W. T. Church, for appellant:

The act to regulate the speed of automobiles and other horseless conveyances, approved May 13, 1903, is unconstitutional, as it unjustly discriminates against horseless conveyances in favor of conveyances propelled by horses.

Const. art. 2, § 2; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Gillespie v. People*, 188 Ill. 176,

that is greater than is reasonable and proper having regard to the traffic on the highway," that the traffic on the highway shall have been interrupted, interfered with, incommoded, or affected by reason of the speed at which the defendant drove his tricycle, as the words "having regard to the traffic on the highway" mean having regard to the traffic on the road, and not having regard to the traffic in the immediate vicinity of the light locomotive. *Smith v. Boon*, 84 L. T. N. S. 593, 49 Week. Rep. 480.

The presence of passengers on the highway is not necessary to the conviction of the driver of a motor car for driving it at an excessive rate of speed "to the common danger of passengers" contrary to art. IV. § 1, of the light locomotives on highways order of 1896 which provides that the driver of a light locomotive when used on a highway shall not drive "at any speed greater than is reasonable and proper having regard to the traffic on the highway, or so as to endanger the life or limb of any person, or to the common danger of passengers." *Mayhew v. Sutton*, 71 L. J. K. B. N. S. 46, 86 L. T. N. S. 18, 50 Week. Rep. 216.

c. Prohibited hours and places.

In *Ex parte Berry* (Cal.) 82 Pac. 44, the court, acting upon its judicial knowledge of the danger to traffic involved in the use of automobiles on country roads, especially in the nighttime, held that, under present conditions, a county ordinance prohibiting

52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

Section 2 of the act to regulate the speed of automobiles, approved May 13, 1903, is unconstitutional, as the provisions thereof are not expressed in the title.

Const. art. 4, § 13; *Allardt v. People*, 197 Ill. 501, 64 N. E. 533.

The verdict rendered in this case is the result of passion and prejudice against automobiles, existing by common knowledge in rural communities, and should, for that reason, be reversed.

Chicago City R. Co. v. Fennimore, 78 Ill. App. 478; *Robinson v. Webb*, 73 Ill. App. 569.

Messrs. William J. Graham and Henry E. Burgess, for appellee:

The supreme court does not have jurisdiction of this cause for the reason that the question of the constitutionality of the act regulating the speed of automobiles has not been raised in a proper manner.

Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 580; *Pearson v. Zehr*, 125 Ill. 576, 18 N. E. 204; *Nall v. Wabash, St. L.*

& P. R. Co. 97 Mo. 68, 10 S. W. 613; *Shepherd v. Sullivan*, 166 Ill. 78, 46 N. E. 720; *Woodruff v. Kellyville Coal Co.* 182 Ill. 480, 55 N. E. 550; *Joseph Schlitz Brewing Co. v. Compton*, 46 Ill. App. 34; *North Chicago Street R. Co. v. Burgess*, 94 Ill. App. 337; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290; *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Waidner v. Pauly*, 37 Ill. App. 278; *Chicago v. Seben*, 62 Ill. App. 248; *Lechleiter v. Broehl*, 17 Ill. App. 490.

If a law is general in its application to a certain class, and there is some reasonable ground for the classification, such a law is not class legislation.

Cooley, Const. Lim. 6th ed. pp. 479-481; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Allen v. Pioneer-Press Co.* 40 Minn. 117, 3 L. R. A. 532, 12 Am. St. Rep. 707, 41 N. W. 936; *Gartside v. East St. Louis*, 43 Ill. 47; *Sanitary District v. Bernstein*, 175 Ill. 215, 51 N. E. 720; *Lasher v. People*, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103, 53 N. E. 663; *Nagle v. Augusta*, 5 Ga. 546; *Brimm v. Jones*, 11 Utah, 200, 29 L. R. A. 97, 39 Pac. 825.

Laws regulating the speed of automobiles are valid.

the running of automobiles on country roads between sunset and sunrise is not unreasonable. The court said that if the use of automobiles gradually becomes more common there may come a time when such an ordinance would be unreasonable.

Although plenary power has been conferred on the South Park Commissioners of Chicago over the parks and boulevards, they are not given the right to exclude automobiles by name from the parks and boulevards. *People v. Kipley*, 18 Nat. Corp. Rep. 874. The court said that the order in question was void in singling out automobiles by name, and placing them under the ban of outlawry, when, as a matter of common observation and scientific knowledge, there is less danger in propelling an automobile than there is in driving a horse and buggy.

A petition for a writ of mandamus to compel a turnpike company to permit the petitioner to operate and use his automobile over its turnpike road must, in any event, show that the petitioner has complied with the requirements essential, under Pa. act April 23, 1903, to the right to use or operate automobiles on the highways. *Bertels v. Laurel Run Turnp. Co.* 31 Pa. Co. Ct. 129.

As an additional reason for the decision, the court in the last case referred to the fact that no rate of toll for automobiles had been fixed by statute, and that none had been established by rule or regulation of the turnpike company. The court also ex-

pressed the opinion that it was proper for the turnpike company, in the exercise of a sound discretion, to exclude automobiles from its road.

d. Regulation of automobiles used for hire.

Electric carriages or automobiles rented for hire, or use in carrying passengers in the city of Washington, are not within the 26th section of the license law of the District of Columbia, passed by the late legislative assembly and approved on August 23, 1871, requiring the proprietors of "hack-cabs, omnibuses, and other vehicles for transporting passengers for hire" to pay annually a certain fee. The decision is upon the ground that the term "other vehicles" was intended manifestly to embrace only such other vehicles as were *ejusdem generis* with those specifically named, and that at the time of the passage of the act automobiles were not in use. The court said that if they had been known and in use at that time, there would have been good ground for assuming that they were within the terms of the act, although not specifically mentioned therein. *Washington Electric Vehicle Transp. Co. v. District of Columbia*, 19 App. D. C. 462.

A municipal ordinance making it unlawful for the driver of an omnibus, automobile, or locomobile to refuse to convey any passenger within the city is a reasonable exercise of the power conferred upon the municipality to regulate the business of

Thies v. Thomas, 77 N. Y. Supp. 276; Hinkle v. McCullough, 116 Ky. 960, 105 Wm. St. Rep. 249, 77 S. W. 196.

The legislature of a state may enact any and all laws on any and every subject, unless restricted by the delegation of the power to the general government, or its power has been limited by the Federal or state Constitution.

Cairo & St. L. R. Co. v. Warrington, 92 Ill. 157; Chicago, R. I. & P. R. Co. v. Reidy, 6 Ill. 43; Indianapolis & St. L. R. Co. v. People, 91 Ill. 452; Cairo & St. L. R. Co. v. Peoples, 92 Ill. 101, 34 Am. Rep. 112; Chicago & E. I. R. Co. v. People, 120 Ill. 67, 12 N. E. 207; Chicago & E. I. R. Co. v. Beaver, 96 Ill. App. 558.

Unless the provisions claimed not to be embraced in the title contain matter incongruous, and have no proper connection or relation to the title, they will not be void as not being embraced therein.

People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217; Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Hudnall v. Ham, 172 Ill. 76, 49 N. E. 985; Boehm v. Hertz, 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973.

The law does not impute to persons riding in a buggy any negligence of which the driver of the buggy is guilty, unless such

driving such vehicles. Fonsler v. Atlantic City, 70 N. J. L. 125, 56 Atl. 119.

It is within the power of Atlantic City to pass ordinances regulating the business of driving omnibuses, automobiles, or locomobiles, and fixing the fares to be charged. *Ibid.* This was a prosecution for the violation of an ordinance passed in the exercise of such power. The defendant seems to have been the driver of an omnibus.

c. Restrictions as to transportation of gasoline carried by automobiles.

It was held in *The Texas*, 134 Fed. 909, that gasoline contained in the metal tank of an automobile which was transported on a passenger vessel was freight, within the meaning of U. S. Rev. Stat. § 4472 (U. S. Comp. Stat. 1901, p. 3050), prohibiting passenger steamers, except in certain cases and under certain restrictions, from carrying as freight the products of petroleum or other like explosive fluids; and it was further held, upon the testimony of experts in the case, that an automobile whose motive power is furnished by a gasoline engine operated by a series of intermittent explosions induced by the passing of an electric spark through a compressed mixture of gasoline and air in the cylinders carries "fire," within the meaning of the provision of that section (as amended by act of February 20, 1901, chap. 386) excepting from its operation gasoline or any of the products of petroleum when carried by I.L.R.A.(N.S.)

person is in some manner at fault for such negligence.

Landon v. Chicago & G. T. R. Co. 92 Ill. App. 216; West Chicago Street R. Co. v. Dedloff, 92 Ill. App. 547; Chicago City R. Co. v. Wall, 93 Ill. App. 411; West Chicago Street R. Co. v. Piper, 165 Ill. 325, 46 N. E. 186; Hebard v. Mabie, 98 Ill. App. 545; Chicago, R. I. & P. R. Co. v. Reidy, 66 Ill. 43.

Magruder, J., delivered the opinion of the court:

1. It is strenuously insisted by the appellee that this court has no jurisdiction to entertain this cause, and that the appeal from the judgment of the circuit court should have been taken to the appellate court. The ground upon which the cause is brought by the appellant to this court is that the constitutionality of the act regulating the speed of automobiles, etc., set forth in the statement preceding this opinion, is involved in the cause. The appellee contends that, inasmuch as the constitutionality of the act was not challenged or questioned by the appellant upon the trial below, nor until the written reasons were filed in support of the motion for new trial, the record is not in such condition as to present to this court the question of the constitution-

ality of a motor vehicle (commonly known as automobiles) using the same as a source of motive power: Provided that all fire, if any, in such vehicles or automobiles be extinguished before entering the vessel, and be not relighted until after the vehicle shall have left the same. The vessel was accordingly held liable to the penalty prescribed by § 4499 (U. S. Comp. Stat. 1901, p. 3060), it appearing that the automobile was run on and off from the vessel under its own power.

It is to be noted, with reference to this case, that the scientific testimony of two witnesses was taken on behalf of the government, and none on behalf of the other party; and the decision appears to be founded upon, and therefore to be limited by, the testimony of these experts, which was directed not only to the mode of the operation of the engine, but also to the scientific question whether the mode of operation involved the generation of fire. It is a question, therefore, how far this case would be a precedent for a subsequent case, arising under the same statute, upon a different state of expert testimony.

III. Statutory duty of operator of automobile.

The opinion in *CHRISTY v. ELLIOTT* contains a valuable discussion of various questions that arise under statutes imposing special duties upon operators of automobiles toward other travelers encountered on the

tionality of the act. In the investigation of this subject, we have entertained much doubt as to whether the case is properly here, and think there is much force in the position of appellee.

This court has held that the constitutionality of a statute may be raised by demurrer to the declaration. *Shepherd v. Sullivan*, 166 Ill. 78, 46 N. E. 720; *Woodruff v. Kellyville Coal Co.* 182 Ill. 480, 55 N. E. 550. Here, however, no demurrer was filed to the declaration. This court has also held that the constitutionality of a statute may be raised by an objection to evidence offered under it. *Pearson v. Zehr*, 125 Ill. 573, 18 N. E. 204. Here no objection was made to the introduction of any testimony by the appellant upon the ground that the statute was unconstitutional, so far as the bill of exceptions shows. After the verdict was rendered, however, the appellant made a motion for new trial, and filed fifteen written reasons in support thereof. The fourteenth reason was as follows: "The court erred in the giving of instruction for plaintiff No. 1, as the act of 1903 to regulate the speed of automobiles is void." The fifteenth reason was as follows: "The court erred in the giving of plaintiff's instruction No. 4, as § 2 of the act of 1903 to regulate the speed of automobiles is void." The fifteenth

pressed in the title of said act." The position of the appellee is that the question of the constitutionality of the act could not be raised for the first time on motion for new trial, inasmuch as no ruling had been asked of the trial court upon this question during the progress of the trial. Appellant, however, excepted to the giving of instruction numbered 1 and 4 in behalf of the appellee. Instruction numbered 1 told the jury that the statutes of this state provided that it shall be unlawful for any person to drive, run, conduct, or propel any automobile whether propelled by steam, gasoline, or electricity, or any other mechanical power at a rate of speed in excess of 15 miles an hour upon any road or highway in the state unless the same was within some village or city where such speed was allowed by ordinance; and also instructed them that they found from the evidence that, at the time the injuries in question occurred, the defendant was driving an automobile at a rate of speed in excess of 15 miles an hour upon a public highway as described in the declaration, and that, on account of the defendant so driving such automobile, the plaintiff was injured, as alleged in the first count of the declaration, and was then and there exercising reasonable care and caution in that behalf, they should find for the

highway. See also *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253, *infra*, V.

Notwithstanding the New York statute (Laws 1890, chap. 568, p. 1206, as amended by Laws 1903, chap. 625, p. 1418) which authorizes the operator of an automobile, in the absence of any signal, to pass a vehicle drawn by a horse, at the rate of 8 miles an hour without stopping, he is, nevertheless, bound to take notice of the conditions before him: and, if it is apparent that by any particular method of proceeding he is liable to work an injury either by frightening the horse or colliding with the vehicle, it is his duty to adopt some other and safer method of proceeding if with reasonable care and prudence he can do so. *Davis v. Maxwell*, 96 N. Y. Supp. 45.

An automobile coming up behind a vehicle drawn by horses is "approaching" it, within the meaning of Mass. Stat. 1903, chap. 473, § 7, p. 360, requiring the driver of an automobile, approaching any vehicle drawn by a horse or horses, to "operate, manage, and control such automobile . . . in such manner as to exercise every reasonable precaution to prevent the frightening of such horse or horses, and to insure the safety and protection of any person riding or driving the same." *Gifford v. Jennings* (Mass.) 76 N. E. 233. Section 10 of the foregoing act requires that every automobile shall be provided with a "suitable bell, horn, or other means of signaling." It was further held in this case that the jury were warranted by the evidence in finding that the defendant

was negligent in not sounding his horn as he approached from behind the plaintiff's vehicle, and that, by reason of such negligence, he was responsible for the plaintiff's horse kicking and breaking the plaintiff's leg.

IV. Common-law duty and liability of operator of automobile.

The operator of an automobile and a pedestrian have reciprocal rights and duties, and, although each has the right to pass and repass, neither must so negligently exercise that right as to injure the other. *Hennessey v. Taylor* (Mass.) 76 N. E. 224.

In *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478, the court said that the use of the streets must become extended to meet the modern innovations of rapid use, and that it was not meant to suggest that an automobile, or any other of the present means of conveyance, is an unlawful or improper user.

In *Indiana Springs Co. v. Brown* (Ind.) 74 N. E. 615, the action was brought to recover damages for personal injuries, and injuries to a horse and buggy, alleged to have been the result of defendant's negligence in unreasonably and unnecessarily speeding, and refusing to reduce the speed of his automobile, which approached the plaintiff's rig from the front while the latter was on a narrow approach to a bridge guarded on either side by a railing extending for a distance of 230 feet to a cross street. The accident which gave rise

plaintiff, etc. The exception taken to the giving of this instruction raised the question whether the instruction correctly stated the law or not, and, if the act limiting the speed of automobiles to 15 miles an hour was unconstitutional, then the instruction did not state the law correctly. Instruction numbered 4, given in behalf of appellee, told the jury that, if they believed from the evidence that the appellant was driving the automobile along the public highway, and that it appeared to him, or might by the exercise of reasonable diligence on his part have appeared to him, that the team of mules drawing the conveyance in which the plaintiff was riding was about to become frightened; and if they further found that the defendant did not thereupon cause the automobile to come to a full stop until said team had passed, and that plaintiff was himself exercising reasonable care and caution, and was injured by reason of the failure of the defendant to bring the automobile to a full stop,—then the defendant was liable to the plaintiff for the loss and damage sustained by him by reason of such injuries, etc. The exception to the giving of this instruction raised the question whether or not it stated the law correctly, and, if § 2 of the act is unconstitutional for the alleged reason that the subject-matter of the section is not ex-

pressed in the title of the act, then instruction numbered 4 did not state the law correctly. If a demurrer to a declaration which sets up the provisions of a statute under which suit is brought raises the question of the constitutionality of such statute, it would seem that exception taken to an instruction based upon the provisions of a statute would also raise the question whether the statute was constitutional or not. We find in the record, among the reasons in favor of the motion for new trial, two reasons which expressly specify the unconstitutionality of the statute as grounds for challenging the correctness of the court's action in giving two of the instructions which were specifically excepted to by the appellant. We are inclined, therefore, to the opinion that the validity of the statute is involved upon the record.

2. The 1st section of the statute is challenged as being unconstitutional, upon the alleged ground that it is class legislation, because, as is insisted, it unjustly discriminates against automobiles and other horseless conveyances, and therefore against manufacturers of the same. In other words, appellant contends that the owners of automobiles or horseless conveyances, and drivers of the same, are entitled to the same rights and privileges under the law as the

to the action occurred in May, 1902, and the complaint alleged, *inter alia*, that the defendant's automobile was "12 feet long, 5 feet wide, 8½ feet high, had a canopy top, elevated seats for passengers, was painted red, propelled by an exploding gasoline engine, made a great noise, was the first machine of the kind in the community." There were other allegations indicative of the fearsome appearance of the machine, and suggesting that to the mind of the pleader the term "devil wagon" is not inappropriately applied to vehicles of this class. The court thus defined the respective rights and duties of one driving a horse and one operating an automobile who meet on the public highway: "It cannot be said, as matter of law, that appellant was guilty of negligence for using an automobile as a means of conveyance on the public highway. The law does not denounce motor carriages as such on the public ways. For so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention; and, in

respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience, and even incidental injury, to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance, that concerns the courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury upon the other. And in this the quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence, or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance and power used are common or new to the road; the known tendency of any feature to frighten animals, etc."

The court, in the last case, quotes with approval the following passages from the opinion of Cooley, Ch. J., in *Macomber v. Nichols*, 34 Mich. 217, 22 Am. Rep. 522, an action to recover for an injury occasioned by a horse taking fright from a traction engine operated on the highway: "A

owners or drivers of any other vehicles, and that any law which deprives them of such rights, or that restricts and limits such rights, is unconstitutional, as being in conflict with § 2 of article 2 of the state Constitution, which provides as follows: "No person shall be deprived of life, liberty, or property without due process of law." We are of the opinion that the act is not unconstitutional for the reason thus stated. The passage of the act was clearly within the power of the legislature, because it is a police regulation. The legislature is entitled to exercise the police power wherever the public health or comfort, or the safety or welfare of society requires it to do so. We have said: "The state inherently possesses, and the general assembly may lawfully exercise, such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the state. In the exercise of this power the general assembly may, by valid enactments—i. e., 'due process of law'—prohibit all things hurtful to the comfort, safety, and welfare of society, even though the prohibition invade the right of liberty or property of an individual." *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116,

60 N. E. 98; *Booth v. People*, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41.

The act in question was designed to secure the safety of travelers upon the public highway. It is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape and form, is capable of a high rate of speed, and produces puffing noise when in motion. All this makes such a horseless vehicle a source of danger to persons traveling upon the highway in vehicles drawn by horses.

Such laws as the act here in question have never been regarded as class legislation simply because they affect one class, and not another, inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis. "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." *Cooley Const. Lim.* 6th ed. pp. 479-481. In *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925,

highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them."

One operating an automobile on the public highway owes to persons driving horses thereon the duty carefully to control and operate the machine so as to avoid causing needless injury; and this duty requires him to take into account the character of his machine, its general appearance, the noise accompanying its operation, its new use in the vicinity, its tendency to frighten horses, and, from such and all other pertinent considerations, to proceed with that speed and caution which reasonable care requires according to the place and presence of other travelers. *Indiana Springs Co. v. Brown (Ind.)* 74 N. E. 615.

While automobiles are lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with their safety. If the operator of an automobile knows, or by the exercise of ordinary care may know, that his machine has so far excited a horse as to render the animal dangerous and unmanageable, it is his duty to stop the automobile, and take such other steps for the safety of those in the vehicle drawn by the horse as ordinary prudence may suggest. *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 1 L.R.A. (N.S.)

196. This seems to be laid down as the duty of the operator of an automobile at common law. So far as appears, there were no statutory provisions on the subject.

While an automobile is a lawful means of conveyance, and has equal rights upon the road with a horse and carriage, its use cannot be lawfully countenanced, unless accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with safety. *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999.

In *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253, an action for injuries resulting from the fright of a horse at an automobile, the common-law rule with respect to the right to use the highway was declared as follows: "The rule of the common law is, and always has been, that while a person might travel the highway with a conveyance or a loaded vehicle liable to frighten horses, yet he must, while doing so, exercise reasonable care to avoid accident and injury to others traveling along such highway."

In the last case *Williams, J.* said "Since the automobile has come into use upon our streets and highways these accidents have been common, and actions to recover damages resulting therefrom have been frequent. These machines may be used on the public highways, but horses will also continue to be used for a time at least. Both may be legally used as a motive power in public travel. Some horses are

5 Sup. Ct. Rep. 360, the Supreme Court of the United States said: "Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment," which amendment referred to by the court is the 14th Amendment to the Constitution of the United States, which provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." "Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition or business of such class." *Allen v. Pioneer-Press Co.* 40 Minn. 120, 3 L. R. A. 532, 12 Am. St. Rep. 707, 41 N. W. 936. In *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 566, 9 Sup. Ct. Rep. 208, it was said: "The concluding clause of the 1st section of the 14th Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. . . . The discrimina-

tions which are open to objection,' . . . 'are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law.'" The statute in controversy in the case at bar certainly applies to all drivers of automobiles, without distinction, and is therefore general as to that class; and, for the reason that such horseless vehicles constitute a source of danger to travelers upon the highway, it cannot be said that the classification is not a reasonable one.

In *Garstide v. East St. Louis*, 43 Ill. 47, this court, in discussing an ordinance requiring certain teamsters engaged in hauling coal through the city to pay a certain license, said (p. 50): "From the extent and character of his business, these teams must have passed and repassed almost constantly. This then, renders the repair of the streets more expensive and more necessary, from the fact that his vehicles seem to be large and heavy. For the comfort and convenience of the citizens of the place, as well as persons not residing therein, but traveling on its streets, it is necessary that they should be repaired and kept in good condi-

frightened when they meet these machines, and it is the duty of persons running the machines to exercise reasonable care to avoid accident when horses become frightened. It is not pleasant to be obliged to slow down these rapid running machines to accommodate persons driving or riding slow country horses that do not readily become accustomed to the innovation. It is more agreeable to send the machine along, and let the horse get on as best he may; but it is well to understand, if this course is adopted, and accident and injury result, that the automobile owner may be called upon to respond in damages for such injuries."

Freedman, J., in a charge to the jury in *Thies v. Thomas*, 77 N. Y. Supp. 276 (an action to recover damages caused by the death of a boy between six and seven years of age, who was run over by the defendant's automobile), thus defined the duty of the driver of an automobile on a city street: "No owner or operator of an automobile is, therefore, exempt from liability for collision in a public street by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by law or the ordinances. On the contrary, . . . he still remains bound to anticipate that he may meet persons at any point in a public street, and he must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. If necessary, he shall slow up, and even

stop. No blowing of a horn or of a whistle, nor the ringing of a bell or gong, without an attempt to slow the speed, is sufficient, if the circumstances at a given point demand that the speed should be slackened, or the machine be stopped, and such a course is practicable, or, in the exercise of ordinary care and caution proportionate to the circumstances, should have been practicable. The true test is, that he must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances. On the other hand, every such operator of an automobile has the right to assume and to act upon the assumption, that every person whom he meets will also exercise ordinary care and caution according to the circumstances, and will not negligently or recklessly expose himself to danger, but, rather, make an attempt to avoid it. It is only when such an operator has had time to realize, or by the exercise of a proper lookout should have realized, that a person whom he meets is in a somewhat helpless condition, or in a position of disadvantage, and therefore seemingly unable to avoid the coming automobile, that the operator is required to exercise increased exertion to avoid a collision. This applies peculiarly when children of tender years are met."

One, whether an adult or infant, has the right to assume that a person in charge of an automobile will exercise care, and respect the rights of pedestrians, when he has occa-

tion." And the ordinance, for the reasons stated, was upheld in that case. In *Sanitary District v. Bernstein*, 175 Ill. 215, 51 N. E. 720, this court held that a discrimination between different classes of litigants, which was merely arbitrary in its nature, is a denial of the right of litigants to equal protection of the law; but that, if there is a reasonable ground of distinction, the legislature has discretion to impose reasonable conditions or restrictions, which it deems in furtherance of justice. In *Lasher v. People*, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, it was said by this court (p. 231 of 183 Ill.): "The legislature have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference." In *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 208, the Supreme Court of the United States said: "When the calling, or profession, or business is attended with danger, or requires a certain degree of scientific knowledge, upon which others must rely, then legislation properly steps in to impose conditions upon its exercise." It is certainly true that the business of the man who operates and propels an automobile along the

public highway, called a "chauffeur," is such a business as is above alluded to. It is attended with danger, and requires a degree of scientific knowledge upon which others must rely. These horseless vehicles are certainly capable of being propelled at a greater rate of speed than any ordinary vehicles known to the traveling public prior to their invention, and, if they may travel at any rate of speed of which they are capable, persons injured would have no remedy, except for such negligence as the common law gives a remedy for.

Statutes regulating the speed of persons traveling upon public highways have been upon the statute books of this state for many years, and have never been regarded as invalid. A statute of this state provides that no person driving any carriage upon any public highway shall run his horses or carriage or permit the same to run, etc. 3 Starr & C. Anno. Stat. 1896, 2d ed. p. 3604, chap. 121. A statute of this state provides that it shall not be lawful for the driver of any carriage used for the purpose of conveying passengers for hire to leave the horse attached thereto while passengers remain therein, without making such horses fast, etc. Id. p. 3605, § 157. It is provided by statute in this state that persons traveling with carriages and meeting on any public

sion to turn the corner of a street. Due care in the operation of an automobile requires, under such circumstances, that it shall be slowed down and operated with care. At such place the operator is bound to take notice that people will be at the crossing or entering thereon; and this obligation upon the part of the operator is one which the pedestrian has the right to assume will be observed. *Buscher v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. Supp. 798.

A guest or visitor of the owner of a private lane, tacitly open to the public use, who is operating an automobile through the lane, owes the duty of exercising reasonable care not to injure a person, who is a licensee, driving a horse and carriage through the lane as a short cut between two highways to his home. *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999.

One running an automobile is bound to take notice of a person standing in the roadway, conversing with a friend sitting in a carriage, and to use care not to injure him. *Kathmeyer v. Mehl* (N. J. L.) 60 Atl. 40.

Plaintiff in an action for injuries occasioned by the fright of the plaintiff's horse at the defendant's automobile as the latter was attempting to pass must show that she used ordinary care to avoid being injured. *Nadeau v. Sawyer*, 73 N. H. 70, 59 Atl. 369.

It is proper, upon the question of due 1 L.R.A. (N.S.)

care on the part of plaintiff, who was injured by reason of her horse taking fright at the defendant's automobile, which approached from behind and attempted to pass her, to read to the jury the provisions of a statute to the effect that, if a person traveling on a highway is informed that another person traveling in the same direction desires to pass him, he shall turn to the right if there is sufficient room to enable him to do so, where there is evidence tending to prove that, as the defendant approached, he gave warning of his presence by sounding a horn, and that the plaintiff drove along the highway for some distance without turning out, although there was sufficient room to the right of the traveled part of the highway to have enabled her to have done so with safety. Ibid.

There is no imperative rule of law requiring a pedestrian, when lawfully using the public ways, to be continuously looking or listening to ascertain if auto cars are approaching, under the penalty that, upon the failure so to do, if he is injured, his own negligence must be conclusively presumed. *Hennessey v. Taylor* (Mass.) 76 N. E. 224.

V. Questions of negligence and contributory negligence upon particular state of facts.

Whether one operating an automobile on the public highway was guilty of negligence rendering him liable to a person who

highway shall turn to the right. Id. p. 3004, ¶ 153. A statute of this state also provides that persons in charge of any steam engine propelled over the highways of the state by steam power shall stop the same whenever they meet persons going in the opposite direction on said highways with horses or other animals, until the latter shall have passed by. Id. p. 3628, ¶ 272. While these enactments may not establish the constitutionality of the law under consideration, they at least show that the legislative department of the government has supposed that such legislation is not inhibited by the fundamental law; and the fact that the validity of such laws has not been questioned for a long series of years is no light consideration in passing upon the validity of a law. *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157. This court has recognized the validity of ordinances regulating the speed of trains, and of statutes requiring railroads to fence their tracks, and to bring their trains to a full stop before crossing another railroad. It has been held that "the safety of the traveling community demands that these police regulations shall be enforced." *Indianapolis & St. L. R. Co. v. People*, 91 Ill. 452; *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Chicago, R. I. & P. R. Co. v. Reidy*, 66 Ill. 43; *Cairo & St.*

L. R. Co. v. Warrington, 92 Ill. 157; *Chicago & E. I. R. Co. v. People*, 120 Ill. 687, 12 N. E. 207.

3. Section 2 of the act in question is said to be in conflict with § 13 of article 4 of the Constitution, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The 2d section provides that the person driving an automobile shall cause the same to come to a full stop whenever it shall appear that any horse driven or ridden by any person upon any street, road, or highway is about to become frightened by the approach of any such automobile, until such horse or horses have passed. The title of the act is "An Act to Regulate the Speed of Automobiles and Other Horseless Conveyances upon the Public Streets, Roads, and Highways of the State of Illinois." It is said that speed means action, and is directly opposed to stopping, which is inaction, and that therefore stopping a machine does not come within the meaning of regulating its speed. The objection is hypercriticism. Section 13 of article 4 of the Constitution was intended to put an end to cer-

was injured in consequence of a horse becoming frightened at the automobile and overturning the wagon is a question for the jury, where it appears that the accident occurred after the taking effect of N. Y. Laws 1903, chap. 625, § 3, which provides that every person driving an automobile or motor vehicle shall, at request or signal by putting up the hand from a person driving or riding a restive horse, cause the automobile immediately to stop and to remain stationary, and, upon request, shall stop the running of the engine so long as may be necessary to allow the horse to pass; and the plaintiff's testimony tends to show that when the automobile came in view the horse was afraid, that the plaintiff's husband got out of the wagon, motioned the automobile with his hand to stop, went to the horse's head and took him by the bit, that the automobile stopped once, and then started along towards the horse, that, as it approached him the horse became unmanageable, reared, and plunged, and the plaintiff's husband struggled to control him, and halloed "Whoa" continually, that the automobile nevertheless was kept right along on its course, and passed along near the horse, not turning away from him at all, and that the horse then forced the wagon into the ditch, where it was turned over and the plaintiff thrown out and injured. *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253.

Whether the owner of an automobile, having stopped at the request of a driver

whose horse was frightened by the approach of the machine, was guilty of negligence in starting up his machine again while the driver was holding the horse by the head, and while the horse was still frightened, is a question for the jury. *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 909.

In *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478, it was held that there was some evidence justifying the conclusion reached by the municipal court of the city of Rochester, that there was negligence on the part of the defendant in operating an automobile upon a street of the city, rendering him liable for injuries caused by the running away of a horse which was frightened at the machine,—the testimony of the plaintiff tending to show that the machine was of somewhat crude and unusual construction, propelled by steam generated by a gasoline burner; that it gave forth a loud puffing noise, and could be heard for two blocks; that the odor was pronounced; that, as the carriage ran along, there was a humming sound from its engine; that steam or smoke issued from the exhaust; that other teams had been frightened by it; that at the time of the accident it was passing the plaintiff's horse at the speed of 10 or 12 miles an hour, and did not slacken until the horse, which was unattended, but fastened by an iron weight, became frightened. It was therefore held that, as there was evidence justifying the conclusion reached by the municipal court,

tain vicious legislation, but its design is not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217. Limitation of the speed of automobiles upon the public streets, roads, and highways is for the protection of travelers and drivers of horse-drawn vehicles upon such highways. The requirement that the automobile driver shall, under certain circumstances, bring his machine to a full stop, is reasonably connected with the purpose of such protection, as expressed in the title. The cessation of the speed of the automobile altogether, or its reduction to a scarcely perceptible movement, is not incongruous with the title of the act. This provision of the Constitution must receive a liberal construction. Unless the provision in an act contains matter incongruous with the title, or having no proper connection with or relation to the title, it will not be void as not embraced therein. *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985. All matters are properly included in the act which are germane to the title. If all the provisions relate to the one subject, indicated in the title, and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view, then the provision of the

Constitution under consideration is obeyed. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Boehm v. Hertz*, 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973. The stopping of an automobile when a horse appears to be frightened, until such horse shall pass, is embraced within the subject of regulating the speed of automobiles, as indicated by the title. It cannot be said that the subject-matter of § 2 is not reasonably connected with the subject mentioned in the title of the act. The stoppage of an automobile until a frightened horse has passed it is certainly, in a reasonable sense, auxiliary to the object of regulating the speed of an automobile upon the public highway. We are of the opinion, therefore, that § 2 is not unconstitutional for the reason insisted upon.

4. Various errors are assigned upon the giving and refusal and modification of instructions by the trial court. In addition to the objection already mentioned to instruction numbered 4 given for appeal, that instruction is said to be erroneous upon the alleged ground that it requires the jury to find whether it "might, by the exercise of reasonable diligence on his part, have appeared to him [the automobile driver] that the team of mules drawing the conveyance in which plaintiff was riding was about to

the county court had no power to reverse it as against the weight of evidence,—the judgment of reversal in this case having been rendered before the amendment of § 3063 of the Code of Civil Procedure.

The driver of an automobile operated by a gasoline engine was guilty of negligence rendering him liable for injuries resulting from a horse taking fright at the machine and running away, where he drove the automobile towards the plaintiff at the rate of 20 miles an hour as the plaintiff was descending a narrow side-guarded approach to a bridge, whence he could not escape without proceeding forward to a cross street 230 feet distant from the bridge, and, notwithstanding that he saw that the horse was rearing and plunging, refused to stop or slow down so as to enable the plaintiff to reach the cross street. *Indiana Springs Co. v. Brown (Ind.)* 74 N. E. 615. Counsel for the defendant contended that, since it was not shown by the complaint that the defendant knew the cause of the fright of the plaintiff's horse, it failed to show negligence. Naturally, the court, in view of the circumstances, refused to take such contention seriously.

Whether the driver of a horse attached to plaintiff's cab was guilty of contributory negligence, and whether the act of the defendant's employee in backing an electric cab into the horse constituted negligence merely or a trespass, are for the jury upon evidence that upon the refusal of the driver of the plaintiff's cab to yield an ad-

vantageous position in a line of cabs at the demand of the driver of the electric cab, the latter cut in ahead of the plaintiff's cab and backed into the horse. *Curley v. Electric Vehicle Co.* 68 App. Div. 18, 74 N. Y. Supp. 35.

The questions of negligence and contributory negligence are for the jury, in an action for injuries to a street-car conductor who was struck by an automobile as he stepped from the forward end of his car to pass to the rear of the same, upon evidence that the car, which was bound south, had come to a full stop before the plaintiff alighted; that at that time the automobile was 15 to 18 feet distant, proceeding in a southerly direction at the rate of from 3 to 5 miles an hour, upon a line about 3 feet distant from the track on which the car was standing, with a clear space of from 12 to 15 feet between the track and the curb of the westerly sidewalk; that the operator of the automobile had a clear view ahead of him; and that the plaintiff, as he stepped from the car, looked in the direction in which the car was to proceed. *Cesar v. Fifth Ave. Coach Co.* 45 Misc. 331, 90 N. Y. Supp. 359. The court said that the plaintiff had a right to rely upon the exercise of reasonable care, on the part of drivers of vehicles, to avoid causing injuries to persons in the street, and that his failure to anticipate the omission of such care did not render him negligent.

A finding of negligence on the part of the driver of an electric cab is not just

become frightened." Section 2 of the act says: "Whenever it shall appear that any horse driven or ridden by any person," etc., is about to become frightened, etc. The contention of counsel for appellant is that under the act it must appear to the driver of the automobile that the horse is about to be frightened, and that it was erroneous for the instruction to say if it might so appear "by the exercise of reasonable diligence." The instruction is not erroneous for the reason thus indicated. If it might appear to the driver of the automobile, by the exercise of reasonable diligence on his part, that the horse was about to become frightened, it would be his duty to stop, because otherwise he might shut his eyes, and claim that it did not appear to him that the horse was about to be frightened. The construction contended for would permit the driver of the automobile to wilfully evade the statute, and to take advantage of his own wilfulness or gross negligence. Such a person might purposely refuse to look toward an approaching team, and, when put upon the witness stand, could truthfully say that it did not appear to him to be frightened, because he did not look towards it. He is equally at fault when such circumstance might appear to him if he would exercise reasonable diligence to observe the condition

of the team which he is passing. In *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, which was an action for injuries sustained by plaintiff by his horse having been frightened by the defendant's automobile, which was alleged to have been running at an excessive rate of speed, the court of appeals of Kentucky said: "While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others, which is consistent with their safety. If, as the jury found by their verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest."

Objection is made to an instruction given for appellee because it told the jury "that, in determining the question as to whether the defendant was exercising reasonable care and diligence upon the occasion in question, you have a right to take into consideration the situation and condition of the parties."

fed where it appears that the plaintiff, before leaving the east curb to cross the street, saw the cab coming down on the west side of the street at a moderate pace, that when he reached the easterly street car track he looked south to see if a car was coming, and, seeing none, proceeded and walked or ran into the side of the cab and was thrown down and injured; notwithstanding that there is some evidence tending to show that the cab had changed its course before the plaintiff struck it. *West v. New York Transp. Co.* 94 N. Y. Supp. 426.

In *Davis v. Maxwell*, 96 N. Y. Supp. 45, it was held that the jury would not have been justified in finding that the defendant was guilty of negligence rendering him liable for injuries to plaintiff, occasioned by the plaintiff's horse swerving over a bank at the side of the highway as the defendant's automobile passed the plaintiff's vehicle, going in the opposite direction, if they believed the defendant's testimony, which was to the effect that, as he came over a rise in the highway, traveling eastward, he saw the plaintiff approaching from the west, and disconnected his engine from the running gear and ran down the incline by the force of gravity; that he was not going more than 3 or 4 miles an hour when he passed the plaintiff's vehicle; that, as he approached the plaintiff's horse, it exhibited no symptoms of restiveness or fright; that he was given no signal, and saw nothing whatever in the conduct of the driver or of the horse to indi-

cate that the horse was likely to be frightened; that, as he came down the incline, he began to turn to the right a long distance before he came to the horse, and that when he got opposite the horse, he was some 5 or 6 feet north of it; that no exhibition of fear was manifested by the horse until just as the machine got opposite it, and the horse then made a sudden swerve, or jumped to the right. The jury were instructed generally that the sole question in the case was whether the automobile was being propelled at an unreasonable and improper rate of speed, or was being run along the highway with care and prudence, and in such a manner as that the defendant had shown care and given due attention to the rights of the plaintiff; but they were not instructed as to whether they might consider that defendant was running with care and prudence if he ran just as he testified he did. In consequence of such omission, the appellate court was apprehensive that the jury might have found that the defendant's testimony was true, and have rendered a verdict against him on the theory that he was guilty of negligence because he passed the plaintiff without stopping, and at a distance nearer than he need to have done. There was, however, another question in the case, which, in any event, required the reversal of the judgment for the plaintiff.

The questions of negligence and contributory negligence are for the jury, upon evidence that the defendant's automobile was operated at a very rapid rate of speed

etc. The objection made to the instruction is its use of the words "the situation and condition of the parties." It is said that this authorized the jury to consider the wealth of the appellant and the poverty of the appellee, in assessing the damages. There is nothing in this point. There was no evidence of the financial condition of the parties on either side. The words used refer to the situation and condition of the parties at the time when the accident occurred, and in connection with the subjects of the exercise of care on the part of appellee, and of negligence on the part of the appellant. In other words, the language used refers to the general surroundings of the parties at the time of the accident. The instruction was based upon the common-law duty of drivers of automobiles upon the highways, and it was proper to authorize the jury to consider the probable effect of the movement of the automobile upon the horses driven upon the highway. Another instruction is objected to because it conditions the action of the jury upon their finding that the appellee "was then exercising reasonable care and diligence for his own safety, as explained in the instructions," etc. It is said that, by the use of the words "as explained in the instructions," the questions of care and diligence and of negligence were taken away from the

jury and made questions for the court. Such is not the proper construction of the instruction. All the instructions left it to the jury to determine whether or not the appellee was in the exercise of due care for his own safety, and whether or not the appellant was guilty of negligence. The court has a right to explain to the jury what constitutes ordinary care, as a matter of law. The language in question has reference to such an explanation, and not to a decision by the court upon a question of fact.

Objection is made to an instruction given for the appellee which told the jury "that the negligence of William Parker in driving his team, if you believe from the evidence that he was negligent in that regard, would not amount to negligence upon the part of plaintiff, unless plaintiff was himself at fault, or by his conduct contributed to such negligence." This instruction was merely intended to lay down the rule that, where the injury is the result of the negligence of the defendant and that of a third person, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285. In other words, where a defendant is guilty of negligence which causes an injury, and the plaintiff is free from negligence con-

westward on Fortieth street in the city of New York, and that, without slackening speed or giving any signal of its approach, it turned northward into Tenth avenue, and ran over and killed a bright, active boy eight years and three months old; it appearing from the testimony of two witnesses who crossed the street just ahead of the automobile, and who were obliged to hurry to get out of its way, that at that time the boy was about 15 feet north of the corner of Tenth avenue, standing on the sidewalk, and that, as the witnesses crossed the street, their backs were turned toward the automobile, and almost immediately they heard a scream, and turned and saw the rear wheel of the automobile passing over the boy's body, which was about 2 feet distant from the curb. *Buscher v. New York Transp. Co.* 106 App. Div. 493, 94 N. Y. Supp. 798.

In *Polsky v. New York Transp. Co.* 96 App. Div. 613, 88 N. Y. Supp. 1024, a judgment in favor of a pedestrian who was struck by an automobile was reversed, upon the ground that the findings that the defendant was negligent, and that the plaintiff was free from contributory negligence, were against the weight of evidence. Two of the judges dissented upon the ground that the questions of negligence and contributory negligence were for the jury. The decision depends so much upon the circumstances of the particular case that it is of little or no value as a precedent, except that the court apparently entirely dis-

regarded as improbable the testimony of some of the witnesses to the effect that the automobile, which at the time of the accident was proceeding down Fifth avenue in New York city between Fifteenth and Fourteenth streets, was running at a rate of 15 miles an hour; it appearing that immediately after the accident the automobile was turned into a pile of dirt, and stopped within 2 or 3 feet of the place where the accident occurred. Presumably, the majority of the court would have held that the case should have been submitted to the jury if the circumstances had not, in their view, precluded the possibility of the correctness of the opinion of the witnesses as to the speed of the automobile.

One was not guilty of contributory negligence, precluding recovery for injuries from being struck by an automobile, because he was standing in the roadway conversing with a person who had stopped his wagon at the point where the accident happened. *Kathmeyer v. Mehl* (N. J. L.) 60 Atl. 40.

In *Turck v. New York C. & H. R. R. Co.* 95 N. Y. Supp. 1100, a judgment on a verdict for plaintiff in an action to recover damages for the death of plaintiff's son, who was killed while crossing a railroad track in an automobile, was reversed upon the ground that the evidence was insufficient to sustain a finding that the deceased was free from contributory negligence. The only significance of the fact that the deceased was in an automobile at the time of the accident arose from the testimony of a person who

Buting thereto, the fact that the negligence of a third party also contributed would relieve the defendant from liability for negligence. Another instruction is objected to as authorizing the jury to consider the effect of the injury upon the use of appellee's arm and leg; it being claimed by appellant that some of the witnesses testified that there was no injury to the leg, except the enlargement of the glands of the groin. There was, however, testimony of some of the witnesses for appellee, and of appellee himself, that his leg was injured by the accident, and the jury had a right to take into consideration such evidence.

The appellant asked the court to instruct the jury as follows: "The court instructs the jury that an owner of an automobile has the right to use the highway of this state, provided in using it he does not violate the law of the state." The court modified this instruction by changing it so that the last clause read as follows: "Provided in using it he uses reasonable care and caution for the safety of others, and does not violate the law of the state." The modification was proper. The declaration was framed upon three theories: First, that the machine was going at a speed in excess of the limit of 15 miles an hour fixed by the statute; second, that it was not brought to

a full stop when the team showed fright; and, third, upon the ground of common-law negligence. The instruction, as offered, would tend to make the jury believe that, if there was no infraction of the statute, the appellant would not be liable, whereas, under the fifth and sixth counts, the appellant was liable if he was guilty of common-law negligence, or if he failed to perform his duty under the common law to avoid injury to the appellee. The modification of the instruction simply called attention to this common-law duty, in addition to the duty imposed by the statute.

Complaint is also made that the court refused instruction numbered 21 asked by the appellant. That instruction was as follows: "The court instructs the jury that where witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information are superior." Certain doctors were called on the part of the appellant as experts to testify that appellee suffered no injury to his leg from the accident, and this instruction was calculated to induce the jury to give greater consideration to the testimony of such experts than to the testimony of other witnesses, who differed with the experts, and who swore that appellee

drove across the track just ahead of the automobile, that he saw the train, and thought there was some risk in attempting to cross in front of it, but concluded that it was safer to take the risk as his team was a spirited one; and that, if he had had his other team, he would have waited for the train to pass; and the appellate court's comment that, as the automobile could be stopped quicker and in a shorter space than a team, and when stopped it would stand steadily and in safety, a deliberate attempt on the part of deceased to cross ahead of the train was gross carelessness.

In *Spina v. New York Transp. Co.* 96 N. Y. Supp. 270 (an action by a father to recover for loss of services of his minor son), the son testified that he was going north on the left side of Fifth avenue in the city of New York; that he looked east, but did not observe any wagons, and that he had taken three steps into 18th street, in order to cross, when he was struck by the defendant's automobile, which, he testified, he did not see until it struck him, and which came north along the right side of the avenue, and swung into 18th street in a westerly direction. It was held that, the case having been fairly presented to the jury, the judgment upon their verdict in favor of the plaintiff would not be disturbed, since it could not, under all the circumstances, be said, as a matter of law, that the boy was, or that the defendant was not, at fault.

In *Hennessey v. Taylor* (Mass.) 76 N. E. 24, the plaintiff, who was struck by the de-

fendant's automobile as she was crossing the street to take a street car, testified that "she did not see any automobile coming." The defendant contended that her language imported that she had seen the automobile arrive and come to a stop before she attempted to cross. The court, however, said that it was for the jury to interpret her meaning, and also to determine how far any failure by her more fully and carefully to observe the amount or kind of travel in the street was indicative of such want of care as ought to bar her recovery.

In the last case the plaintiff testified that she looked to see if there was any danger, but did not observe the defendant's automobile, nor hear any signal of its approach sounded; a witness, called by her, who stood by her side before she attempted to cross the street, had observed the defendant's machine at some distance; but it was not shown that she communicated such information to the plaintiff. Upon such state of evidence, the court said that no such balancing of probabilities by plaintiff, with a willingness to take the risk of safety getting over before the defendant came up, was shown, as to convict her of contributory negligence as a matter of law; and that, even if she had seen the defendant's machine approaching, and decided it was sufficiently distant to enable her safely to pass, she might have been found by the jury to have exercised due care, though the accident proved her judgment to have been erroneous.

In *King v. Consolidated Traction Co.* 33-

could not walk for seventeen days, nor after that time without having his hand on a chair, nor subsequently to that time without a cane. But the court gave on behalf of the defendant an instruction, numbered 19, which embodied in it all that was material in the refused instruction numbered 21. Instruction numbered 19 was as follows: "The court instructs the jury that, in determining the credibility of the witnesses, you have a right to take into consideration the means of information of the several witnesses." In regard to this instruction, it is stated in the abstract, "which instruction the court gave of his own motion." This is not true, as the record shows that the instruction was given at the request of the defendant.

It is said that the court erred in refusing instruction numbered 22 asked by the appellant, which told the jury that, if they believed from the evidence that the plaintiff knew, or had reason to believe, that the mules driven by Parker were about to become frightened, and that there was danger of their running away, and that plaintiff had time to get out of the vehicle and thus be out of danger, and, instead of doing so, plaintiff concluded to risk the danger and stay in the vehicle, and by remaining in the vehicle he became injured by reason of

not using the usual and ordinary care for his safety that an ordinarily reasonable and prudent man would under similar circumstances, then they should find the appellant not guilty. This instruction was embodied in several other instructions given for the appellant, which required the jury to find from the evidence that the plaintiff employed all reasonable means to prevent the injury, and used such care and caution for his own safety, or such care and caution as an ordinarily prudent man would have used under the circumstances. Instruction numbered 11, given for the appellant, told the jury that, if they believed from the evidence that the plaintiff might, in the exercise of ordinary care and caution, have seen or have known the danger and avoided it, and his omission to do so contributed in any degree to his accident, then he was guilty of such negligence as would prevent a recovery. Other instructions were given requiring the jury to find appellant not guilty if they found that the appellee could, by the exercise of ordinary care and prudence, have avoided the injury. In view of these instructions so given, there was no error in refusing appellant's instruction numbered 22.

It is also said that the court erred in refusing instruction numbered 23 asked by the appellant, which told the jury that, if they

Pittsb. L. J. N. S. 138, the court denied plaintiff's motion for a new trial after a verdict for \$1 in his favor for the destruction of an automobile which was struck by a traction car, notwithstanding that the undisputed testimony fixed the loss at not less than \$1,500, because the verdict for plaintiff was based substantially on a guess both as to the defendant's negligence and the plaintiff's contributory negligence. The facts developed at the trial were that the plaintiff, during a misty night, was proceeding in an electric automobile along the tracks of the traction company, that he saw a car approaching several blocks away, and endeavored to get off the tracks, but failed because the rear wheels had settled in a rut along-side the rail and the power was too weak to force them out, that he then ran 60 feet toward the car waving his hands and shouting; there being no evidence as to the speed of the car and none that with reasonable care it could have been stopped within a shorter distance than it was after the motorman saw the automobile.

VI. Instructions with respect to particular state of facts.

The court in *CHRISTY v. ELLIOTT* passes upon several instructions given by the trial court for the guidance of the jury in determining the questions of negligence and contributory negligence of the operator of

an automobile and the driver of a team encountering each other on the highway. See also *Nadeau v. Sawyer*, 73 N. H. 70 59 Atl. 369, *supra*, IV.

An instruction that, if defendant was operating an automobile at a high rate of speed, and because of such rate of speed, or because of such rate of speed together with noise emanating from the automobile, the plaintiff's horse became frightened and caused the injury to plaintiff; and if the jury further believed that the act of defendant in operating the automobile at a high rate of speed was an act of negligence on his part, the plaintiff was entitled to recover,—if subject to criticism at all in view of the fact that it was nowhere alleged in the pleading that the horse was frightened by any noise,—was not prejudicial, defendant himself having testified that the operation of the machine was always accompanied by noise. *Shinkle v. McLaughlin*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196.

An instruction, in an action to recover for injuries received from being struck by an automobile, as to the requisites of gross negligence on the part of the defendant which will support a recovery by the plaintiff, notwithstanding negligence on his own part, should be sufficiently full to enable the jury to know that gross negligence is a wrong materially different in kind from ordinary negligence. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594. It was held in this case that the following instruction lacked

elieved from all the evidence in the case that the plaintiff or others in the carriage did not indicate to defendant that Parker's mules were about to become frightened, and it did not appear to defendant that they were about to become frightened, it did not become the duty of defendant to stop his automobile. This instruction was properly refused. It cannot be said, as a matter of law, that the fact that, if the appellee and those with him in the spring wagon did not give a signal to the appellant that Parker's mules were about to become frightened, the appellee failed to exercise due diligence for his own safety. There was evidence tending to show that the mules were frightened, and that the women in the wagon screamed; and, if it appeared to the appellant from these circumstances that the mules were about to become frightened, he was obliged to stop his automobile, under the law, whether any signal was given to him by those in the wagon or not. The refusal of instruction numbered 24, asked by the appellant, was proper, because it singles out and unduly emphasizes particular evidence in regard to the speed of the automobile. The testimony of appellee's witnesses was to the effect that the automobile was traveling at the rate of about 25 miles an hour, while the testimony produced by the appellant

tended to show that the automobile was going only from 10 to 12 miles an hour. There was as much testimony on one side of this question as upon the other, and it was a matter for the determination of the jury. We are unable to say that the weight of the evidence is against the finding of the jury upon this question.

5. Appellant claims that the court below erred in refusing to instruct the jury to find the appellant not guilty at the close of appellee's testimony, and again at the close of all the testimony. The contention of the appellant upon this subject is that the evidence does not tend to show negligence on his part. We do not agree with the appellant upon this subject. The evidence of appellee tends to show that the automobile was traveling at the rate of from 20 to 30 miles an hour, while that of appellant tends to show that it was going at the rate of only from 10 to 12 miles an hour. The road was unobstructed, and it is impossible to believe that appellant did not know and could not see the people approaching him in the wagon from the north. The jury were justified in concluding that, if he did not see the team approaching, he could have done so by the exercise of ordinary prudence and care. The evidence is of such a character, too, that the jury were justified

something of the fullness necessary to distinguish ordinary from gross negligence: "Gross negligence is great negligence. To make out the proposition of gross negligence, you must be satisfied that the way the machine was operated by . . . [defendant] was reckless,—was careless to the degree of recklessness; that it was run with a reckless disregard of the rights of . . . [plaintiff] in this street. If that is established,—namely, that there was a reckless disregard of the rights of . . . [plaintiff,] in the way this machine was run,—then . . . [plaintiff] is not required to show that he was himself in the exercise of due care. . . . If the manner in which the machine . . . was run on the occasion of this accident was such that it was grossly negligent (that is, careless to such a degree that you can say it was reckless, using your common sense and judgment and applying them to the evidence), then . . . [plaintiff] is not required to show that he was in the exercise of due care, because, if the defendant's carelessness was gross in the sense that has been defined to you, there is an obligation to pay damages independent of the matter of due care."

VII. Responsibility of owner when automobile in charge of another, or when put in operation by another.

The proprietor of an electric cab is liable for damages caused by the act of his employee, who was endeavoring to secure an

advantageous position in a line of waiting cabs, in backing the cab against the plaintiff's horse, whether such act was negligent or wilful; since in either case the employee was acting in the course of his employment and for the purpose of furthering his master's business. *Curley v. Electric Vehicle Co.* 68 App. Div. 18, 74 N. Y. Supp. 35.

The owner of an automobile is not responsible for injuries caused by its negligent operation by a chauffeur who was in his general employment, where the latter, in disobedience of his instructions, had the automobile out for his own pleasure at the time of the accident. *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161.

But the facts that defendant was the owner of the automobile which struck and injured a person, and that the chauffeur in charge at the time was in his employ to operate it, are sufficient to make out a prima facie case that the chauffeur was acting within the scope of his employment at the time of the accident. *Ibid.*

An automobile company is not responsible for an injury due to the negligence of its general manager and another employee in the management of an automobile, where the general manager was enjoying a day off on the day of the accident, and, having gone out of town on his own business, upon his return telephoned for the other employee to come to the depot for him with an automobile, the accident having occurred as they were returning from the depot. The

in believing that the appellant saw that the horses were frightened by the approach of his machine. This being so, it was his duty to stop his automobile. But the evidence is that he did not do so, nor did he slacken its speed, but proceeded upon his way without taking any notice whatever of the parties in the wagon who were injured. The statute does not contemplate that the driver of an automobile can proceed until a team turns over the wagon and runs away, but is intended to prevent such occurrences. The testimony of the appellee is to the effect that, when the machine was 3 or 4 rods from them, the team turned backwards and tried to run, and when the machine was just opposite them their vehicle upset. Parker testifies that the mules were jumping against one another, and when they were about 5 or 6 rods from the machine they lunged forward and upset the vehicle just as the machine was opposite them. Such, substantially, also, is the testimony of at least two of the women who were in the wagon with appellee. Such, also, was the testimony of one Irving Hoogner, who was an entirely disinterested witness. He swears that the team was going south, and that, just as the automobile was even with them, they stuck up their ears and lunged to the west. In view of this evidence, the jury were authorized in finding that the team was frightened by the approach of the automobile. One witness, who was at work in a field 60 rods

away, swears that he heard the woman screaming, and yet appellant testifies that he heard nothing. It was for the jury to say who told the truth in reference to the matter.

6. We deem it our duty to call the attention of counsel to the abstract in this case. Rule 14 of this court (168 Ill. 13, 47 N. E. vi) requires the party bringing a cause into this court to "furnish a complete abstract or abridgment of the record referring to the pages of the record by numerals on the margin." The abstract does not state the substance of the declaration, nor make any other reference to it than merely to say that there is a declaration on page 4 of the record. The declaration is a long document, consisting of six counts, and we have been obliged to go to the record to find out what its allegations are; receiving no aid whatever in this respect from the abstract. This is a clear violation of the rule. In addition to this, the abstract in certain respects misrepresents the evidence. For instance, in the abstract, Emma Peterson is represented as giving the following testimony: "I first saw Mr. Christy opposite the big tree 1/2 mile south of the Wilcox place. We were 120 rods north from that tree, and 40 rods from the Wilcox place. We were going at the rate of 4 or 5 miles and hour,—the 40 rods to the Wilcox place. He passed us just as we turned in. He was going about the same rate of speed, I should

decision is upon the ground that neither the general manager nor the other employee was engaged in the business of the company at the time of the accident; and it was so held, notwithstanding that it appeared that, while the general manager was away on his own business, he purchased some goods at the request of a coemployee, and had the same charged to the automobile company as a means of paying for the goods. *Clark v. Buckmobile Co.* 94 N. Y. Supp. 771.

The negligence of a clerk, who is also a son, of a dealer in automobiles, in operating an automobile belonging to the latter, is not imputable to the dealer, where it appears that the clerk, who was enjoying a holiday, took the machine without the defendant's knowledge, and was using it for his own convenience; and the fact that the machine still wore the decorations which had been placed upon it for the purposes of a parade which had taken place earlier in the day, and that it might, on account thereof, attract attention and incidentally advertise the defendant's business, does not justify the jury in finding that the clerk was engaged in the defendant's business at the time of the accident. *Reynolds v. Buck* (Iowa), 103 N. W. 946.

In *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619, where it appeared that the defendant's son and his coachman were in the automobile at the time of the acci-

dent, but that the son was driving or controlling the machine, it was held error to refuse the following requested instruction: "If the jury find, either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son an accident occurred without contributory negligence on the plaintiff's part, then in either case the defendant is responsible and liable for that negligence and its consequences."

The act of a small boy in pulling the starting lever and putting in motion an electric truck which was standing on the street with the brake on and the current off while the operator was delivering goods to a customer is the proximate cause of a subsequent injury by the collision of the truck and a horse and wagon, and, being the intervening act of a third party, the owner of the truck is not liable. *Berman v. Schultz*, 40 Misc. 212, 81 N. Y. Supp. 647. So far as the report of the case shows, there was nothing in the circumstance to charge the chauffeur with notice of any probability that the truck would be interfered with while he was absent, or that he was absent for an undue period, or that he was in any way remiss after dis-

hink." The witness is thus made to state that the appellant was going about the same rate of speed as she and those riding with her were going, to wit, at the rate of 4 or 5 miles an hour.

The testimony as found in the record is as follows:

Q. Where did he pass you?

A. Just as we drove into the Wilcox place, as we turned in.

Q. Did you notice him as he went past?

A. Yes; I noticed him.

Q. How was his speed as he passed you compared with his speed as he had followed you up the road?

A. About the same, I should think.

The testimony of the witness was that the appellant was going very fast, and that his speed as he passed her was about the same as the speed at which he had been going before he passed her. The witness did not say, by any means, that his speed was about the same as hers, to wit, 4 or 5 miles an hour. Again, the witness Amanda Hoogner, who was with Mrs. Peterson at the time, said, as would appear from the abstract: "Saw Mr. Christy on that occasion. . . . He was traveling fast in an automobile. He was, I should judge, 120 rods back. We drove into the Wilcox place. I should judge we were driving 8 miles an hour. The automobile passed us as we went in. It was going about the same rate of speed." The

witness Amanda Hoogner is made to say that she and Mrs. Peterson were driving at the rate of 8 miles an hour, and that appellant, in his automobile, was traveling at the same rate of speed. Amanda Hoogner however, according to the record, did not so testify.

The record is as follows:

Tell in miles how fast you were going.

A. I should judge we would be going at least 8 miles an hour, if not more.

Q. Where did the automobile pass you?

A. It passed us as we went in. We just got in when it went by us.

Q. When it passed you, how was its speed compared with the speed it had back of you?

A. About the same.

Her testimony was that the speed of the automobile was the same when it passed them as it had been before it reached them, and not that the speed of the automobile and the vehicle which the witness was driving or riding in was the same. Such misinterpretation of the testimony of the witnesses, as presented by an abstract, does not commend itself to the favorable consideration of this court.

We find no error in the record which would justify us in reversing this judgment. Accordingly the judgment of the Circuit Court of Mercer County is affirmed.

Petition for rehearing denied.

covering that the truck had been put in motion. Upon a new trial upon practically the same testimony in this case, the trial justice gave judgment for the plaintiff upon the ground that the operator of the machine, did not exercise due and proper care before leaving the machine to guard against accident, and that it was not left "in a proper condition to guard against the possibility of its running away." This judgment was reversed by the appellate term (84 N. Y. Supp. 292) for substantially the same reasons given for the reversal of the previous judgment. The appellate term said that it was not the duty of the defendant to chain the machine to a post, or in some way fasten it so that it was impossible for it to be started by the act of a third party; that the law did not impose upon the defendant a degree of care that made the starting of the machine impossible; and that it was his duty only to exercise such care as a person of ordinary care would use under the circumstances, and that such care was used in this case.

In *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506, an action to recover for personal injuries from being struck by a motor car, the defendant's chauffeur, who, at the time of the accident, was operating the car, was called as a witness by the plaintiff, who examined him at length to show that at

that time he was in the employ of the defendant, and to identify the car by proof of its number, size, equipments, and general appearance. Upon cross-examination by the defendant, the witness was asked whether, at the time of the accident, he was not using the car for his own purposes and in violation of the orders of the defendant, and, having answered in the affirmative, the trial court entered a compulsory nonsuit. It was urged on appeal from the refusal to take off the nonsuit, that the cross-examination was not proper, and that the witness's answer afforded no proper foundation for a compulsory nonsuit. The supreme court, however, held that, as the whole trend of the examination in chief of the witness was to establish facts and circumstances which would make the defendant answerable on the ground that the negligence alleged was that of his servant acting within the scope of his employment, the cross-examination was competent, and afforded a sufficient foundation for the entering of the nonsuit.

VIII. Duty and liability to operator of automobile.

In *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336, the court without, deciding whether roads must be kept in such a state of repair and smoothness that an automo-

INDIANA SUPREME COURT.

INDIANA SPRINGS COMPANY, Appt.,
v.
THOMAS BROWN.

(... Ind. ...)

1. Automobile—use of—negligence.

The use of an automobile on a public highway is not negligence as matter of law.

2. Highway—correlative rights in.

The driver of an automobile, and the driver of a horse upon a highway, are each required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury on another.

3. Automobile—duty to stop.

The driver of an automobile, upon meeting upon the highway a horse which is frightened and in such a situation that its driver cannot extricate himself from danger unless the machine is stopped, is bound to stop, and will be liable for the injuries inflicted by his failure so to do.

(June 1, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Fountain County in plaintiff's favor in an action brought to

bile can go over them with assured safety, under Rev. Law, chap. 51, § 1, which requires highways to be kept in repair "so that the same may be reasonably safe and convenient for travelers with their horses, teams, and carriages at all seasons of the year," held that a person traveling in an automobile could recover for injuries from a defect in the highway which was dangerous to ordinary travel. The court also expressed the opinion, although it does not seem to have expressly so decided, that an automobile was a "carriage" within such statute.

An instruction is proper that, in considering the question whether a person operating an automobile exercised due care in choosing a narrower opening to the right of workmen who were engaged in opening a trench near the middle of the roadway, rather than the wider one to the left, the jury may have in mind the rule of the road, which requires one to turn to the right in meeting another vehicle, although no other vehicles were in sight at the time. *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

Negligence cannot be predicated of the act of a motorman of one of a line of south-bound stalled cars in calling the attention of the operator of an automobile to a space between his car and the car in front of him of sufficient width to admit the passage of the automobile, where the operator of the automobile looked through the windows of the stalled car and saw a

recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. James McCabe and Edwin F. McCabe, for appellant:

The evidence fails to establish that the defendant's servant knew the cause of the fright of the horse, or that the horse was under control. This was essential.

Lake Erie & W. R. Co. v. Juday, 19 Ind. App. 465, 49 N. E. 843; *Ellis v. Lynn*, 4 B. R. Co. 160 Mass. 341, 35 N. E. 1127; *Benjamin v. Holyoke Street R. Co.* 16 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95.

Appellee voluntarily assumed the risk of injury by putting his horse into a run to meet the auto, or beat it to the cross street, instead of getting out and holding his horse or letting it go.

Salem v. Walker, 16 Ind. App. 637, 48 N. E. 90; *Moran v. Leslie*, 33 Ind. App. 80, 70 N. E. 162; *Citizens' Street R. Co. v. Helvie*, 22 Ind. App. 515, 53 N. E. 191; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 270.

No recovery can be had unless there was wanton or malicious disregard for the safety of the driver or other travelers upon the street.

north-bound car approaching it a distance of about 75 feet, but nevertheless put on slow speed and proceeded to pass between the two stalled cars, and was struck by the north-bound car. *Hirsch v. Interurban Street R. Co.* 94 N. Y. Supp. 330.

In *Morris v. Interurban Street R. Co.* 100 App. Div. 295, 91 N. Y. Supp. 479, it appeared that the plaintiff's intestate, who was operating an automobile on Seventh avenue between Forty-Third and Forty-Fourth street in the city of New York, was thrown into an excavation, made in the street in the course of construction of the underground railroad and killed, in consequence of his automobile crashing into the fence at the side of the excavation as he turned from the south-bound to the north-bound track of the surface railway. The court held that, even assuming that the inability of the deceased to turn the automobile onto the north track was due to a hole 5 or 6 inches deep, which had existed for some time by the side of a switch connecting the two tracks, the city was not liable for such condition, in view of the fact that the surface of the street was constantly being changed by the contractors for the underground road. The judgment of the lower court in favor of the plaintiff was accordingly reversed upon the ground that there was no evidence to sustain the finding that the city was guilty of negligence, or that the deceased was free from contributory negligence.

Terre Haute Electric R. Co. v. Yant, 21 Ind. App. 489, 69 Am. St. Rep. 376, 51 E. 732.

Persons traveling by means of horses have no superior rights to those traveling upon the highway by improved methods of travel, which are adapted to and consistent with the proper use of the highway.

Holland v. Barch, 120 Ind. 51, 16 Am. St. Rep. 307, 22 N. E. 83; *Wabash St. L. P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. St. Rep. 696, 12 N. E. 296; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Lake Shore & M. S. R. Co. v. Butts*, 28 Ind. App. 89, 62 N. E. 647.

Mr. C. V. McAdams, for appellee:

When a person is in peril of life or limb, caused by the act of another, which peril can be and is observed by such other person, and the cause thereof understood by him, when such person dare not do anything, which he can avoid, which will increase the peril or add to the threatened danger. If he does, it will constitute actionable negligence.

Muncie Street R. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 343; *Marion Street R. Co. v. Carr*, 10 Ind. App. 200, 37 N. E. 952; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 7, 39 N. E. 165; *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588, 41 N. E. 471;

IX. Pleading; evidence; judicial notice.

In *Trout Brook Ice & Feed Co. v. Hartford Electric Light Co.* 77 Conn. 338, 59 Atl. 405, a judgment for plaintiff in an action to recover damages for injuries to a team of horses which took fright at the defendant's automobile, ran away, and were injured, was reversed because of a variance between the allegations in the plaintiff's complaint and the findings of fact by the trial court, it having been alleged, in effect, that the defendant negligently, carelessly, and with great violence drove the automobile against the horses; whereas the trial court found that, while the automobile was moving at a slow rate of speed and under the control of the man in charge, it approached the horses along a curved course, moving more and more directly towards the place where they stood, and that the operator, then seeing that the horses were frightened and about to run, did not stop the automobile or slacken its speed until it was brought to a standstill at or near the place where the horses stood.

The plaintiff and the party from whom he purchased an automobile are competent to testify as to its value, in an action against a common carrier for damages in transporting the same. *Paterson v. Chicago, M. & St. P. R. Co.* (Minn.) 103 N. W. 621.

Defendant in an action for damages for injuries to an automobile in transportation

Lake Erie & W. R. Co. v. Juday, 19 Ind. App. 451, 49 N. E. 843; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 590, 52 N. E. 1013; *Citizens' Street R. Co. v. Hamer*, 29 Ind. App. 436, 62 N. E. 658, 63 N. E. 778.

Hadley, J., delivered the opinion of the court.

This is a suit by appellee to recover damages for personal injuries and injuries to his horse and buggy, alleged to have been the result of appellant's negligence in unreasonably and unnecessarily speeding and refusing to stop or slow up its automobile, thereby causing the plaintiff's horse to take fright and run away. The complaint is in two paragraphs, alike in all respects, except that one is for personal injuries, and the other for damages to the horse and buggy. A demurrer to each paragraph of the complaint was overruled. Answer, the general denial. Trial by jury. Verdict and judgment for appellee, from which the defendant appeals. The assignment challenges the action of the trial court in overruling the demurrers and the motion for a new trial.

Each paragraph of the complaint is based on two grounds of negligence: (1) Violation of speed ordinance of the town of At-

was not injured by evidence as to the feasibility and cost of repairing the automobile, where the jury found the damages materially greater than any witness estimated the cost of repairing, and the defendant offered no evidence as to the value of the automobile either before or after the injury. *Ibid.*

Proof that an automobile was in good condition when it was delivered to an initial carrier, and in a damaged condition when it was delivered by the last connecting carrier to the consignee, is sufficient to establish prima facie, in an action against the last connecting carrier, that it was received by the defendant in good condition. *Ibid.*

In *White Sewing Mach. Co. v. Phenix Nerve Beverage Co.* 188 Mass. 407, 74 N. E. 600, an action to recover the value of an automobile partially destroyed by defendant's negligence while in its possession under a contract of rental with an option of purchase, it appeared that, after the machine had been returned to the plaintiff at Boston, it was sent as freight to Cleveland, and about seven months later was examined by mechanical experts. The defendant excepted to the admission of the depositions of such experts giving an opinion as to the value of the machine, upon the ground that no testimony had been offered by the plaintiff that the condition of the machine remained the same during the intervening period of seven months. The court said, however, that, the plaintiff having shown the state of repair when the

tica; and (2) negligence in operating the automobile. The court excluded from the jury the ordinance relied upon, and it is manifest from the record that the case was tried upon the charge of negligence in operating the motor carriage. Among other things, it is alleged that the automobile complained of was 12 feet long, 5 feet wide, 8½ feet high, had a canopy top, elevated seats for passengers, was painted red, propelled by an exploding gasoline engine, made a great noise, was the first machine of the kind in the community, and its appearance and unusually rapid and noisy movement in the highway were calculated to, and did, greatly frighten horses unaccustomed to see the like; that on May 10, 1902, the plaintiff and companion were traveling in a buggy, drawn by one horse, to the city of Attica.

machine was received and shipped, and there being no suggestion by the defendant of any change before the examination, the presumption which might be drawn from the whole evidence that the automobile seen and examined by the experts was in all respects unchanged, presented a question of fact, and that the length of time, the means of transportation used, the improbability of any intermeddling, the correspondence between the description of the experts and similar evidence of defendant's witnesses, were circumstances affecting the force of the presumption, but did not, as a matter of law, require the withdrawal of the question from the jury.

The testimony of the operator of an automobile upon the trial in a justice's court in an action on account for repairs to a buggy damaged by the running away of a horse which was frightened by the automobile, that he considered himself responsible for the accident, is admissible to contradict his testimony that he had not been guilty of any negligence which superinduced the accident, given upon the trial of an action for personal injuries sustained by the plaintiff in the same accident. *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196.

The court may, under a statutory provision that courts take a judicial notice "of the true significance of all English words and phrases," for the purpose of determining the reasonableness of a regulation affecting the use of automobiles, take judicial notice of an automobile and its characteristics and the consequences of its use. *Ex parte Berry* (Cal.) 82 Pac. 44.

The court may take judicial notice that many automobiles may be driven at a speed of at least 40 miles an hour. *People v. Schneider* (Mich.) 12 Det. L. N. 32, 69 L. R. A. 345, 103 N. W. 172.

X. Right of owner of garage to a lien.

The owner of a garage has no lien at common law for work and materials furnished in repairing and keeping in condition an automobile which the owner kept at the garage, but operated and enjoyed at his own pleasure. *Smith v. O'Brien*, 40 Misc. 325, 94 N. Y. Supp. 673.

The horse was gentle and well broken, but had never before met an automobile in the highway. Having passed over the bridge of the Wabash river, and while descending on the approach thereto, which is 20 feet wide, with precipitous banks and guard fence on each side for a distance of 230 feet to a cross street, the defendant, by its servants and agents in charge of said automobile, did approach the plaintiff from the opposite direction, driving said machine along the highway at great speed, to wit, 20 miles an hour, thereby causing it to give forth a loud, whirring, puffing, buzzing noise, that could be heard several hundred yards. As soon as the auto approached within seeing and hearing distance, plaintiff's horse became greatly frightened at the appearance, sound, and approach of the same, and plain-

nished in repairing and keeping in condition an automobile which the owner kept at the garage, but operated and enjoyed at his own pleasure. *Smith v. O'Brien*, 40 Misc. 325, 94 N. Y. Supp. 673.

The owner of a garage who performs work and furnishes material for repairing and keeping an automobile in condition is not entitled to a lien thereon under N. Y. lien law, § 70, providing that one who repairs, or in any way enhances the value of, an article of personal property at the request or with the consent of the owner, has a lien on such article while lawfully in his possession, for his reasonable charges for work done and materials furnished, and may retain possession thereof until such charges are paid, where the owner removes the automobile from the garage, and operates and enjoys its use from time to time at his own pleasure. *Ibid*.

The owner of a garage has no lien for storage as a warehouseman upon an automobile which is being used continuously or occasionally upon the road at its owner's pleasure, although when not in use it is kept at the garage. *Ibid*.

XI. Miscellaneous.

In *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125, the appellate division approved of the finding of the trial court that the maintenance of an automobile station or garage on the boulevard at Rockaway beach in the neighborhood occupied by summer residences did not constitute a common-law nuisance.

A town which fails to maintain a fence or railing, as required by statute, along the side of a road at a point where it is so raised above the adjoining ground as to be unsafe for travel, is liable for injuries to the driver of a horse, occasioned by the horse shying at an automobile, driven with ordinary care and at a reasonable speed, and plunging over the unprotected bank. *Upton v. Windham*, 75 Conn. 288, 96 Am. St. Rep. 197, 53 Atl. 660. G. H. P.

iff and his companion signaled and called out to them to stop until the plaintiff and his companion could escape on said cross street; that said servants and agents could plainly see, and did see, from the horse's conduct, that he was greatly frightened, and could have stopped the machine before it reached and passed the plaintiff; "but the plaintiff avers said servants so in charge of such automobile wholly disregarded the plaintiff's signals and entreaties to stop, not, on the contrary, negligently, wantonly, and insolently continued to drive the monster machine upon the plaintiff and his horse at the reckless speed and in the reckless and negligent manner aforesaid, and, when the same came up to the plaintiff and his conveyance, his horse became thereby so frenzied with fright caused by the rapid speed, unrightly and unusual appearance of the machine, and the unusual and alarming noises given forth by it, that it became wholly unmanageable and beyond control, and did run away and overturn the buggy, throwing the plaintiff out, whereby," etc.

It cannot be said, as matter of law, that appellant was guilty of negligence for using an automobile as a means of conveyance on the public highway. The law does not denounce motor carriages, as such, on the public ways. For, so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance, that concerns the courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting

injury upon the other. And in this the quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence, or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance and power used are common or new to the road; the known tendency of any feature to frighten animals, etc. The restrictions which the law imposes upon all modes of travel and traffic on the highways are such as tend to secure to the general public the largest enjoyment of the easement, and must be observed and borne by all alike on the broad ground that all have an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law awards no redress. "When the highway is not restricted in its dedication to some particular mode of use," says Cooley, Ch. J., in *Macomber v. Nichols*, 34 Mich. 217, 22 Am. Rep. 522, "it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience, or even to the injury, of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them." *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999; *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196; *Elliott, Roads & Streets*, § 851; *Bogue v. Bennett*, 156 Ind. 478, 482, 83 Am. St. Rep. 212, 60 N. E. 143, and cases cited.

Applying the foregoing principles to the facts alleged in the complaint, the appellant, in operating on the highway a novel wheeled conveyance, of uncommon appearance and noise, owed to the plaintiff and other travelers the duty to carefully control and drive the same along so as to avoid causing needless injury. This duty required appellant to take into account the character of their machine, its general appearance, the loud, puffing noise sent forth while going, its new use in the vicinity, its tendency to frighten horses, and from these and all other pertinent considerations proceed with that speed and caution which reasonable care requires, according to the place and presence of other travelers. It is alleged that the defendant drove its automobile towards the plaintiff at the rate of 20 miles an hour; that at the time the plaintiff was descending in his buggy, drawn by a gentle horse, along a narrow, side-

guarded approach to the Wabash bridge, whence he could not escape without proceeding forward to a cross street 230 feet from the bridge; that it was impossible for him to escape by said cross street before being met by the on-coming automobile; that the plaintiff's horse became frightened at the noise and appearance of the approaching machine, and plaintiff and his companion called to and signaled the defendant to stop and give them time to escape by said side street, but, although the defendant saw said signals, and the frightened condition of plaintiff's horse, and could have stopped said automobile so as to have enabled the plaintiff to have escaped by said side street, it failed and refused to do so, and, coming up to the plaintiff, his horse became frenzied with fright, unmanageable, and ran away throwing the plaintiff from the buggy, thereby inflicting severe injuries, etc., The conduct of the defendant here averred falls far short of being warrantable under the circumstances described. As drivers about to meet on the road, each owed the other the reciprocal duty to conduct himself and conveyance in a manner to avoid placing the other in jeopardy. And when the defendant saw that the plaintiff's horse had become frightened at the rapid approach of the strange, noisy carriage, and that the plaintiff was in danger, which was reasonably certain to increase by the nearer approach of the motor, and from which it was plain he could not extricate himself, except by defendant stopping or slowing down to enable the plaintiff to reach the cross street, it was the highest moral as well as legal duty of the defendant to stop and remove the plaintiff's peril, rather than increase it by rushing onward. Counsel for appellant argues that, since it is not shown by the complaint that defendant knew the cause of the fright of the plaintiff's horse, it fails to show negligence. Will anyone seriously say that the driver of such an automobile, recently brought to the vicinity, may speed it at 20 miles an hour along the highway, towards approaching harnessed horses, puffing and whirring so as to be heard several hundred yards away, and, seeing a horse in front of him, hitched to a buggy, rearing, plunging, and trying to bolt from the road without any other apparent cause, is justified in maintaining his speed because he does not know what it is that causes the horse's fright? Such contention is not argument. Any reasonable chauffeur, inclined to respond to the simplest offices of humanity, would not think of circumscribing his conduct under such circumstances by the rules of the law, even if such rules lead to the absurd limits suggested. The law of the road does not tolerate any such inconsiderate

and reckless disregard of the rights of other travelers on the highway. *Cincinnati, I. S. L. & C. R. Co. v. Long*, 112 Ind. 166, 172 N. E. 659; *Citizens' Street R. Co. v. Hamer*, 29 Ind. App. 422, 436, 62 N. E. 655; 63 N. E. 778; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47, 54, 39 N. E. 165; *Vincent v. Norton & T. Street R. Co.* 181 Mass. 104, 61 N. E. 822; *Benjamin v. Hoiyoke Street R. Co.* 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95.

Appellant assails divers instructions given by the court in accordance with the view above expressed, and complains of the court in refusing to give others, requested by the defendant expressing a contrary doctrine, a review of which would lead to repetition and serve no useful purpose. A review is therefore omitted. The evidence abundantly supported the verdict. We find no error in the record.

Judgment affirmed.

Petition for rehearing denied.

ALABAMA SUPREME COURT.

J. C. HAAS et al., Appts.,
v.

CITIZENS' BANK OF DYERSBURG.

(.... Ala.)

1. Bill of lading—liability of purchaser.

A bank which purchases a draft with bill of lading attached making the goods deliverable to the order of the consignor assumes the obligation of the seller to deliver, according to contract, the property represented by the bill of lading, to the drawee of the draft.

2. Same—effect of payment of draft.

Payment of a draft which is drawn for the price of goods, and attached to the bill

Case Note.—The above case is opposed to the great weight of authority, as shown in the note to *Finch v. Gregg*, 49 L. R. A. 679. Of the three cases cited as sustaining it, the first (*Eufaula Grocery Co. v. Missouri Nat. Bank*, 118 Ala. 408, 24 So. 389) holds that a bank, to the order of whose cashier a draft with bill of lading attached is payable "on arrival of car of hay," which indorses such draft for collection for its account, and sends it for collection to a bank in the place where the purchaser lives, cannot deny its ownership of the draft in an action against it for money had and received by the purchaser, after rescinding the contract because of the poor quality of the hay.

The second of the cases cited to sustain *HAAS v. CITIZENS' BANK* (*Finch v. Gregg*, 126 N. C. 176, 49 L. R. A. 679, 35 S. E. 251) holds that the assignee of a bill of lading with draft attached, who receives payment

of lading, to the bank which has purchased it, does not absolve the bank from its duty to deliver the property represented by the bill of lading.

(June 30, 1905.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to hold defendant liable for shortage in certain consignments of feed, the drafts for which plaintiffs had paid to defendant. Reversed.

The two principal counts of the complaint were similar, with the exception that one referred to meal and the other to bran, and alleged that plaintiffs ordered the feed from Henry A. Klyce, who filled the order, made out an account of the sales, drew a draft for the amount, secured by bill of lading, payable to his own order, and sold and delivered the draft, bill of lading, and account to defendant; that plaintiffs were compelled to pay the draft before having an oppor-

of the draft, is subject to an action for the return of the money if the property covered by the bill does not comply with the contract, and that subsequent consignments to such assignee, covered by bills of lading with drafts attached, are subject to attachment in his hands for loss from failure of the first consignment to comply with the contract. It was based largely on *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, a substantially similar case, which has been overruled by the supreme court in *S. Blaisdell, Jr., Co. v. Citizens Nat. Bank.* 96 Tex. 626, 62 L. R. A. 968, 97 Am. St. Rep. 944, 75 S. W. 292, cited in *HAAS v. CITIZENS' BANK*, which holds that a bank does not, by purchasing a draft and bill of lading attached, become substituted for the consignor to such extent as to be responsible to the consignee in case, after he has paid the draft, the bill of lading proves fraudulent, so that the consideration fails; and this decision of the supreme court was subsequently followed in the same case in 76 S. W. 70, by the Texas court of civil appeals of the first district, so that the case of *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, *supra*, can no longer be considered the law of Texas.

The Finch Case has been cited with approval in *Sloan v. Carolina C. R. Co.* 126 N. C. 487, 36 S. E. 21, upholding a carrier's right to permit a consignee to inspect the property before delivery, as against an assignee of the bill of lading, inasmuch as, if the consignee had taken it without opportunity of inspection, it might immediately have recovered from such assignee for any deficiency in quality, weight, or otherwise; and cited also in *Searles Bros. v. Smith Grain Co.* 80 Miss. 688, 32 So. 287; and in *HAAS v. CITIZENS' BANK* in support of its decision, and further discussed *infra*.

tunity to inspect the cars, and that, upon inspection, they discovered a shortage, to recover for which they brought this action.

Further facts appear in the opinion.

Messrs. Crum & Weil for appellants.

Messrs. Walker, Tillman, Campbell, & Morrow and Alexander Troy, for appellee: Defendant was not liable.

First Nat. Bank v. Burkham, 32 Mich. 328; *Tolerton & S. Co. v. Anglo-California Bank*, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930; *S. Blaisdell, Jr., Co. v. Citizens Nat. Bank*, 96 Tex. 626, 62 L. R. A. 968, 97 Am. St. Rep. 944, 75 S. W. 292; *Young v. Lehman*, 63 Ala. 519; *Kelly v. Lynch*, 22 Cal. 661; *Robinson v. Reynolds*, 2 Q. B. 196; *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4; *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; *Woods v. Thiedemann*, 1 Hurlst. & C. 478; *Leather v. Simpson*, 40 L. J. Ch. N. S. 177, L. R. 11 Eq. 398.

Mr. Thomas H. Watts also for appellee.

The Finch Case has been distinguished in *Perry v. Bank of Smithfield*, 131 N. C. 120, 42 S. E. 551, holding that one making a cash sale of cotton, and accepting payment in the check of the buyer, who sells part of the cotton to a third party, and deposits the latter's draft with bill of lading to his credit in the bank on which the check is drawn, which credits such draft to the buyer's account and honors checks by him until his credit is reduced below the amount of the check held by the seller, without knowledge of any agreement that the sale was to be for cash, cannot maintain an action against the bank for the purchase money; and in *Willard Mfg. Co. v. Tierney*, 133 N. C. 630, 45 S. E. 1026, which holds that where a bank takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and that he cannot retain the price of the goods on account of a debt due him from the consignor,—stating that the principle that the title to the goods vests in the indorsee of a draft with bill of lading attached had been carried to its fullest extent in the case cited.

The Finch Case was disapproved in several cases. *Tolerton & S. Co. v. Anglo-California Bank*, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930 (cited in *HAAS v. CITIZENS' BANK*), holds that the purchaser of a draft with bill of lading attached is not liable on a warranty by his assignor of the goods represented by the bill of lading, and that the drawee of such draft, after paying the same, cannot recover back the amount paid on the ground that the payee had received money which it could not equitably retain, because of the breach of the warranty made by the drawer to the drawee, as any equities arising therefrom did not affect the payee

Tyson, J., delivered the opinion of the court:

The question raised by demurrer to the complaint as amended because of misjoinder of counts was eliminated by striking the third count, which was the common count for money had and received. The theory of this demurrer was that the two special counts were in case, for a breach of duty. We do not so construe them. They are each clearly a special declaration in assumpsit, predicated upon a breach of contract, and practically seek a recovery for the money paid by plaintiffs for goods which were never delivered to them. They are, in substance, counts for money had and received, averring specially the facts upon which that claim is predicated. Doubtless the purpose of the pleader in framing them was to have the liability of defendant *vel non* for the money paid by plaintiffs to it as the owner of the goods determined by demurrer, instead of by objections to evidence or by charges, which latter method would necessarily have been resorted to had

the complaint simply contained the common count for money had and received for their use. On the facts averred there can be no doubt of Klyce's liability if he had made no assignment of the bill of lading. Did the defendant, by becoming the owner of the bill of lading and the debt to accrue upon the actual or symbolical delivery of the goods to the plaintiffs, take Klyce's place? In other words, did it, by becoming the owner of the goods while in transit, become responsible for the performance of Klyce's contract? Or is it entirely relieved of all its burdens, and entitled to have and hold the money paid to it for the goods which it never delivered? It will scarcely be doubted that defendant, by becoming the owner of the bill of lading, became the owner of the goods, and the goods continued to be its property until the account assigned by Klyce to it against the plaintiffs, and the draft drawn by Klyce on the plaintiffs, which also became its property, were paid, and the goods delivered. *American Nat. Bank v. Henderson*, 123 Ala. 612, 82 Am.

after securing an acceptance or payment of the draft. The similar decision in *S. Blaisell, Jr., Co. v. Citizens Nat. Bank*, 96 Tex. 626, 62 L. R. A. 968, 97 Am. St. Rep. 944, 75 S. W. 292, is given above. Also in *Hall v. Keller*, 64 Kan. 211, 62 L. R. A. 759, 91 Am. St. Rep. 209, 67 Pac. 518, it was held that neither a bank purchasing a draft for a consignment of grain, with bill of lading attached, nor the payees who indorsed and delivered it to the bank, are liable to the consignees of the grain, who accepted and paid the draft, for failure of title in the drawer to the property shipped, on the ground that the right to the price only was transferred to the bank, stating that the weakness in the case cited was in treating the bank as the purchaser of the grain.

The third case cited in support of *HAAS v. CITIZENS' BANK*, (*Searles Bros. v. Smith Grain Co.* 80 Miss. 688, 32 So. 287) holds that a bank buying a draft and bill of lading is placed in the exact situation in which its assignor stood, and that the consignee, after paying the draft and receiving the bill of lading and grain, might subject the draft in the hands of a collecting bank to his demand for damages from shortage in weights and the consignor's failure to deliver all the grain contracted for. It is to be noticed, however, that the decision in this case was also based largely on that of *Landa v. Latin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, which, as stated above, is no longer authority in the state in which it was rendered.

Searles Bros. v. Smith Grain Co. 80 Miss. 688, 32 So. 287 has also been limited in *Exchange Nat. Bank v. Searles Bros.* 81 Miss. 169, 32 So. 314, which holds that although a bank buying a consignor's draft for the price of grain, and taking an assignment of a

bill of lading therefor, may be held liable to the consignee for damages resulting from shortage in weights and defective quality of the particular grain represented by the bill of lading, it cannot be held liable for damages resulting from the consignor's failure to deliver other grain, though there may have been one entire contract of sale.

There are other recent cases involving the same point. *Commerce Mill. & Grain Co. v. Morris*, 27 Tex. Civ. App. 553, 65 S. W. 1118, and *Gregory v. Sturgis Nat. Bank* (Tex. Civ. App.) 71 S. W. 66, hold that a bank receiving for collection a draft with bill of lading attached is not liable to the consignee for any breach in the contract with the consignor. *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887, holds that a bank to which another bank sends for collection a draft with bill of lading attached, purchased by it, acts as the agent of such bank instead of the consignor, in making the collection, and that the drawee, after having made the former bank liable to its principal by surrendering to him the bill of lading on receiving a check from him, and notifying such principal that the draft has been paid, cannot stop payment of such check on subsequently discovering the poor condition of the fruit covered by the bill of lading. *Guaranty Trust Co. v. Grottrian*, 57 L. R. A. 689, 52 C. C. A. 235, 114 Fed. 453, Affirming 105 Fed. 566, holds that one accepting a draft "against indorsed bills of lading" for flaxseed on a specified vessel, who pays such draft before the arrival of the vessel, may recover back the money so paid, where the bills of lading accompanying the draft were forged, of which fact he had no knowledge, either at the time of acceptance or of payment.

St. Rep. 147, 26 So. 498. Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of the transferor to the goods described in them. *Commercial Bank v. Hurt*, 99 Ala. 130, 19 L. R. A. 701, 42 Am. St. Rep. 38, 12 So. 568; *Jasper Trust Co. v. Kansas City M. & B. R. Co.* 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546; 4 Am. & Eng. Enc. Law, 2d ed. p. 549.

The contract of sale between Klyce and the plaintiffs was merely an executory one. Klyce had agreed to sell and the plaintiffs to pay for the goods upon their delivery. Before this contract was executed between these parties, the defendant became the owner of the goods and of the right to receive pay for them. It undertook the performance of the executory contract by a delivery of the goods to plaintiffs, and received the money agreed to be paid by plaintiffs upon the execution of that contract, and, notwithstanding it was paid for goods which it never delivered, and which it assumed to deliver, it undertakes to avoid its liability by saying that, because it became the owner of the draft which was paid by plaintiffs, it is a bona fide purchaser for value of the goods from Klyce, and therefore not responsible for their delivery. To so hold would be to give effect to only a part of the transaction, —to ignore its ownership of the goods and the account transferred to it by Klyce. By no rule of construction can the averments of the complaint justify the conclusion that the bill of lading was held by defendant as collateral security to the draft, or that defendant was merely Klyce's agent for its collection. The cases relied upon by appellee (reported in *S. Blaisdell, Jr., Co. v. Citizens Nat. Bank*, 96 Tex. 628, 62 L. R. A. 968, 97 Am. St. Rep. 944, 75 S. W. 292; *Tolerton & S. Co. v. Anglo-California Bank*, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930, and *Schlichting v. Chicago, R. I. & P. R. Co.* 121 Iowa, 502, 96 N. W. 950) proceed upon the theory that the bill of lading was held by the bank as a security for the payment of the draft. The writers of those opinions were influenced to reach that conclusion partly upon the idea that to hold otherwise would impose a hardship upon the bank. The complaint in neither of the cases justified such a construction. And, in order to sustain that conclusion, the court resorted to its common knowledge of usages among banks to discount drafts and to accept a transfer of bills of lading as collateral security, instead of dealing with the transaction as laid in the complaint. In each of the cases it was necessary, to sustain the conclusion reached, that the unqualified ownership by the bank

of the bill of lading be gotten rid of; otherwise there was no escaping the conclusion that it was liable. To do this, notwithstanding the complaint alleged a purchase of the draft and the bill of lading by the bank, it became necessary to hold that the transaction in legal effect was a loan of money by the bank, and the transfer of the debt and bill of lading was intended as a security therefor. There is no rule of law or of public policy against a bank becoming the absolute owner of the debt and the bill of lading for the goods, or its undertaking to perform an executory contract for the sale of the goods. And no sound reason exists why it should not be required to perform its contracts as individuals are required to do. Would any court hold that if A. contracted to sell B. a horse, warranting its soundness, for \$100, to be paid upon its delivery, and A. should assign the contract to C., and C. should deliver an unsound horse to B., and receive the \$100, that C. would not be liable for a breach of the warranty? We think not. The case in hand is not different in principle, unless the fact that plaintiffs paid the draft, which was the property of defendant for the purchase price of the goods, differentiates it. The draft was drawn to the defendant's order, accompanied by the bill of lading and the account, each of which was sold to it. The draft had not been accepted by the plaintiffs before its negotiation to defendant, and until accepted, in the absence of some fact tending to show that defendant was induced, by the conduct of the plaintiffs, to purchase it, they were not bound by it. When it was paid, the purchase price to be paid for the goods as well as the goods themselves belonged to the defendant. The plaintiffs were not parties to the transaction by which it acquired the ownership of the goods and the right to receive payment for them. And when, as here, the defendant became the owner of the debt and the goods, and assumed, necessarily, the responsibility and burden of delivering them to the plaintiffs, it became the seller in fact, and must bear the burden of the transaction. In short, the defendant took the contract of Klyce, the shipper, and stood in his shoes, with the same rights,—no greater, no less. And the payment of the draft by plaintiffs, which merely evidenced the price to be paid for the goods, can no more shield or protect the defendant from liability than its payment would have protected Klyce had he undertaken a delivery of the goods and received the purchase price for them. It would be an anomaly to hold that the defendant is protected as purchaser of the account and bill of lading, because the plaintiffs paid the draft, which also belonged to it in

right of its ownership of the goods; or that it held the bill of lading as security for a debt which belonged to it. Just how it could be the unqualified owner of the debt and only a qualified owner of the goods, when it purchased both, we confess our inability to see. When it purchased these papers it was bound to know the nature of the transaction between Klyce and plaintiffs. The bill of lading and the account attached to the draft carried notice on their face that Klyce had contracted to sell the goods represented by the account and bill of lading, and to deliver them at the point of their destination.

To repeat, in a measure: The essence of the agreement between Klyce and plaintiffs was that of a cash transaction, to be consummated in the future; that is, the goods were to remain the property of Klyce until there was an actual or symbolical delivery of them and contemporaneous payment of the price. The distance of the parties from each other necessitated a resort to the usages of trade, whereby the price is paid on a symbolical delivery of the goods by a transfer of the bill of lading. By shipping the goods to his own order Klyce retained the absolute title, and he would have had the title until the goods were at the place of delivery, so that an actual delivery could have been made on and for the payment of the price. But he chose not to do so. He said, in effect, to defendant: "I have agreed to sell and deliver to the plaintiffs at a certain place certain goods at a certain price. Here is a bill of lading for these goods to my order; here is a draft for the price to be paid on delivery of the goods; and here is an account showing the items. I desire the money for these goods now. I propose to sell the contract to you. If you choose to deliver the goods, which you may do actually, or symbolically, by assignment of bill of lading to plaintiffs, you will have the money to be paid for them at the place of delivery; otherwise you will have your goods and an obligation of plaintiffs to take them at the price." Thus far the defendant has dealt only with Klyce. After defendant purchased the contract, it went to plaintiffs, and said: "Here is the bill of lading for the goods Klyce was to deliver to you, but which belong to me. Pay me the price, and you can have the goods." The plaintiffs pay the price, and take an assignment of the bill of lading. It is therefore plain that the symbolical delivery was the defendant's act, and, as it took the place of an actual delivery, it must be as perfect as an actual delivery. If it is false in any respect, there is a liability upon defendant, who made itself a party to the transaction. 1 L.R.A. (N.S.)

The plaintiffs having paid the purchase price to defendant for its goods, it will not be allowed to say to plaintiffs, "You did not deal with me." This conclusion is fully sustained by our own case of Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389, and the following cases in other jurisdictions: Finch v. Gregg, 126 N. C. 176, 49 L. R. A. 679, 35 S. E. 251, and Searles Bros. v. Smith Grain Co. 80 Miss. 688, 32 So. 287. On the facts averred, if proved, we entertain no doubt of the plaintiffs' right of recovery.

Reversed and remanded.

ALABAMA SUPREME COURT.

JEFFERSON COUNTY SAVINGS BANK,
Appt.,
v.

JOHN C. HENDRIX.

(.... Ala.)

1. Banks—collection of check.

Credit, to the depositor, of a check received for collection, followed by negligence in making the collection, so that the rights on the paper are lost, does not make the bank liable for the face of the paper, but only for the amount lost through the neglect.

2. Pleading—negligence in collecting check.

The liability of a bank for negligence in collecting a check deposited for that pur-

Case Note.—The holdings of *JEFFERSON COUNTY SAV. BANK v. HENDRIX*, that in an action for damages for the neglect of a collecting bank to make due presentment of a check intrusted to it for collection, actual damage must be alleged and proved, is fully sustained by the cases cited and by other authorities. It is the rule that is applied to defaults of agents in general. "It is a good excuse," says Judge Story, "that the misconduct of the agent has been followed by no loss or damage whatsoever to the principal; for then the rule applies, that although it is a wrong, yet it is without any damage; and, to maintain an action, both must concur; for *damnum absque injuria* and *injuria absque damno*, are, in general, equally objections to any recovery." Story, Agency, § 236.

It is this relation of mere agency between a collecting bank and its principal, which distinguishes the liability from that imposed in cases of negligence by parties to negotiable paper. As is said in one of the leading works upon commercial paper, the "failure to give notice of dishonor now affords a complete defense to the party entitled to it, without any evidence of injury on his part. And it is not competent for the holder to show that the defendant sustained no injury by reason of the delay or

pose cannot be enforced under the common counts.

3. Pleading—action against bank—demurrer.

A complaint seeking to charge a bank with the amount of a check deposited for collection, which is not effected because of its negligence, cannot be upheld against demurrer on the theory that it cannot be deemed bad merely because it makes a claim of damages which is erroneous only as to amount and form, since the only damages to which plaintiff is entitled are those actually suffered by the bank's neglect, and the form of the complaint would authorize a recovery though no such damages were proved.

4. Banks—collection of check—negligence.

Sending a check for collection to the drawee bank is prima facie negligence on the part of the collecting bank; at least, when it is a cashier's check on his own bank.

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failure to give the proper notice. This rule is subject to modification, however, as between an agent and the principal to whom he has indorsed." 3 Randolph, Com. Paper, § 1199.

But the question here is whether proof of actual damage is part of plaintiff's case.

The Bank of Mobile v. Huggins, 3 Ala. 206, cited in support of the holding in JEFFERSON COUNTY SAV. BANK v. HENDRIX, is a well considered case. The contention there was that when the owner of a note has shown the discharge of one of the parties thereto, in consequence of the negligence of the collecting agent, this should, prima facie, be considered sufficient evidence to charge the latter with the amount due by the face of the note. After showing that Allen v. Suydam, 17 Wend. 368, relied upon in support of the above position, is not sustained by Van Wart v. Woolley, 3 Barn. & C. 430, which it cites, the court says: "We cannot bring our judgments to follow the rule settled in New York, as to the ascertainment of the damages. The general rule of evidence certainly is that the affirmative shall be maintained by the party who is presumed to have possession of the necessary information of the fact to be established. The mere production of a paper, with a name signed to it, promising to pay a sum of money, does not import, necessarily, that the paper has any actual value. Its value depends entirely upon the ability of the parties to comply with what they have promised. The knowledge of this ability is to be presumed to be with the person who has an interest in it; and it is difficult to conceive how a mere agent, who is intrusted with the paper only for one specific purpose, in no ways coupled with any interest, can be held to proof of those circumstances on which its value or its worthlessness depend."

Bank of Mobile v. Huggins is cited with approval in Pennington v. Yell, 11 Ark. 212, 223, 52 Am. Dec. 262, an action against an at-

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover the amount of a check deposited with defendant for collection. Reversed.

Plaintiff received a cashier's check on the Shelby County Bank, and deposited it with defendant for collection. The check was sent directly to the drawee bank, which failed without making the payment. The owner then brought this action against defendant to recover the amount of the check, the claim being based upon failure to make the collection. The complaint consisted of eight counts. The first four were the common counts. The fifth alleged a deposit of money with defendant, and failure to repay the same on demand. The sixth alleged a deposit of the check, collection of it, and failure to pay the amount on demand. The seventh and eighth alleged a deposit of the

torney for failure, through negligence, to collect a note, wherein it is held that after proof of the attorney's negligence, "the extent of the damages that have resulted must also be affirmatively shown, as, in the case where the amount of a note is alleged to have been lost by his negligence, it must be shown that it is a subsisting debt against the maker, and also that he was solvent. And, unless the latter be shown, he would be liable only for nominal damages, and, under no circumstances, would he be liable for more than the actual damage that the client has sustained by reason of the negligence."

In Hair v. Glover, 14 Ala. 500, 504, it is held that an attorney's receipt for securities placed in his hands for suit is prima facie evidence that they are genuine and just, and distinguishes the case from Bank of Mobile v. Huggins.

In Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11, also cited in JEFFERSON COUNTY SAV. BANK v. HENDRIX, a complaint by the drawer for damages from the payee's delay in presenting a check for payment was held bad on demurrer because of the failure to aver any damage. It is not, therefore, strictly in point, save to the general proposition that a complaint sounding in damages must aver facts showing the actual damage sustained. The case was subsequently overruled as to the other questions involved.

In Sahlien v. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373, it is held that the neglect of a collecting bank to notify a drawer of the nonpayment of a draft for ten days after its receipt for collection is not sufficient to impose a liability for the amount of the draft, where the evidence tends to show that the drawee was insolvent at the time the draft was received. The burden being upon the plaintiff in such case to show that the claim was good and collectible.

The only remaining case cited in support of the position in JEFFERSON COUNTY SAV. BANK v. HENDRIX is that of Farmers' Bank

check for collection and negligent failure to collect it.

Further facts appear in the opinion.

Mr. George Huddleston, for appellant:

The deposit of the check by Hendrix created the relation of principal and agent between the depositor and the deposittee.

Bank of Mobile v. Huggins, 3 Ala. 206; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Ward v. Smith, 7 Wall. 451, 19 L. ed. 209; Dodge v. Freedman's Sav. & T. Co. 93 U. S. 385, 23 L. ed. 922; Cheney v. Libby, 134 U. S. 83, 33 L. ed. 825, 10 Sup. Ct. Rep. 498; Commercial Nat. Bank v. Armstrong, 148 U. S. 58, 37 L. ed. 367, 13 Sup. Ct. Rep. 533; Old Nat. Bank v. German-American Nat. Bank, 155 U. S. 563, 39 L. ed. 262, 15 Sup. Ct. Rep. 221; Bank of Montreal v. Ingerson, 105 Iowa, 361, 75 N. W. 361; Branch v. United States Nat. Bank, 50 Neb. 474, 70 N. W. 34; National Bank v. Johnson, 6 N. D. 184, 69 N. W. 49; National Butchers' & D. Bank v. Hubbell, 117 N. Y. 384, 7 L. R. A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031; Arnot v. Bingham, 55

Hun, 553, 9 N. Y. Supp. 68; Freeman's Nat. Bank v. National Tube Works Co. 151 Mass. 413, 8 L. R. A. 42, 21 Am. St. Rep. 461, 24 N. E. 779.

The title to a check deposited for collection does not pass to the collecting agent by reason of his negligent failure to collect.

Bank of Mobile v. Huggins, 3 Ala. 206; Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; Bell v. Somerville, 17 L. R. A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; National Butchers' & D. Bank v. Hubbell, 117 N. Y. 384, 7 L. R. A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. Rep. 533; Freeman's Nat. Bank v. National Tube Works Co. 151 Mass. 413, 8 L. R. A. 42, 21 Am. St. Rep. 461, 24 N. E. 779; Old Nat. Bank v. German-American Nat. Bank, 155 U. S. 556, 39 L. ed. 259, 15 Sup. Ct. Rep. 221; Balbach v. Frelinghuysen, 15 Fed. 675.

For a bank's failure to perform the duties

& T. Co. v. Newland, 97 Ky. 464, 31 S. W. 38, in which a petition alleging damages in the amount of a certificate of deposit for which the defendant accepted in payment a check subsequently dishonored is held defective in part for failure to allege that the bank's negligence had caused the plaintiff to lose his debt against the bank issuing the certificate.

Turning now to cases outside those cited in JEFFERSON COUNTY SAV. BANK v. HENDRIX, we find that a number of authorities of high character support the holding in that case.

Van Wart v. Woolley, 3 Barn. & C. 439, is a leading case. There the plaintiff, residing at Birmingham, having received in payment of certain merchandise a bill drawn in the United States on a party in London, delivered the same to bankers in Birmingham, to get it accepted. The latter's London correspondent held the bill for some sixty days after presentment and refusal to accept, without giving notice of dishonor, and meanwhile the drawer became bankrupt. It appeared, however, that neither at the time the bill was drawn nor at any subsequent time, did the drawer have any funds in the hands of the drawees. The plaintiff claimed damage in two respects: first, by the loss of remedy against Irving & Co., from whom he received the bill; second, by the loss of remedy against Cranston, the drawer of the bill. It was held that the plaintiff not having made the bill his own, he still had his remedy against Irving & Co., and was not entitled to recover on that ground, and that while he was entitled to damages for the loss of remedy against the drawer, yet this might be merely nominal; and, not having been inquired into, the case should be again submitted to a jury.

The last preceding case is cited in Allen 1 L.R.A. (N.S.)

v. Suydam, 17 Wend. 368, in support of the position that, in the absence of evidence of actual damage, in an action for damages against a collecting bank for a delay of seventeen days in making presentment of a bill, the jury might find for plaintiff for the amount of the draft, although it appeared that the drawees had no funds, that they were directed by the drawer not to accept, and that the lateness of the presentment had no influence upon the nonacceptance. Upon appeal the above holding of the supreme court of New York was reversed (30 Wend. 321, 32 Am. Dec. 555), and the construction of Van Wart v. Woolley was shown to be erroneous, it being held that, upon the evidence, the jury should have been instructed that the plaintiff was entitled to nominal damages only, or such as they should believe it probable might have been sustained from the delay. The court says: "The case of Van Wart v. Woolley is a direct authority to show that the agent ought not to be charged with the whole amount of the bill unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him." This statement seems to place the case in line with authorities holding that plaintiff must prove actual loss to entitle him to recover; but in Morange v. Mix, 44 N. Y. 315, 322, this is denied to be the proper construction of the opinion.

However, in Lienan v. Dinsmore, 10 Abb. Pr. N. S. 209, 213, it is held, upon the authority of Allen v. Suydam, *supra*, that to sustain a recovery for more than nominal damages, by an owner of commercial paper against a collecting agent, the plaintiff must show that he could, in all probability, have collected the amount of the draft, or some

aposed upon it by the deposit of a check for collection, it is liable to its depositor principal in an action in case, for the breach of duty, or in assumpsit, for the breach of the contract.

Bank of Mobile v. Huggins, 3 Ala. 206; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 So. 11; 16 Enc. Pl. & Pr. 911.

The agent is liable for only the actual losses sustained by his principal.

Bank of Mobile v. Huggins, 3 Ala. 206; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 So. 11; *Mardis v. Shackelford*, 4 Ala. 33; *Bagby v. Harris*, 9 Ala. 173; *Sablien v. Bank of Lenoche*, 90 Tenn. 227, 16 S. W. 73; *Farmers' Bank & T. Co. v. Newland*, 7 Ky. 464, 31 S. W. 38; *Zane, Banks*, § 64.

Messrs. Cabanis & Weakley, for appellee:

The measure of damages which the holder is entitled to recover of the bank or other collecting agent who has been guilty of negligence or default in respect to it is the actual loss which has been suffered.

and thereof, from the drawee, if he had received notice of nonpayment, which defendant's duty in the premises required him to give.

And in *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, the defendant received in payment of a draft held for collection, the drawee's check, which was dishonored through its neglect to present same in proper time. But the evidence showed that defendant caused the drawer to be charged, and secured and preserved against it all the rights and remedies of the plaintiff. There was no evidence as to the solvency of the drawer. Upon this showing, the court, after considering the holdings in *Borup v. Nininger*, 5 Minn. 523, Gil. 417; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555; and *Van Wart v. Woolley*, 5 Dowl. & R. 374, 3 Barn. & C. 439, says: "The result is that the plaintiff has recovered against the defendant, as damages, for its negligence, the full amount of the draft. But the draft is not, by this judgment, transferred to the defendant, and it is not subrogated to plaintiff's rights and remedies thereon against the drawer; and the plaintiff still holds the draft, and, for aught that appears in this case, can enforce it, or has enforced it, for the full amount against the drawer. To justify such judgment, the plaintiff should have shown that the draft was wholly worthless, or that, for some reason, the responsibility of the drawer thereon was wholly unavailable to it. The plaintiff is entitled to indemnity, and no more, for the loss caused by the fault of the defendant, and it must show the extent of such loss."

The measure of damages for the neglect of a collecting bank to fix the liability of an indorser by notice of demand and nonpayment is said, in *Borup v. Nininger*, *supra*, 11 L.R.A. (N.S.)

This loss is, *prima facie*, the amount of the check.

1 Dan. Neg. Inst. 2d ed. § 329; *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011; *First Nat. Bank v. First Nat. Bank*, 4 Dill. 290, Fed. Cas. No. 4,810; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485; *Second Nat. Bank v. Merchants Nat. Bank*, 111 Ky. 930, 55 L. R. A. 273, 98 Am. St. Rep. 439, 65 S. W. 4; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 So. 11, 122 Ala. 580, 82 Am. St. Rep. 95, 25 So. 499; *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714.

The burden is on the defendant to reduce the damages.

1 Dan. Neg. Inst. § 329; 3 *Sutherland Damages*, pp. 18, 19; *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171; *National Revere Bank v. National Bank*, 172 N. Y. 102, 64 N. E. 799; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec.

to be the face of the note; but the court adds: "The plaintiff must make out the insolvency of the maker, and the solvency of the indorser, discharged by the act of the defendants. The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages." Citing *Sedg. Damages*, 340 et seq.; *Howard v. Garner*, 3 Sandf. 179; *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345; *Allen v. Merchants Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555. To the same effect is *West v. St. Paul Nat. Bank*, 54 Minn. 466, 56 N. W. 54.

Where, in an action against a collecting bank for damages from failure to give notice of the nonacceptance of drafts, the finding of facts does not cover the issue of damages, the United States Supreme Court will not render judgment for any specific amount of damages, although the complaint alleges that the drawers and indorsers are discharged for want of notice of nonacceptance, and it is found that the drawers were in good credit when the drafts were discounted, and that the drawers and indorsers had become insolvent before notice of nonacceptance was given. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141.

A complaint alleging a bank's neglect to collect a draft until it became impossible for plaintiff to collect same, and that by reason of such neglect plaintiff had lost all opportunity to collect same, sufficiently shows that,

273; 3 Sutherland Damages, 3d ed. § 775, p. 2372; West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. 54; Camidge v. Allenby, 6 Barn. & C. 373.

Having sent the check to the drawee, and having given Hendrix no notice in time to protect himself, the bank lost the right to charge off the deposit which it had entered to the credit of Hendrix, and made the paper its own.

Kavanaugh v. Farmers' Bank, 59 Mo. App. 540; First Nat. Bank v. First Nat. Bank, 4 Dill. 290, Fed. Cas. No. 4,810; Shipsey v. Bowers Nat. Bank, 59 N. Y. 485; Second Nat. Bank v. Merchants Nat. Bank, 111 Ky. 930, 55 L. R. A. 273, 98 Am. St. Rep. 439, 65 S. W. 4; Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Chouteau v. Rowse, 56 Mo. 65; State ex rel. Clark v. Gates, 67 Mo. 139; National Revere Bank v. National Bank, 172 N. Y. 102, 64 N. E. 799; German Nat. Bank v. Burns, 12 Colo. 539, 21 Pac. 714; Merchants' Nat. Bank v. Goodman, 109 Pa. 428, 58 Am. Rep. 728, 2 Atl. 687; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co. 117 Ill. 100, 57 Am. Rep. 355, 7 N. E. 601; First Nat. Bank v. Miller,

37 Neb. 500, 40 Am. St. Rep. 499, 55 N. W. 1064.

McClellan, Ch. J., delivered the opinion of the court:

Neither the deposit of a check with bank for collection, nor the entry on its books of the amount of the check as deposit of money in favor of the owner of the check, nor yet the negligence of the bank in and about the collection of the check from the drawee bank, whereby there is a failure to collect it, nor all these facts combined, makes such check the property of the collecting bank, nor the owner of the check a depositor of the money entered to his credit, in such sense as gives him right of action for money had and received, or otherwise, for the amount of the face of the check, as money due him from the bank. A bank which receives a check for collection, and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it. If the collection is made, the relation of depositor and banker is consummated. If the collection is not made, the bank's right to charge off the deposit arises. If the bank fails to collect the check through fault of its own it is liable to the holder for all damages sustained by him through such failure; and

defendant's neglect resulted in loss to plaintiff. Finch v. Karste, 97 Mich. 20, 56 N. W. 123.

The damages recoverable for the failure of an attorney to enforce the collection of a note until after it has become barred being dependent upon the value of the note and the probability of its collection, mere proof of the attorney's receipt for the note, and of his failure to take the necessary steps for its collection, is not sufficient to charge him with the amount thereof. Mitchell v. Shuert, 10 Mich. 444.

Some courts and text writers seem to have been misled by the *dictum* of the court in Allen v. Suydam, *supra*, that where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where, by the negligence of the agent, the liability of a drawer or indorser apparently able to pay has been discharged, "so that the owner of the bill cannot legally recover against such drawer or indorser," the agent is *prima facie* liable for the whole amount of the bill, with interest as damages. But it is evident that the court means simply this: that where the plaintiff makes out a *prima facie* case of total loss, the face of the bill is the measure of his damages. Indeed, the decision of the lower court was reversed because the court instructed the jury that, there being no evidence of damage except the amount of the draft, they should find for that amount. Likewise the refusal of the court to sustain

the above instruction was the occasion for the dissenting opinion.

Among those who have been misled by the above remark in Allen v. Suydam, *supra*, is the learned author of Daniel on Negotiable Instruments, vol. 1, 5th ed., § 329, who recognizes the rule that the measure of damages for the default of a collecting agent "is the actual loss which has been suffered;" but adds: "That loss is *prima facie* the amount of the bill or note placed in its or his hands, but evidence is admissible to reduce it to its nominal sum." The following cases cited by the author do not support the text, as is shown above: Van Wart v. Woolley, 1 Dowl. & R. 374; Allen v. Suydam, 20 West. 321, 32 Am. Dec. 555; Borup v. Nininger, 1 Minn. 523, Gil. 417; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Blanc v. New Orleans Mut. Nat. Bank, 28 La. Ann. 921, 26 Am. Rep. 119. The other cases cited are: Livaudais v. Denis, 4 La. Ann. 300; Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171.

And it is held in Louisiana that, in an action against a collecting bank for damages from failure to give notice, the onus is on the agent to show that the holder sustained no damage by the neglect of the agent to make a proper demand and to give due notice to the other parties to the bill: citing Crawford v. Louisiana State Bank, 1 Mart. N. S. 214; Montillet v. Bank of United States, 1 Mar. N. S. 365.

his liability may be enforced by an action of assumpsit sounding damages for a breach of the bank's implied undertaking to use due care and diligence to collect the check, or by an action in case for damages resulting from negligence of the duties in respect of collection imposed upon it by law upon the fact of its receiving the check for collection. But the damages recoverable are not means necessarily the amount of the check. It by no means follows from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the paper, whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even any part of it. To the contrary, it is frequently, if not generally, true that the owner of the paper secures some part or all of the debt for which it was given in some other way, as by subsequent voluntary payment by or suit against the drawee bank when it is solvent, or by dividends upon its being wound up as an insolvent concern. It will, therefore, not suffice for the owner to hale the collector of the check into court and plead that "you took this check to collect it. You did not do your duty in that regard, and of consequence the check was not collected. Therefore the check is yours, and the amount of it in money is mine, and in your hands for me, and you must pay me that amount." It does not follow from the facts the owner thus puts forward that the bank is liable to the extent he seeks to hold it, or to any extent in fact. The mere failure of collection of the check does not demonstrate the loss to the owner of the demand for which it was given, or any part of such demand. The owner should say to the bank: "You took this check for collection. Certain duties were thereby devolved upon you in respect of efforts to collect, or in respect of notice to me of its dishonor. You failed to perform those duties. From such failure resulted the nonpayment of the check. Because of its nonpayment, I have suffered damages in the sum of so many dollars. For these damages you are liable to me, and must account in this action." In other words, a complaint in the common counts, or for money deposited, or for the amount of the check, averring the bank's unwarranted failure to collect it, or negligence operating to deprive the owner of opportunity to collect it,—averments which, if proved, and this theory of liability were sound, would entitle the plaintiff to recover the full face value of the check, though his demand may have been satisfied in whole or in part from other sources, though

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he had suffered no damages or only nominal damages from the defendant's derelictions,—would either not, by intendment or expressly, present the facts of this case (which is true of the common counts and of special counts 5 and 6), or claim a recovery of the facts of this case upon an inadmissible theory and in an amount which those facts do not justify (which is true of counts 7 and 8). Hence it is that we deem it unnecessary to discuss rulings below bearing upon the first six counts of the complaint. None of them is supported by the evidence. Hence it is, also, that we hold that the demurrers to counts 7 and 8 should have been sustained. These counts not only claim a sum of money, to wit, the amount of the check, which the plaintiff, by their averments, is not shown to be entitled to; but they are so wanting in averments of damages suffered by plaintiff as to state no cause of action. It will not do to say that they aver facts which warrant a recovery of damages, and that they are not rendered bad by the form and amount of the claim they make, because, if they are held good against the demurrer, a recovery would follow proof of their averments, though no proof of damages should be made, since neither of them contains any allegations that plaintiff has suffered any damages from defendant's failure to collect the check; *non constat* but that his demand has been otherwise paid, as above suggested, and *non constat*, but that, though not paid, the demand is collectible in whole or in part out of the assets of the drawee bank. Bank of Mobile v. Huggins, 3 Ala. 206; Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 So. 11; Sahlien v. Bank of Lonoke, 90 Tenn. 227, 16 S. W. 373; Farmers' Bank & T. Co. v. Newland, 97 Ky. 464, 31 S. W. 38; Zane, Banks & Banking, § 184.

The different doctrine which prevails where a creditor receives the check of his debtor to pay the debt may be referable to the distinctive consideration that in such case the creditor, being the payee in the check or unqualified indorser, is the legal holder and owner of it for the purpose of realizing upon it and applying its proceeds to his own debt; and upon this theory the case of Watt v. Gans, 114 Ala. 264, 62 Am. St. Rep. 99, 21 So. 1011, is not opposed to the views above expressed. Abstractly, and prima facie at least, it is negligence in a collecting bank to send the check to be collected by mail or otherwise directly to the drawee bank for payment, especially when the paper is a cashier's check; i. e., drawn officially by the cashier of the drawee bank. Of course, it is the duty of a

collecting bank to give the depositor prompt notice of the dishonor of a check deposited for collection.

Reversed and remanded.

Haralson, Dowdell, and Denson, JJ., concur.

MARYLAND COURT OF APPEALS.

ITALIAN FRUIT & IMPORTING COMPANY OF BALTIMORE CITY, Appt.,

v.

GEORGE DOBBIN PENNIMAN et al., Receivers of City Trust & Banking Company.

(.... Md.)

Banks—special deposit—trust.

Money known to have been deposited by other parties on the day of the failure of the bank cannot be appropriated in repayment of a special fund which had been deposited by a customer to indemnify the bank for its guaranty of the performance of a contract by the one making the deposit.

(June 22, 1905.)

A PPEAL by exceptant from an order of the Circuit Court, No. 2, of Baltimore City overruling exceptions to an audit dis-

tributing assets of the City Trust & Banking Company. Affirmed.

The facts are stated in the opinion.

Mr. John J. Hurst for appellant.

Mr. Edward C. Carrington, Jr., for appellee:

A cestui que trust is entitled to no preference over a general creditor in the distribution of the general assets of an insolvent corporation.

Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497; Drovers' & M. Nat. Bank v. Roller, 85 Md. 495, 36 L. R. A. 707, 60 Am. St. Rep. 344, 37 Atl. 300; Knatchbull v. Hallett, L. R. 13 Ch. Div. 626; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Slater v. Oriental Mills, 19 R. I. 352, 27 Atl. 443; Shields v. Thomas, 71 Miss. 260, 42 Am. St. Rep. 458, 14 So. 84; Ferchen v. Arndt, 26 Or. 121, 29 L. R. A. 604, 46 Am. St. Rep. 603, 37 Pac. 161; Philadelphia Nat. Bank v. Dowd, 3 L. R. A. 480, 38 Fed. 172; Little v. Chadwick, 151 Mass. 109, 7 L. R. A. 570, 23 N. E. 1005.

The criterion is the identification of the original fund, or the result of that origi-

Case Note.—The above case is also supported by *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 655, 44 L. R. A. 493, 78 N. W. 893, which holds that a receiver of a bank in which a trust fund was deposited cannot be required to repay it in preference to the claims of other creditors, unless the trust fund can be identified, or traced into some other specific fund or property.

And *Northern Dakota Elevator Co. v. Clark*, 3 N. D. 26, 53 N. W. 175, holds that the mere fact that the proceeds of a draft sent to bankers for use in paying wheat tickets or checks for the sender went to enrich their estate, and increase the general mass of their property, prior to their assignment, does not entitle the sender to priority out of the general assets in the hands of their assignees for creditors, where practically the entire amount was paid out before the assignment, and it is impossible to identify or trace it.

And *Jones v. Chesebrough*, 105 Iowa, 303, 75 N. W. 97, denies the right of an assignee for creditors to recover, as trust funds, from the assignee of a bank, funds of the estate deposited by him in such bank, where, at the time of its failure, the bank had on hand only a very small amount of cash, and the amount deposited was mingled with other money, and used by it in the usual and ordinary course of business in payment of its debts, and no new loans had been made by the bank, nor property of any kind, nor securities on hand, had been purchased with the money so deposited.

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And *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, holds that, where a county treasurer wrongfully deposits public funds to his own credit in a bank, which, with knowledge of the facts, uses such deposits in paying off other depositors, and becomes insolvent, the county, although entitled to reclaim, as part of the trust fund, cash left in the vaults of the bank, is not entitled to a preference from the other assets of the bank into which the money cannot be traced.

But *People v. City Bank*, 96 N. Y. 32, holds that one giving checks to a bank for the amount of notes previously discounted by it for him, which notes are not yet due under the mistaken belief that the bank still holds them, entries being made in its books to the effect that the notes are paid, is entitled, on the appointment of a receiver of its property before the maturity of the notes, to have them paid out of funds coming into his hands. There was no claim in this case however, as explained in *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, that the proceeds of the checks had not gone into the general fund of the bank, or that they had not passed in some form to the receiver.

And *Independent District v. King*, 50 Iowa, 497, 45 N. W. 908, holds that a bank in which a school district treasurer, contrary to law, deposits in his own name money of the district, notifying the bank that it is school money, holds it in trust for the district; and that, on its becoming insolvent, the district is entitled to priority

al fund in the shape of some investment made by the trustee on behalf of his cestui *in trust*.

Drovers' & M. Nat. Bank v. Roller; Enlar v. Offutt; Cavin v. Gleason; Central Nat. Bank v. Connecticut Mut. L. Ins. Co.; later v. Oriental Mills; and Little v. Chadwick.—*supra*; Thompson's Appeal, 22 Pa. 6; Shields v. Thomas; Ferchen v. Arndt; and Philadelphia Nat. Bank v. Dowd,—*supra*.

If the money which actually came into the hands of the receivers is impressed with a trust, such trust is in favor of those persons who created such fund, and not in favor of the appellant.

Wasson v. Hawkins, 59 Fed. 233; Lake Erie & W. R. Co. v. Indianapolis Nat. Bank, 15 Fed. 690; Beal v. Somerville, 17 L. R. A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; Furber v. Stephens, 35 Fed. 17; Quin v. Earle, 95 Fed. 728; Pott v. Schmucker, 84 Md. 554, 35 L. R. A. 392, 17 Am. St. Rep. 415, 36 Atl. 592.

Boyd, J., delivered the opinion of the court:

This is an appeal from an order overruling the exceptions to an audit distributing assets of the City Trust & Banking Company. The appellant chartered the steamship *Astrea* for five months at \$4,001-

in funds in the hands of the assignee for creditors, although the money so deposited has been paid out, and cannot be traced into any of the property going into the assignee's hands,—at least, unless it is affirmatively shown that the estate coming into his hands has not been increased thereby.

And Richardson v. New Orleans Debenture Redemption Co. 52 L. R. A. 67, 42 C. C. A. 619, 102 Fed. 780, holds that a deposit obtained by fraud, when a bank is hopelessly insolvent, creates a trust in favor of the depositor, and can be recovered from a receiver of the company, even if the identical money deposited does not pass into his hands, where the funds received by him are in any event increased by the amount of the deposit.

And Woodhouse v. Crandall, 197 Ill. 104, 38 L. R. A. 385, 64 N. E. 292, holds that, if a bank fails after receiving money to be kept as a trust fund for the benefit of the depositor, it will be presumed that enough of the money in its possession when it closes its doors, to satisfy such fund, belongs to the trust; and that, if the balance on hand is not equal to such fund, the entire balance will be turned over to the beneficiary.

It should be noted, however, that in ITALIAN FRUIT & IMPORTING CO. v. PENNIMAN any presumption which might have existed, that any part of the trust fund went into the assets going to the receivers, was expressly rebutted; and that the amount of

.25 per month, payable semimonthly in advance. The owner demanded security, and the City Trust & Banking Company gave what is spoken of as a "banker's guaranty" for that purpose on March 14, 1903. The appellant company had an account with the banking company previous to that time, and on that date drew a certified check for \$15,000 to the order of Wm. F. Wheatley, who was president of the banking company, which was charged to the general account of the appellant. At the time the certified check was given, the appellant apparently did not have the full amount in its account, but it was made good a day or two afterward. The receiving teller testified that the certified check was credited to an account in which the banking company kept "special moneys for disbursements that we were obligated for." There is some controversy between the parties as to the exact status of this fund; but it is shown that, after the check was given, the representative of the steamship was satisfied. An effort was made to get a bonding company as security for the charter party; but that failed. The object was to release the \$15,000 so that appellant would have the use of it. An arrangement was made by which the banking company was to pay the semimonthly charges for the vessel out of the \$15,000 and some additional deposits

such assets was not in any manner increased because of the special trust fund.

That the assets in the hands of the receivers, on which the claim was made, having been deposited in the afternoon of the day on which the receivers were appointed, belonged to those making deposit,—at least, if there was only one depositor,—instead of to the bank, might, it would seem, be set up as another reason for sustaining the holding of the court. Thus, it has been held in *Re Commercial Bank*, 1 Ohio N. P. 358; *Chaffee v. Fort*, 2 Lans. 81; and *Furber v. Stephens*, 35 Fed. 17,—that one depositing money in an insolvent bank on the day of, and a short time before, its closing, may recover the same from the receiver if it has been kept in a separate package.

But *Ex parte Clutton, Fonblanque*, 187, holds that, where money was paid after office hours, and, on the same evening, one of the partners in the bank made a declaration in insolvency, which was afterwards acquiesced in by the other partner; and the bank never afterwards opened for business, but was adjudicated bankrupt,—the amount so deposited passed to the assignee.

And *Re North River Bank*, 60 Hun. 91, 14 N. Y. Supp. 261, holds that one making a deposit two hours before the bank closes cannot recover it from the receiver, where it has gone into the general funds of the bank, unless he shows that it has reached the hands of the receiver.

made by appellant which were necessary to meet the charges for five months. It did make some payments, and, on June 6, 1902, there was still a balance of \$8,786.48. On that date the banking company was placed in the hands of receivers, who are the appellees, and the appellant filed a petition alleging that said balance was a special fund held in trust for the payment of the hire of the ship, and was not a regular deposit subject to check. The petition asked the court to pass an order requiring the receivers to pay said sum to a trustee to be appointed by the court, to be applied towards the payment of the hire of the ship as it became due. The court passed an order for the receivers to show cause why that should not be done. They answered the petition. Testimony was taken before an examiner, and some before the auditor. An audit was stated, distributing 20 per cent to the general creditors, including the appellant, which filed exceptions because it was not distributed to in full payment of its account. There is some controversy between the parties as to whether the relation of trustee and *cestui que trust* did not exist between the banking company and the appellant; but, in the view we take of the case, that is immaterial. The contradicted testimony of Mr. Carrington, one of the receivers, shows that on June 6th there appeared by the books of the banking company to be in other banks and on hand \$4,485.69, of which amount only \$2,062.75 was received by the receivers, in currency and checks. The latter amount was deposited after 12 o'clock on that day, and was in the vault of the company. All moneys received prior to 12 o'clock, it being Saturday, were deposited in one or more of several banks named, as all of the banking company's reserve agents closed their doors at that hour. The receivers never received anything from the apparent balances in the banks, as they were held by the respective banks as credits on amounts due them by the banking company, excepting in one instance, where the balance in a New York trust company was attached. So the only amount that could possibly be claimed by the appellant is the \$2,062.75, and, as Mr. Carrington proved that the identical money they received was deposited by depositors with the banking company after 12 o'clock the day the receivers were appointed, it is difficult to understand upon what theory the appellant can claim it, or any part of it.

The cases of Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497, and Drovers' & M. Nat. Bank v. Roller, 85 Md. 495, 36 L. R. A. 767, 60 Am. St. Rep. 344, 37 Atl. 30, are conclusive of the question, without requiring reference to those else- 1 L.R.A. (N.S.)

where. It was said in the former that, as long as a trust fund can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow the right to be defeated by the wrongful act of the trustee or fiduciary in mixing or commingling the trust fund with funds of his own or even those of a third party. The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him. It makes no difference whether the fund be traced into a bank account, into the hands of an individual or firm; if its identity can be established, and no superior rights of innocent parties have intervened, it will be held for the benefit of the *cestui que trust*. Nor does the fact that it has been changed or altered in its nature or character affect the relation between the *cestui que trust* and the trustee, or those claiming under him. "The sole question, therefore, in every case where trust property is attempted to be traced, is whether it can or cannot be identified either in its original or altered form." That test disposes of the appellant's claim for priority. This fund is not only not identified as in any way belonging to it, but it is affirmatively shown that it never did. The cases cited above have so fully considered the question, and so clearly explained the position this court has taken, that it would be useless to prolong this opinion by a further discussion of the subject.

The appellant does not claim any of the other money realized by the receivers from the assets of the banking company and distributed in the audit. Mr. Carrington said they received it "from a general recourse against the assets of the City Trust & Banking Company, consisting of bonds, and stock, and collections on notes, and other obligations." No attempt was made to trace the appellant's funds, or any part thereof, into those assets. The order of the court below overruling the exceptions and ratifying the audit will be affirmed.

Order affirmed, the appellant to pay the costs.

MARYLAND COURT OF APPEALS.

STATE OF MARYLAND, Appt.,
v.

G. HARLAN WILLIAMS, Receiver of Home
Fire Insurance Company.

(.... Md.)

1. Insurance company—insolvency—priority
of state.

The state has no preference over other

editors for payment of losses and unearned premiums out of the assets in the hands of a receiver of an insolvent insurance company with which it has insured state property.

Costs—against state.

Costs cannot be awarded against the state in civil actions, in the absence of express statutory authority.

(June 23, 1905.)

APPEAL by the state from an order of Circuit Court No. 2 of Baltimore City dismissing a petition to establish priority of assets in the hands of defendant. Modified.

The facts are stated in the opinion.

Mr. William S. Bryan, Jr., Attorney General, for appellant:

The sovereign is never responsible for debts.

Case Note.—The court in the above case relies upon *State v. Bank of Maryland*, 6 Gill & J. 206, 26 Am. Dec. 561, in denying the right of a state to priority over other creditors in the payment of debts arising upon a simple contract claim. This case was referred to with approval in *Orem v. Wrightson*, 51 Md. 42, 34 Am. Dec. 286, as settling the rule as to the state's priority as a prerogative right derived from the common law, enabling it to be paid first, except where some antecedent lien stands in the way. The case was also cited in *State v. Foster*, 5 Wro. 210, 29 L. R. A. 226, 63 Am. St. Rep. 47, 33 Pac. 926, in which it was held that the right of the state or a municipality, if any exists, to priority or preference in payment from an insolvent estate, cannot be asserted after a general assignment for creditors which passes the title.

In *Parlett v. Dugan*, 85 Md. 410, 37 Atl. 36, the state is denied priority of payment of taxes out of the funds in the hands of a trustee for the benefit of creditors, where the taxes are due on property which the trustee refuses to take into his possession. The case of *State v. Bank of Maryland* was distinguished on the ground that the property primarily liable for the taxes was still in existence and ample for their payment.

But in *Middlesex County v. State Bank*, 29 N. J. Eq. 273, which also referred to the case of *State v. Bank of Maryland*, it was held that the state of New Jersey does not possess the common-law prerogative to have its claims paid before the debts of other creditors.

Some other cases not referred to in *STATE v. WILLIAMS* or cited in the authorities there mentioned, but which also pass on the question of the right of the state to priority of payment of claims, are as follows:

In *United States v. State Bank*, 6 Pet. 29, 4 L. ed. 308, it was held that the right of the United States to priority of payment of debts due it does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of its statutes. 1 L.R.A. (N.S.)

State use of Charlotte Hall School v. Greenwell, 4 Gill & J. 408; *Stanley v. Schwalby*, 162 U. S. 272, 40 L. ed. 966, 16 Sup. Ct. Rep. 754; *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370; *United States v. Barker*, 2 Wheat. 395, 4 L. ed. 271; *The Antelope*, 12 Wheat. 546, 6 L. ed. 723; *United States v. Ringgold*, 8 Pet. 150, 8 L. ed. 899; *United States v. Boyd*, 5 How. 20, 12 L. ed. 36; *United States v. Thompson*, 98 U. S. 489, 25 L. ed. 195; *Carlisle v. Cooper*, 12 C. C. A. 235, 26 U. S. App. 240, 64 Fed. 472; *Marine v. Lyon*, 10 C. C. A. 315, 8 U. S. App. 573, 62 Fed. 153; *State ex rel. Pollard v. Brewer*, 59 Ala. 134; *Noyes v. State*, 46 Wis. 251, 32 Am. Rep. 710, 1 N. W. 1; *Sandberg v. State*, 113 Wis. 580, 89 N. W. 504.

The state had a right to a priority in payment over other creditors holding debts of the same class.

In South Carolina it is held that the state is not entitled to priority over other creditors except in cases provided by statute. *State v. Cleary*, 2 Hill, L. 600.

But in *Seay v. Bank of Rome*, 66 Ga. 615, the court held that debts due the state have priority in the distribution of the assets of an insolvent over debts due to individuals, without regard to the respective dates of the liens.

In *Bent v. Hubbardston*, 138 Mass. 99, it was held that taxes collected by a tax collector and unaccounted for become a debt to the town, and a claim against his estate in insolvency, for which the town is entitled to priority.

And in *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260, 18 N. E. 92, the state was given a paramount right to collect from money in the hands of a receiver taxes due from a railroad corporation, when the railroad was operated by the receiver appointed in a mortgage foreclosure. The same rule as to priority is sustained in *Gray v. Logan County*, 7 Okla. 324, 54 Pac. 485.

Minnesota v. Central Trust Co. 36 C. C. A. 218, 94 Fed. 248, held that the statutory tax lien on personal property was paramount to every private lien, prior or subsequent.

But in *Schenck v. Consumers' Coal Co.* 26 Abb. N. C. 356, 14 N. Y. Supp. 343, the court refused to direct a receiver to pay taxes in preference to possible liens for employees' wages.

Baxter v. Baxter, 23 S. C. 114, sustains the state's right to priority of payment in the case of a debt due from a surety on a county treasurer's bond, at the time of his death, for the default of his principal.

But in *Ramsey's Appeal*, 4 Watts, 71, it was held that a judgment of the state against a decedent ranks with other judgments.

By taking a mortgage security the state does not waive its right to priority. *Lenoir v. Winn*, 4 Desauss. Eq. 65, 6 Am. Dec. 597.

3 Bl. Com. 420; Davidson v. Clayland, 1 Harr. & J. 549; State v. Baltimore, 10 Md. 504; Green's Estate, 4 Md. Ch. 356; Murray v. Ridley, 3 Harr. & M'H. 171; State v. Rogers, 2 Harr. & M'H. 198; State v. Bank of Maryland, 6 Gill & J. 206; 26 Am. Dec. 561; Smith v. State, 5 Gill, 51; Orem v. Wrightson, 51 Md. 42, 34 Am. Rep. 286.

Mr. Charles W. Heusler for appellee.

Pearce, J., delivered the opinion of the court:

As a result of the great fire in the city of Baltimore on February 7 and 8, 1904, the Home Fire Insurance Company of Baltimore became insolvent, and upon a bill filed in circuit court No. 2 of Baltimore city by Bernard Wiesenfeld, a stockholder, and Lloyd Wilkinson, state insurance commissioner of Maryland, G. Harlan Williams was, with the consent of said company, appointed receiver to settle and close up its business. Subsequently the state of Maryland, by its attorney general, Hon. William S. Bryan, Jr., filed a petition in that cause showing that on April 4, 1902, said insurance company issued a policy of insurance to the state of Maryland insuring certain public buildings described in said policy, in the amounts specified therein, from noon of April 9, 1902, to noon of April 9, 1907, in consideration of a premium of \$1,052.80 paid by said state to said company; that among the public buildings so insured were three of the state tobacco warehouses, all of which were destroyed in said fire, and upon which the aggregate insurance under said policy was \$17,500; that the state had furnished due proof of loss to said receiver, who had accepted the same; that upon the appointment of said receiver, on the ground of admitted insolvency, all the outstanding policies of insurance issued by said company were rescinded and annulled, and the state of Maryland became entitled to the return to it by said receiver of the unearned premium paid by it upon the policy upon said state tobacco warehouses, and that the amount of said unearned premium was the sum of \$661.10; that there was due the state of Maryland from the said company, in addition to the above unearned premium, the sum of \$17,500, being the amount insured, aggregating \$18,161.10 with interest until paid, for which amount the state was entitled to a preference over any and all creditors of said company; and the prayer of the petition was that the receiver be ordered to pay the same out of the first funds coming into his hands as such receiver. The receiver answered this petition, admitting all the allegations of fact therein, except that he alleged the correct

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amount of the unearned premium was \$747.63, but did not admit that the indebtedness carried interest until paid. It was held that the state was entitled to a preference over any creditor of said company, but submitted these questions to the court. The court, upon consideration, dismissed the petition, with costs, and this appeal is taken from that order.

An auditor's account was subsequently stated, in which the state was allowed only a *pro rata* dividend on this claim with other creditors, to the ratification of which account the state excepted; and said account was ratified except as to this dividend. It was held that the question of the state's priority being reserved by the order of ratification, and the receiver having in his hands sufficient funds to pay said claim in full if finally allowed as a preferred claim.

Two questions arise upon this appeal. First. Is the state entitled to the preference claimed? Second. If not so entitled, was it an error to award costs against the state?

We think the case of State v. Bank of Maryland, 6 Gill & J. 206, 26 Am. Dec. 561 is decisive against the preference of the state. In that case the general principle upon which the preference or priority of the state over other creditors as against the property of a common debtor were very carefully considered in an elaborate opinion by Chief Justice Buchanan. The Bank of Maryland, being insolvent, conveyed all its property, funds, rights, and credits to trustees for the benefit of its creditors. Before and on the date of this conveyance the treasurer of the Western Shore of the State of Maryland had on deposit in said bank the sum of \$50,089.96 of the public money of the state, and after the date of said conveyance filed a bill in equity against the bank and its said trustees, claiming to be preferred in payment of said sum out of the funds in the trustees' hands; but this preference was denied and the bill was dismissed. The court said: "In State v. Rogers, 2 Harr. & M'H. 198; Murray v. Ridley, 3 Harr. & M'H. 171; and Conner v. Chew, 1 Harr. & J. 417, it was held that at common law the state had a preference and a right to be first paid out of the estates of deceased persons, where no law stood in the way. These cases were decided in the late general court, and were not appealed from, but acquiesced in by the parties contesting the right. And in State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534, and Dashiell v. Atty. Gen. 5 Harr. & J. 392, 9 Am. Dec. 572, it was decided by this court that the common law was adopted by the 3d article of the Bill of Rights, so far at least as it was not inconsistent with the principles of that instrument and the

ature of our political institutions.' It is so late, therefore, at this day to deny the state's right at common law to have its debt first paid out of the property of its debtor remaining in his hands, and no lien standing in the way. For notwithstanding all that has been said in disparagement of its right of priority, it is not perceived to be inconsistent with the principles or spirit of our political institutions. It does not, indeed, exist here with all the incidents to the royal prerogative right in England. We have not the writ of protection, nor the extent in chief, or in aid. And the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid where the individual creditor has no antecedent lien overreaching it." Judge Buchanan then proceeded to inquire whether that was a case in which the state's priority attached, or whether it had been defeated by the act of the bank, and in considering that question said: "The debt due from the bank to the state is a debt on simple contract only, and not a lien, as is, and must be conceded. The state therefore having no lien on the property covered by the deed of trust, but a priority only in the payment of its claim, if that right of priority has been lost, it is subject, claiming under the common-law, to the same common-law rule applicable to the royal prerogative right of priority in England of the same description. That right in England is enforced by the process in the writ of extent in chief, or in aid, according to circumstances, and may be here by proceedings known to our courts. But in either case, to make it available, the proceeding must be resorted to before other vested rights to the property sought to be subjected to the claim are acquired." In support of this statement of the law he cites 2 Tidd's Practice, 1098, 1099, where it is said: "When goods are bona fide sold, or fairly assigned by the King's debtor to the trustees for the benefit of his creditors, before the lapse of the extent, they cannot be taken under it, even though in the latter case the debtor was a trader within the bankrupt laws, and the assignment was an act of bankruptcy;" and Mr. Tidd is sustained by the cases of King ex rel. Braddock v. Watkins, 3 Exch. 6, and Giles v. Grover (H. L. (Ac.) 1 Clark & F. 72, cited and commented on by Judge Buchanan. In the latter case Lord Chief Justice Tindal states the controlling principle thus: "The actual sale of property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the Crown process, the property is protected therefrom; but where

it is not completed, the property may be seized thereunder." This language is in exact accord with the careful and accurate expression of Judge Buchanan when, in the passage above quoted, he limits the state's priority to "the property of its debtor remaining in his hands," and where in a later passage in the same opinion, he says: "If the property be fairly and bona fide changed, or the right of the individual creditor be completed before the extent, either by sale under fi. fa. or a valid conveyance to him, or to a trustee for his benefit; the extent, coming afterwards, will be unavailing; there being no point of time at which the two rights were in conflict, and nothing for the extent to act upon after the property ceases to be the property of the debtor." There is no conflict or inconsistency between that case and any of the cases cited by the learned attorney general in his argument in this case.

The case of Davidson v. Clayland, 1 Harr. & J. 546, was not a case of preference or priority generally, but a statutory lien, and that lien restricted to the debtor's lands, and not extended to his personal property as well.

In State v. Bank of Maryland, page 230 of 6 Gill & J. 26 Am. Dec. 561, *supra*, the court points out the futility of attempting to assimilate the condition of the bank in that case, after the execution of the deed, to that of a deceased debtor, where the executor or administrator takes the funds of the deceased to be distributed according to law, subject to such preferences as the law allows.

Nor is there any conflict with the law as stated by Mr. Alexander in his note on page 13 of Alexander's British Statutes, in which he says: "It was an established rule of the common law that, where the King's right and that of a private subject met at one and the same time, the King's should be preferred;" nor with the case of Green's Estate, 4 Md. Ch. 349, in which two judgments were rendered against Green in his lifetime on April 17, 1837, one at the suit of the state, the other at suit of Nicholas Watkins; and the state was held entitled to priority of payment out of the proceeds of sale of his real estate. The entry of these two judgments on the same day, and while the property remained the property of the common debtor, clearly illustrates what is meant by the meeting of two conflicting rights at the same time.

We do not perceive any reason why any distinction should be made between the effect of such a conveyance as was made in the case of State v. Bank of Maryland, 6 Gill & J. 230, 26 Am. Dec. 561, and the decree in this case, passed upon a bill

praying the dissolution of an insolvent corporation, in which cases the receivers appointed by a court under § 382 of article 23 of the Code of Public General Laws are vested with all the estate and assets of every kind belonging to such corporation from the time of their qualifying as receivers, and shall be trustees thereof for the benefit of the creditors of such corporation and its stockholders. For the reasons given, we are of opinion the priority of the state was properly denied.

An examination of the authorities has satisfied us that costs cannot properly be awarded against the state in civil actions, in the absence of a statute giving express authority to render such a judgment. State use of Charlotte Hall School v. Greenwell, 4 Gill & J. 407; United States v. Barker, 2 Wheat. 395, 4 L. ed. 271; The Antelope, 12 Wheat. 550, 6 L. ed. 725; Stanley v. Schwalby, 102 U. S. 272, 40 L. ed. 906, 16 Sup. Ct. Rep. 754; Sandberg v. State, 113 Wis. 589, 89 N. W. 504,—declaring that the doubt expressed in Noyes v. State, 46 Wis. 250, 32 Am. Rep. 710, 1 N. W. 1, as to civil actions to be unfounded. We have been referred to State v. Maryland Agri. & Mechanical Asso. 98 Md. 223, 56 Atl. 484, as authority for the allowance of costs against the state. The bill in that case was dismissed by the circuit court without giving costs against the state, and their allowance in this court upon affirming the decree was through inadvertence. This opinion, however, will remove any question as to the propriety of such allowance in future cases.

The order appealed from is modified by striking therefrom the award of costs, and, as so modified, is affirmed.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

CHARLES N. BOULDEN, Appt.,

v.

WILLIAM T. STILWELL et al.

(100 Md. 543.)

1. Fraud—misrepresentations to secure sale of stock.

The secretary of a corporation who is also a stockholder cannot maintain an action against the other officers for fraudulent rep-

Case Note.—The court in BOULDEN v. STILWELL discusses the liability of an officer of a corporation for the fraudulent representations which induce another member of the corporation to sell his stock, and cites and discusses with approval the case of McAleer v. Horsey, 35 Md. 439. This case was referred to with approval in Cahill v. Apple- 1 L.R.A. (N.S.)

resentations upon which he acted, and who were alleged to have been made to induce him to dispose of his stock to them at a loss, where they amount merely to representations that the corporation was going down, that one had bought the other shares and was going to run the business as a family affair, and would depose the secretary, and that this was his last chance to get his money out; and the fact that was not permitted to keep the books down to date, so that he did not know the actual state of the business, is immaterial.

2. Same—measure of damages—future sales.

That stock was resold at a profit several months after it was purchased by one who is alleged to have acted fraudulently is not sufficient to show that it was worth the amount at the time of the alleged fraudulent purchase, for the purpose of forming a basis for damages.

(March 22, 1905.)

APPPEAL by plaintiff from a judgment of the Superior Court of Baltimore City in favor of defendants in an action brought to recover damages for alleged fraudulent representations which were alleged to have induced plaintiff to dispose of certain shares of stock at a loss. Affirmed.

The facts are stated in the opinion.

Messrs. C. Dodd McFarland and Henry Bryant, for appellant:

A cause of action arises where, in a given case, there is fraud accompanied with damage.

McAleer v. Horsey, 35 Md. 454; Buschman v. Codd, 52 Md. 207; Pasley v. Freeman, 3 T. R. 51; Robertson v. Parks, 7 Md. 131, 24 Atl. 411.

Messrs. George R. Gaither and Leon I. Greenbaum, for appellees:

Plaintiff is not entitled to recover if he had at hand the means to ascertain the truth of the alleged false representations or was in as good a position as the appellees to find out the facts, and form his own conclusions.

Buschman v. Codd, 52 Md. 208; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Weaver v. Shriver, 79 Md. 530, 30 Atl. 111.

Pearce, J., delivered the opinion of the court:

The plaintiff in this case complains that by means of certain false and fraudulent

representations, 98 Md. 493, 56 Atl. 794, which is cited in BOULDEN v. STILWELL. This was a case involving the purchase of stock through the alleged fraudulent representations of the president of the corporation. The court held that an instruction to the jury that if the representations "were either known to be false, or, by the exercise of

presentations made to him by the defendants he was induced to sell to Leroux, one of the defendants, certain stock held by the plaintiff in the Structural Iron & Steel Company of Baltimore City, whereby he has sustained damage. The declaration in substance alleges that Stilwell was president and Leroux vice president and general manager of the company, each holding a large number of shares therein; that plaintiff was acting secretary and treasurer, holding 215 shares therein; that defendants, conspiring to obtain from the plaintiff his said shares of stock at a less sum than their real value, entered into a conspiracy, fraudulent combination, and arrangement between them, by which defendant Stilwell would represent to the plaintiff that he had sold his shares of stock in said company to Leroux; that the company was losing money; that it was about to "fall down" meaning thereby that it was about to fail and become insolvent; that he (Stilwell) could not carry it financially much longer;

that Leroux should represent to plaintiff that he had bought Stilwell's stock, which would give him a majority of the stock in the company, and would result in removing plaintiff from his employment in the company; that these representations were made to him by the defendants in pursuance of said conspiracy, and by reason thereof he was induced to sell and deliver his 215 shares of stock for \$5,625, whereas they were of the value of \$21,500, which value was then unknown to him, and of which he had no means of knowledge, though such true value was then known to defendants; that these representations were falsely and fraudulently made, with intent to deceive and defraud him, and did so deceive and defraud him, and that, if the same had not been so made and relied on, he would not have sold his stock; and that by means of the premises he had sustained damage to the extent of \$15,850. The general issue plea was filed, and at the close of the plaintiff's testimony the defendants moved the

ordinary care (that is, such care as might reasonably be expected of an ordinarily prudent and intelligent bank president under the circumstances), ought, in your judgment, to have been known by him to be false," is error. The case was also referred to in *Byrd v. Rautman*, 85 Md. 416, 36 Atl. 199, which was also cited in *BOULDEN v. STILWELL*, and in which it was held that the buyer's false statement as to his purpose in procuring the stock does not constitute fraud which will entitle the seller to rescind. The court said that if the misrepresentations relate to the one in question only in a trivial and unimportant manner, the party complaining will have no right to rely upon them as governing his conduct; his action then, cannot be attributed to the misrepresentations, but to his own folly; and in such case he cannot ask the law to relieve him from the consequences. *McAleer v. Horsey* was cited in *Weaver v. Shriver*, 9 Md. 546, 30 Atl. 189, which held that an action for deceit in the sale of stock could not be maintained by a purchaser who had been in the employ of the corporation issuing the stock, and who could have ascertained all the facts.

The court also discusses with approval the case of *Robertson v. Parks*, 76 Md. 118, 4 Atl. 411. This case was referred to in *American Bldg. & L. Asso. v. Bear*, 48 Neb. 57, 67 N. W. 500, in which the court denied the right to maintain an action to rescind a contract of subscription to stock, where the only fraud complained of was the statement in a circular regarding the existence of an advisory board. The court said that the mere intention to defraud, without damage, was insufficient; and that the representations relied upon, which related to matters of collateral inducement only, did not afford a ground for rescission. *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55, was relied upon 1 L.R.A. (N.S.)

for this doctrine. The *Robertson Case* was also cited with approval in *Cahill v. Applegarth and Weaver v. Shriver*.

The other authorities relied upon by the court are to the same effect as those already mentioned, and have not been cited in other cases.

Some additional cases which pass upon the liability of an officer of a corporation for misrepresentations which induce the sale or purchase of stock are as follows: The general rule is stated in *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426, which holds that an action for deceit will not lie in the purchase or sale of stock if there are no misrepresentations by words or acts, and no active intentional concealment, and no intentional silence when there is a duty to speak.

In *Krumbhaar v. Griffiths*, 151 Pa. 223, 25 Atl. 64, any confidential or fiduciary relation existing between an officer of the corporation and a person from whom such officer purchases stock is denied. The court held that the sale of stock to the secretary of the corporation, who had no knowledge, at the time of the purchase, of any movement which would increase the value of the stock, could not be avoided on the ground of fraud.

And in *Stark v. Soule*, 27 N. Y. Week. Dig. 80, 9 N. Y. S. R. 555, it was held that the act of an officer of a corporation in procuring a transfer of stock to himself, by stating that it was worthless, when in fact it was valuable, was not a breach of any fiduciary relation, and, of itself, was not a ground for avoiding a sale.

In *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827, bank directors were held liable to one who purchased bank stock relying upon a published statement of the condition of the bank, which was false. In *Trimble v. Ward*, 97

court to strike out certain evidence which had been admitted subject to exception, which motion was granted, and thereupon the court granted a prayer offered by the defendants that there was no evidence legally sufficient to entitle the plaintiff to recover, and that the verdict must be for defendants. The single exception is to the granting of this motion and prayer, and considering the instruction given, which will be first taken up, we are required to assume the truth of all the plaintiff's evidence, and all inferences fairly deducible from it.

The general principles which must control our judgment in this case have been established in a series of cases in Maryland, the most important of which are *McAleer v. Horsey*, 35 Md. 439; *Buschman v. Codd*, 52 Md. 202; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411, *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099; *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794. When the decision in *McAleer v. Horsey* was rendered it was there said that we then had for our guidance no express decision of this court upon several points involved; but that decision has ever since been regarded as a notable contribution to the learning upon this sub-

ject, and later cases have covered almost every point likely to arise in such action. Most of these decisions have been made in cases where damages were claimed as the result of purchases induced by false or fraudulent representations; but there can be no good reason why sales so induced, as resulting in damage, should not be governed by the same principles, and these have been so applied in this state in *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1099. In *McAleer v. Horsey*, Judge Miller observed that "neither the common law nor any code of human laws seeks to enforce the rule of perfect morality declared by Divine authority, which acknowledges as its one principle the duty of doing to others as we would that others should do to us, and which, by consequence, absolutely excludes and prohibits a cunning and craft or astuteness practiced by anyone for his own exclusive benefit. And it thence follows that a certain amount of selfish cunning passes unrecognized by courts of justice, and that a man may procure to himself, in his dealings with others, some advantages to which he has no moral right, but to which he may succeed in establishing a perfect legal title." In determining

Ky. 748, 31 S. W. 864, the same rule was applied to a similar state of facts.

In *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914, it was held that officers of a corporation who sign and issue certificates of stock stating upon their faces that the corporation is incorporated according to the laws of a particular state, and that the stock is nonassessable, thereby represent the stock as not invalid because of their acts or omissions, and if such representations are false, the officers will be liable in damages to one who has taken the certificates in good faith, relying upon such representations. And in *Rothmiller v. Stein*, 143 N. Y. 581, 26 L. R. A. 148, 38 N. E. 718, it was held that directors of a corporation who falsely represent its condition to a stockholder, knowing that he seeks information to guide his decision as to selling his stock, are liable for damages sustained by him on account of their misrepresentations, although they were not made with the purpose of inducing the sale.

In *Morgan v. Skiddy*, 62 N. Y. 319, the court held that a director of a corporation who knowingly permits the circulation of a prospectus containing false statements concerning the working capital of a corporation is liable to one who purchases stock, relying on the truth of such statements. The court said that the directors of a company are supposed to know the facts touching its condition and property, and their statements in respect to its affairs naturally attract public confidence. The same doctrine is laid down in *Cook on Stock and Stockholders*, § 145, and in *Bigelow on Frauds*, vol. 1, p. 346.

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Bigelow on Frauds, vol. 1, p. 544, states that it is sufficient if the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action; citing *McAleer v. Horsey*. And in *Cook on Corporations*, vol. 1, § 14 it is stated that mere matters of opinion as to whether the enterprise can be completed or when it will be completed, or the prospects of profits, cannot be misrepresentations; citing *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Shattuck v. Robbins*, 1 N. H. 565, 44 Atl. 694; and *Jefferson Hewitt*, 95 Cal. 535, 30 Pac. 772.

Mechem on Sales, vol. 2, §§ 836, states that representations concerning the worth of an article, or the amount for which it may be sold, are usually nothing more than the mere expression of an opinion respecting a subject upon which either party may easily acquaint himself. Where, however, one party has peculiar means of knowledge, not open to the other, or where a special confidence is reposed by one party in the opinion of the other, the rule is different, and it is equally well settled that false representations as to value, intended to deceive, and accomplishing that result, are to be regarded as fraud, and entitle the defrauded party to his remedy; citing *Wright v. Shriver*, 79 Md. 546, 30 Atl. 189; *McAleer v. Horsey*, 35 Md. 439; and *Merrill v. Philadelphia Land & Improv. Co.* 8 C. C. A. 444, U. S. App. 649, 60 Fed. 17. *Benjamin on Sales*, vol. 1, pp. 555, 556, and *Cook on Torts*, pp. 560, 567, lay down the same rule and cite the same cases.

ing in each case whether the fraud complained of is one which falls within the class above described, or within that other class which courts of justice will recognize and redress "by stepping in and annulling what has been done, or rectifying the wrong by sustaining an action for the deceit," we must be governed by certain precedents and rules which have been established as the result of all the cases, and which, in general terms, may be stated as follows: The foundation of the action is actual fraud, and nothing short of this will suffice. Consequently, a misrepresentation, believed by the speaker to be true, though induced by his ignorance or negligence, will not sustain an action for deceit. There must be either knowledge of the falsity of the representation, or such reckless indifference to truth in making it as is held equivalent to actual knowledge. The fraud must be material: by which is meant that without it the transaction would not have been made. It must be a statement of an alleged existing fact or facts, and not merely of some future or contingent event, or an expression of opinion as to the subject of the statement. The party to whom it is made must rely upon its truth, and must have the right, as a person of ordinary business prudence, to rely upon it, "otherwise it is his own folly or fault, for the consequences of which he cannot ask relief of the law;" and, finally, there must be damage directly resulting from the fraud. Nearly all the Maryland cases, and a number of the leading English cases, have been carefully considered in the recent case of *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794. and there is no occasion to review them here. Keeping in view the principles stated above, we will now briefly consider the testimony upon which this case was withdrawn from the jury.

In support of the averments of the narrative, a summary of which we have given, the plaintiff testified that in June, 1900, while he was employed by the receivers of the Columbian Dry Dock & Ironworks Company, having been with that company for twenty-four years previously, Stilwell proposed to him to go with a company which he and Leroux were about to reorganize as the Structural Iron & Steel Company, and said, if he would go with them, they would appoint him secretary and treasurer at the same salary they received; "each one of the three also to share and share alike in all profits, emoluments," etc.; that he accepted the offer, and a written agreement was entered into between them covering the offer, and assuring him the position for five years at a salary of \$50 per week; that he put \$5,000 in the company, representing 50

shares of preferred stock at par, with which he received, as a bonus, 165 shares of common stock; that the company had quite a number of government contracts, and things went on pretty well until the spring of 1901, when Stilwell and Leroux had several quarrels in his presence, in which each threatened to get out of the company, and which he then thought real quarrels, but which he afterwards learned were mock, or feigned, quarrels, intended to deceive and frighten him into getting out of the company; that in April, 1901, Stilwell told him that he was going to sell out to Leroux; that the company was going "to fall down;" and that, as he had gotten him into the company, and was his friend, he did not want him to remain in a company that was going "to fall down;" and handed him a letter, signed by himself, and addressed to plaintiff, informing him that he had sold his stock to Leroux on the terms stated in his proposition of April 12th, and he then repeated his advice to plaintiff to get out. Plaintiff then saw Leroux who said he had agreed to buy Stilwell's stock, which would give him a controlling interest; that the business was not productive enough to pay three salaried officers, and that he intended to run it as a family company. He told plaintiff this was his last opportunity to accept his offer, and that in reliance upon these statements he accepted the offer, and got out, receiving from Leroux for his 215 shares of stock \$5,650 in cash, of which \$5,000 was the par value of his 50 shares of preferred stock and \$650 was to compensate him for loss to that amount in the sale of some houses which he had sold to raise the money to pay for his stock when he took it, the 165 shares of common stock not being reckoned as of any value, and going with the 50 shares, as he had received it; that he subsequently learned that Stilwell never sold out to Leroux, but had furnished Leroux the money paid him for his stock; and that after this sale Stilwell and Leroux continued to be, respectively, president and vice president, and added to their salaries each one half of the salary he had received. The damage of which he complained was the loss of four years' salary under his contract at \$2,600 per annum, and \$24 per share on his 165 shares of common stock sold by Stilwell and Leroux to Keith some five or six months later; besides one third interest in the sale of the other stock, though it is difficult to understand the last item, as he claimed all the price of the 165 shares, and actually received all the price of the 50 preferred shares. In reply to the direct question from his counsel, "What induced you to sell your stock?" he replied: "The representations made to me at that meeting

that the company was going to fall down, and that Mr. Stilwell was going to get out, and the presentation of that paper, and the advice of Mr. Stilwell to get out while I could, and the offer of Mr. Leroux, and the conditions which would exist if Mr. Stilwell sold his stock to Leroux, giving Leroux controlling interest, and his telling me then and there he would vote me out. 'Now is your chance. Take your money, or we will put you out, and leave your money in the company. You can do as you please.'" Plaintiff also testified that Stilwell and Leroux would not permit him to open a set of books for the new company until six months after it was in operation, and that when opened they were required to be three months in arrears, and by reason of this he did not know and could not ascertain the condition of the company. He admitted on cross-examination that the agreement mentioned was canceled by mutual agreement when he sold his stock, and that was induced by the same reasons which caused him to sell his stock. Mr. Baker and Mr. Ochse, who were respectively the assistant and principal bookkeepers during 1901, testified that Stilwell and Leroux continued to be respectively president and vice president of the company until January, 1903, and that their salaries were increased as before stated after plaintiff got out. George C. Gantz testified that he owned 50 shares of preferred and 30 shares of the common stock, which he sold in July, 1901, through Stilwell, for \$5,050 cash, but did not know who bought them, and that he sold because Stilwell alarmed him by saying the company was losing money. He also said Stilwell told him he and Leroux had feigned quarrels in plaintiff's presence for the purpose of inducing him to sell his stock and get out of the company, and that he furnished Leroux the money paid him for his stock. Minor C. Keith testified that some time in the fall of 1901 he purchased from Stilwell and Leroux a large block of both preferred and common stock of the company, and through them all the residue of both kinds of stock, paying par for the preferred and about \$24 per share for the common; that they always spoke favorably as to the financial condition and future business of the company, and represented that its assets were sufficient to cover the total issue of preferred stock, and something, but not very much, on the common stock; that they furnished him a number of written statements, showing that the assets and liabilities were about even, but there were many bad debts, and that he understood afterwards there was a deficit; that some of the representations made

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to him afterwards proved not to be true, but he thought they were misled in making them. When the representations which plaintiff states caused him to cancel his contract and sell his stock are analyzed, it will be seen that none of them measured up to the requirements of the law. The representation that the company was going to fall down is not a statement of existing insolvency, but a prediction of future insolvency, and comes directly within the ruling in *Robertson v. Parks*, 76 Md. 135, 2 Atl. 411, where it was held that representations concerning the future value or profitability of the business should be excluded by the jury as a basis of recovery, and, as defendants' counsel well said in this brief in this case, "*caveat venditor*" is a sound a rule of law as "*caveat emptor*," though less frequently invoked. So Stilwell's declaration that he was going to get out, and that Leroux would vote Boulle out, are but declarations of future purpose subject to change of mind; and the advice of Stilwell and Leroux to accept the chance to get his money was but "buyer's talk," which in *Byrd v. Rautman*, 85 Md. 414, 36 Atl. 1009, it was said should not be regarded. Even Stilwell's letter, stating he had sold his stock to Leroux, so much relied on as a statement of an existing fact, comes within the category upon which plaintiff was not authorized to rely as the basis of an action for deceit; since in *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794, it was said that a false representation merely as to the ownership of stock would not justify a recovery. It should have been obvious to the plaintiff that if Leroux could with safety not only hold his own stock, but also purchase Stilwell's at par, he could at least with equal safety hold his stock, and that he could not blindly accept Stilwell's prediction that the company was about to fail. Nor is it material whether the money paid him for his stock was supplied by Stilwell or Leroux. In either event he was selling his stock at a premium in a company which his purchaser predicted was about to fail. He was secretary and treasurer of the company, and had at least equal means of knowledge as to its condition and prospects, and, although the books were not up to date, this was a disadvantage common to all three of the parties, and it must be held his own lack of business prudence and business courage which caused him to cancel his contract and sell his stock under the circumstances stated.

In *Buschman v. Codd*, 52 Md. 202, the case of *Vernon v. Keys*, 12 East, 632, was cited with approval upon the point that

where parties have equal means of knowledge as to the truth of representations relating to value or quality of the thing sold. An action for deceit will lie; and again, in *Lyrd v. Rautman* it was cited to show that a false representation as to a future event could not sustain an action. In *Vernon* the defendant represented to the plaintiff, his partner, that he was about to form a partnership with other persons, whom he could not disclose, and that they desired to buy the plaintiff's interest in the existing business, but that his intended partners would not give more than a certain sum, which the plaintiff, in reliance upon this statement, accepted; whereas the new partners had not refused to give more than that sum, but had authorized defendant to make the best terms he could, and he had in fact charged them a much higher sum than plaintiff had received. Lord Ellenborough held that the buyer was not liable in an action of deceit for thus misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered by the buyer, and that it was the seller's indiscretion to rely upon such statement. That case seems to be quite conclusive of the present as to the reliance to be placed upon the representations here made. But there are other objections to the plaintiff's recovery, touching the proof of the damage sustained. There is no proof that the defendants knew, at the time plaintiff sold his stock, that the common stock could be sold to Keith, or to anyone, for anything worth consideration, or even that the preferred stock could be sold for what they paid for it; for proof of value in September is no proof of equal value in the preceding April. In this aspect of the case plaintiff's claim for damages is merely a claim for future contingent profits on the common stock, and, as was said in *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, which was an action for deceit, "Liability does not include the expected fruits of an unrealized speculation."

In the view we take of this case, the result would not be altered if the testimony which was stricken out had remained in; and it is therefore unnecessary to consider the ruling upon the motion to strike out. This case is a practical illustration of the instances referred to by Judge Miller in which a man "may succeed in establishing a perfect legal title to advantages to which he has no moral right," if the testimony at this stage of the case is assumed to be true, as it must be.

The judgment is affirmed, with costs to the appellees above and below.

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MARYLAND COURT OF APPEALS.

CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, Appt.,

v.

MAYOR, ETC., OF BALTIMORE et al.

(.... Md.)

1. Taxation—franchise in street.

The easement acquired by the laying of pipes in the streets of a city under the franchise of a gas company is property distinct from the franchise, which may become the subject of taxation separate from the tax on the capital stock, which is intended to include the value of the franchise.

2. Same—bond debt of corporation.

The bonded indebtedness of a corporation cannot be included in the assessment of its property for taxation where the statutes provide for the assessment of such indebtedness to the holders of the obligations.

3. Same—valuation—review by court.

The court may review the valuation placed on property for taxation where the record shows that it was imposed in a whimsical, capricious, or unwarrantable way, instead of by the exercise of judgment, since such valuation would be no assessment.

4. Same—arbitrary valuation.

A valuation, for taxation, of the property of a corporation, which is arrived at by arbitrary manipulation of figures to reach a preconceived result, is void.

5. Same—assessment—presumption.

There can be no presumption in favor of an assessment for taxation which is arrived at, not by an exercise of judgment, but by an arbitrary manipulation of figures.

(June 22, 1905.)

Case Note.—As an authority for the doctrine that easements acquired by a corporation through the use of its franchise, by laying gas pipes in the public streets, may be assessed and taxed as real estate independent of the capital stock, which includes the value of the franchise, the court chiefly relies on the case of *Appeal Tax Court v. Union R. Co.* 50 Md. 274. This case had been cited by the courts frequently and with approval, but on questions differing from those decided in the case of *CONSOLIDATED GAS CO. v. BALTIMORE*. The case was, however, referred to in *Desty on Taxation*, § 63, in which it is stated that an easement enjoyed on the bed of a public street may be assessed and taxed as real estate.

The court also cites *Providence Gas Co. v. Thurber*, 2 R. I. 21, 55 Am. Dec. 621, in which it was held that the grant to a corporation of the right to lay gas pipes in the streets creates an easement, and the pipes so placed are taxable as real estate, relying on the case of *Boston Water Power Co. v. Boston*, 9 Met. 202, to sustain the proposition.

Providence Gas Co. v. Thurber, 2 R. I. 21,

A PPEAL from an order of the Baltimore City Court sustaining an assessment of appellant's property for taxation. Reversed.

The facts are stated in the opinion.

Messrs. Edgar H. Gans and W. Calvin Chestnut, for appellant:

The intangible right or franchise of the gas company to lay its mains under the public streets of the city is not a subject of taxation by the appeal tax court of Baltimore city under a proper construction of the tax laws of the state of Maryland. This right of the gas company to lay its mains in the public streets is a franchise.

14 Am. & Eng. Enc. Law, p. 4; New Orleans Gaslight Co. v. Louisiana Light & H. P. Mfg. Co. 115 U. S. 660, 29 L. ed. 523, 6 Sup. Ct. Rep. 252; Brooklyn v. Jourdan, 7 Abb. N. C. 23; State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; 10 Am. & Eng. Enc. Law, pp. 401, 402.

Whether a franchise or easement, it is

an incorporeal, intangible right. No authority is found where such intangible, incorporeal rights or franchises of corporations have ever been taxed, except by taxation of the stock.

Baltimore v. Baltimore & O. R. Co. 6 Gill 288, 48 Am. Dec. 531; State v. Philadelphia W. & B. R. Co. 45 Md. 361, 24 Am. Rep. 511; Gordon v. Baltimore, 5 Gill, 231; Tax Cases, 12 Gill & J. 117; Frederick County v. Farmers' & M. Nat. Bank, 48 Md. 117; Anne Arundel County v. Annapolis & E. Ridge R. Co. 47 Md. 592; State v. Baltimore & O. R. Co. 48 Md. 49.

You cannot tax both the real estate and the stock at their full value.

State v. Cumberland & P. R. Co. 40 Md. 52.

Wherever the attempt to tax franchises or easements has arisen in the manner here pursued, under corporate taxation statutes like ours, the exercise of the power has been held invalid.

Alexandria Canal R. & Bridge Co. v. Dis-

55 Am. Dec. 621, is referred to in the following cases:

In Paris v. Norway Water Co. 85 Me. 333, 21 L. R. A. 525, 35 Am. St. Rep. 371, 27 Atl. 143, and in Warwick & C. Water Co. v. Carr, 24 R. I. 231, 52 Atl. 1030, both of which sustain the taxation of water mains as real estate.

In Newark v. State Bd. of Taxation, 66 N. J. L. 469, 49 Atl. 525, in which it was held that the interest which a street railway company has in a highway over which it passes is an easement taxable as real estate. But, with reference to the taxation of the franchise of the railway company, the court said that the distinction between the taxation of the franchise and the property acquired by the corporation to enable it to enjoy its franchise must not be overlooked.

The court also cites the case of People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 441, 63 L. R. A. 884, 105 Am. St. Rep. 674, 67 N. E. 69, as authority for the proposition that the use derived from property through the enjoyment of a franchise is an element to be considered in placing a value on the easement for purposes of taxation.

This case was affirmed in 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, on writ of error, but the only questions considered were in respect to constitutional rights, i. e., whether the statute imposing a special franchise tax impaired the obligation of the contract by which the state granted the right to operate street railways in New York city in consideration of the payment of a gross sum, or an annual payment of a fixed amount or fixed percentage of earnings; or whether it deprived the corporation of the process of law, or denied it the equal protection of the laws.

Other cases citing the authorities mentioned in 1 L.R.A. (N.S.)

tioned in the case of CONSOLIDATED GAS CO. v. BALTIMORE, and sustaining substantially the same doctrine as to taxation of easements, are Shelbyville Water Co. v. People, 140 Ill. 545, 16 L. R. A. 505, 30 N. E. 678; State ex rel. St. Paul City R. Co. v. District Court, 31 Minn. 354, 17 N. W. 954; and Northern P. R. Co. v. Carland, 5 Mont. 146, 3 Pac. 134.

Some cases, not referred to in the case of CONSOLIDATED GAS CO. v. BALTIMORE, and which do not cite the authorities there mentioned, but which pass on the question as to what is real property for the purpose of taxation, are as follows:

In Tide Water Pipe Line Co. v. Berry, 57 N. J. L. 212, 21 Atl. 490, a pipe line for carrying petroleum, laid under the ground by virtue of a grant, was held to be taxable as real estate.

In Western U. Teleg. Co. v. State, 9 Barr 509, 40 Am. Rep. 99, a telegraph line was held to be taxable as realty.

In Capital City Gaslight Co. v. Charter Oak Ins. Co. 51 Iowa, 31, 50 N. W. 579, the court held that mains and pipes of a gas company are mere appurtenances of the realty, and are to be assessed as part of it.

But in People ex rel. Citizens' Gaslight Co. v. Board of Assessors, 39 N. Y. 81, gas mains under city streets were held not to be taxable as realty under the statutory meaning of the word "land."

In New Haven v. Fair Haven & W. R. Co. 38 Conn. 422, 9 Am. Rep. 399, the rails and sleepers, ties and spikes, of a street railway company, attached to the soil, were held to be real estate for purposes of assessment.

In People ex rel. New York & H. R. Co. v. Tax & A. Comrs. 101 N. Y. 322, 4 N. E. 127, tunnels, tracks, and viaducts of a railroad in New York city were held to be taxable as land.

ct of Columbia, 5 Mackey, 376; State v. Wulth Gas & Water Co. 76 Minn. 96, 57 R. A. 63, 78 N. W. 1032; People ex rel. Keystone Gas Co. v. Martin, 48 Hun, 193, 5 N. Y. S. R. 461; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 74 N. Y. 417, 63 L. R. A. 888, 105 Am. t. Rep. 674, 67 N. E. 69; State ex rel. Bee Hdg. Co. v. Savage, 65 Neb. 714, 91 N. W. 16; People ex rel. Delaware, L. & W. R. Co. v. Clapp, 152 N. Y. 490, 39 L. R. A. 37, 46 N. E. 842.

The assessment was purely arbitrary. People ex rel. Delaware, L. & W. R. Co. v. Clapp, 152 N. Y. 490, 39 L. R. A. 237, 46 N. E. 842; People ex rel. Panama R. Co. v. Tax Comrs. 104 N. Y. 240, 10 N. E. 437; People ex rel. Delaware & H. Canal Co. v. Stanley, 29 N. Y. S. R. 131, 8 N. Y. Supp. 63.

Messrs. Sylvan H. Lauchheimer and W. Abell Bruce for appellees.

McSherry, Ch. J., delivered the opinion of the court:

The Consolidated Gas Company of Baltimore is a corporation duly formed under the laws of Maryland. In the year 1904 it was assessed by the appeal tax court of Baltimore city, for the purposes of taxation, with sundry parcels of real estate, valued at \$2,697,791; with 79,000 services, at \$158; and with 455½ miles of gas mains, at \$1,131,640; making a total of \$3,987,431. This total was increased for 1905 to \$4,026,097. On September 23, 1904, the following notice was sent to the company by the appeal tax court: "This is to notify you that it is the purpose of the appeal tax court to increase the assessment on your mains, pipes, and other construction located in, on, under, or over the public highways of Baltimore city, so as to include the value of the easement enjoyed by you in said highways, and that on Thursday, September 29, 1904, at 12 o'clock, you will be given an opportunity to make such statements and present such proofs as you may desire, to show why an additional assessment of \$6,000,000 should not be placed on said real property. Thereafter the court may enter an increased assessment thereof, according to its best judgment and information in the premises." The company appeared by its counsel. No evidence was adduced by either side, but the company's counsel insisted that the contemplated or projected assessment of \$6,000,000 could not be legally made in the form or by the method proposed. On the day following the appeal tax court entered its conclusions in these words: "Additional assessment on mains, pipes, and other construction located in, on, or over public highways of Baltimore city, \$6,000,000." (N.S.)

so as to include the valuation of the easements enjoyed by said company in said highways, \$6,000,000." From that action or determination the gas company appealed to the Baltimore city court. Upon the trial of that appeal, evidence was offered with respect to the method pursued by the appeal tax court in arriving at the sum of \$6,000,000 as "the valuation of the easements enjoyed by said company in said highways;" and propositions of law, embodied in prayers, were presented, with a view of raising the question as to the right and authority of the city to tax the particular easement involved, and the further question as to the regularity of the mode adopted by the appeal tax court in reaching the result to which it came. The Baltimore city court rejected all the prayers of the gas company, but granted four out of the eight prayers presented by the city. The court, sitting without a jury, passed an order sustaining the action of the appeal tax court, and from that order this appeal was taken.

There are two questions in the case: First, Had the city the power to increase the prior assessment on the mains, etc., by the addition of \$6,000,000, so as to include by that addition the taxable value of what the appeal tax court describes as the easements enjoyed by the company in the highways? and, secondly, If it did have that power, has it properly and lawfully exerted it?

It is not denied by the appellant that the legislature could make provision for an independent assessment of the intangible, incorporeal right called by the company a "franchise," but claimed by the city, in view of the facts, to be an easement,—the right to occupy a certain space beneath the surface of the streets with gas mains and service pipes; but it is maintained on behalf of the appellant that the general assembly did not intend, by existing enactments, to allow the appeal tax court to assess as real property the right, privilege, or franchise to occupy the streets with gas mains, because that right, by whatever name you call it, like the franchise to carry on business, forms part of the value of the company's capital, and is taxable only through its shares of stock. It is obvious, when these two contentions are brought into juxtaposition, that, in order to determine the first inquiry with which we have to deal, the exact nature of the right in question, under existing conditions, must be definitely ascertained. It must be ascertained, however, not as a mere abstraction, nor purely from a philosophical standpoint, but especially and specifically with reference to and in the light of previous adjudications by this court, as applied to the actual facts in evidence. It is a question of taxation

which is before us. "An easement is a liberty, privilege, or advantage, without profit, which the owner of one parcel of land may have in the lands of another. An easement, although only an incorporeal right, and appurtenant to another, the dominant tenement, is yet properly denominated an interest in land which constitutes the servient tenement; and the expression 'estate or interest in lands,' when used in a statute, is broad enough to include such rights, for an easement must be an interest in or over the soil." 14 Cyc. Law & Proc. p. 1139. In every instance of a private easement (that is, an easement not enjoyed by the public), there exists the characteristic feature of two distinct tenements,—one dominant, and the other servient. On the other hand, a franchise is a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right. 2 Washb. Real Prop. 303. A franchise does not involve an interest in land. It is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land; but that circumstance does not make the franchise itself an interest in land. To define the nature of a thing by the accidents which are employed in its use is to confound the thing itself with the agencies applied in its adaptation. Because land may be required in putting a franchise into effective operation, it does not follow that the franchise is land, or an interest in land. But an easement is quite a different thing. It is essentially and inherently an interest in land. It is an estate,—a dominant estate imposed upon a servient tenement. To which of these two distinct and dissimilar classes does the right of the gas company to occupy with its mains the subsurface of the streets belong, in the contemplation of the revenue and tax laws of Maryland?

It will be found, upon examining some of the cases, that there is occasionally, in the arguments of counsel, a want of exactness in the use of terms, and now and then the right to do a particular thing, which is the franchise, is confused with the results achieved in the exercise of the right, and those results are inaccurately spoken of as the franchise. The right to occupy the streets with gas mains is a franchise. The actual occupation of them in that way, pursuant to the franchise, is the acquisition of an easement. You must distinguish between the right to do the thing, and the interest acquired in the soil by the exercise of that right. The right of a railroad company to be and to build a road is a franchise from the state. The roadbed acquired

by purchase or condemnation is an easement altogether distinct therefrom, though obtained as a result of the exercise of that pre-existing franchise. It is strictly accurate to say the right of a gas company to lay its pipes, and to use the streets of a city for the purposes of laying pipes to convey gas, is a franchise, and can only be conferred upon a corporation by the legislature. *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 362. It is equally correct to declare: "The right to use the public streets of a city for the purpose of laying gas pipes therein is, in my opinion, a franchise which the state alone can confer." *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. In each of these cases, and in many more that might be cited, the right to do the thing spoken of is the franchise. And so in *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh 78, 36 Am. Dec. 374, it was said: "Now I take a franchise to be (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons, by grant of the sovereign (with us, by special statute), to exercise powers, or to do and perform acts, which, without such grant, they could not do or perform. Thus it is a franchise to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So, it is a franchise to be empowered to build a bridge or keep a ferry over a public stream, with a right to demand tolls or ferriage, or to build a mill upon a public river, and receive tolls for grinding, etc. But the franchise consists in the incorporeal right, the property acquired is not the franchise. A bank has a right to purchase a banking house. When purchased, is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal." In *Bridgeport v. New York & N. H. R. Co.* 34 Conn. 266, 4 Am. Rep. 63, it was held that a franchise does not include property gained by the exercise thereof.

The distinction is clear between a franchise, as such, and the property acquired for the use of the franchise. The naked, unused, slumbering franchise is property; but it is property concerning the assessment of which in that condition for purposes of taxation the statutes do not make provision otherwise than by including it as an element which enhances the value of the shares of the capital stock. But when the franchise is brought into activity, and is availed of to accomplish the ends it was designed to effect, the property acquired under it becomes amenable to the tax laws, apart from the tax on the stock, and its value as an easement, if an easement it be, may be largely augmented by the use

which the franchise enables that property or easement to be put. Said the court in *People ex rel. Metropolitan Street R. Co. v. State Tax Commrs.* 174 N. Y. 441, 63 L. R. A. 892, 105 N. St. Rep. 686, 67 N. E. 74: "They [tangible chattels in the public highway] have no assessable value, worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both, and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon, and especially in estimating its earning capacity, does not rest upon the body, wheels, top, and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which, as a going concern, can neither be assessed nor sold to advantage except as one thing, single and entire." We cite this to show, if precedent be needed to support such a self-evident proposition, that the use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on that easement for purposes of taxation.

What, then, is the thing assessed and taxed in this case? It is the mere right to occupy the streets below the surface with mains and pipes, which is the franchise, or is it the easement acquired, through the franchise, by the actual occupancy of the highways in that manner? Ostensibly it is the latter, and the right to include the value of that easement as an element in fixing an assessment on the tangible property employed in availing of that easement is, we think, no longer an open question in this state, since the decision in *Appeal Tax Court v. Union R. Co.* 50 Md. 274. In that case it appeared that the tracks of the Union Railroad Company within the city of Baltimore were, to a considerable extent, constructed in a tunnel under the bed of Hoffman street, a public highway of the city, and another portion of the road within the city, not in a tunnel, was also, to a considerable extent, within the limits of public highways. The company asked that the assessments of the roadbed in the tunnels be stricken from the property valued to it. The court below granted the relief asked, and the appeal tax court appealed. The specific contention was made in the argument here, as to the tracks located in the tunnel and on the streets, that the railroad company did not own the property (that is, the roadbed), and ought not to be assessed for it as

though it was seized of it; it had only the right to make use of the streets and the soil beneath the streets, and to receive the tolls authorized by its charter. But, in disposing of that contention, our predecessors said: "We do not concur in the position of the appellee that it should only be assessed with the superstructures on the bed of the road, irrespective of the roadbed itself, or any right or interest therein, because the road occupied a tunnel under a public street, or runs along the highways of the city. The appellee has an easement in the way occupied by its road, and, whether that easement be under or over the public street, it is an element of value to the road, and, as such, should be included in the valuation of the road itself. But few of the railroad companies of the country have anything more than a mere easement in the ways occupied by their roads, and we are not aware that it has ever been held that, because the company did not own the freehold estate in the bed of the road, nothing but the mere superstructures thereon could be assessed to the company. The rule would seem to be clearly otherwise, and that an easement enjoyed in the bed of a public street may be assessed and taxed as real estate. *People ex rel. Dunkirk & F. R. Co. v. Cassity*, 46 N. Y. 49; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499; *Providence Gas Co. v. Thurber*, 2 R. I. 21, 55 Am. Dec. 621." The last-cited case (*Providence Gas Co. v. Thurber*, 2 R. I. 21, 55 Am. Dec. 621) is peculiarly apposite. The supreme court of Rhode Island there said: "What, then, is the nature of the right which the plaintiffs [the gas company] take under their charter? We think, when exercised, it is an easement,—an incorporeal hereditament,—like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter which grant the power to take the land upon rendering compensation to the owners." Here is a specific decision that the right conferred by the charter—the franchise—becomes, "when exercised," an easement. But it is not necessary to go beyond Maryland in search of adjudged cases to support the proposition that the easement possessed by a corporation in a public thoroughfare may be assessed and taxed as real estate owned by the corporation. The Appeal Tax Court v. *Union R. Co.* 50 Md. 274, expressly so rules, as already indicated; and that case, though referred to as supporting various propositions, in eight subsequent decisions, has never been doubted, questioned, or even distinguished in any particular. *Swan v. Kemp*, 97 Md. 692, 55 Atl. 441; *Dundalk, S. P. & N. P. R. Co. v. Smith*, 97 Md. 181,

54 Atl. 628; United R. & Electric Co. v. Baltimore, 93 Md. 633, 52 L. R. A. 772, 49 Atl. 655; State v. Northern C. R. Co. 90 Md. 473, 45 Atl. 465; Smith v. Dorchester County, 81 Md. 316, 32 Atl. 193; State v. Falkenham, 73 Md. 467, 21 Atl. 370; State v. Yewell, 63 Md. 121; Philadelphia, W. & B. R. Co. v. Appeal Tax Court, 50 Md. 409. It is true that in only one of the above eight cases was the inquiry with which we are now concerned under discussion, but the frequent reaffirmance of the judgment in Appeal Tax Court v. Union R. Co. as to other propositions covered by it, so thoroughly ingrafts it, in its entirety, on the Maryland system of taxation, that nothing short of a legislative enactment can now disturb or qualify it.

Can anyone doubt that, if the Consolidated Gas Company, by purchase or condemnation, had secured the right to lay its mains through private property, instead of under the streets, lanes, and alleys of the city, it would have acquired an easement—an interest or estate in land—with which it could have been properly assessed as an owner of real estate? Surely no one would seriously contend that such a right of way through private property was a mere franchise, to be considered, in fixing the company's taxable basis, as included in the value of its capital stock. In what respect, looking alone to its legal attributes, would an easement of the kind just supposed differ from the one actually enjoyed by the company? The fact that the pipes are laid in the bed of the street without compensation having been paid for the use of the ground occupied cannot change the nature of the estate held by the company, nor convert the thing done, which is an easement, into a mere right to do the thing, which is the franchise.

From the views thus far expressed, it follows, we think, that the property or estate which the gas company has in the highways of Baltimore is an easement which may be properly assessed to the company as real estate; and hence, there was no error committed by the city court in rejecting the appellant's first prayer, nor in granting the appellee's first and second instructions.

We come next to the second inquiry, namely, Did the appeal tax court properly and lawfully exert the power which we hold that it possessed to tax the easement in question? Before that question can be intelligently answered, the method actually pursued must be closely and critically examined. Now, what did the appeal tax court do? First, as will be remembered, the appeal tax court sent the notice of September 23, 1904, giving the company an opportunity "to show why an additional assess-

ment of \$6,000,000 should not be placed" on its real property. So, in advance of any hearing, the appeal tax court apparently fixed upon a sum to be added to the company's assessment unless the company could show that such an increase would be wrong. The amount of \$6,000,000 was arrived at by the following process: The appeal tax court acted on the theory that the entire assets and property of the company, and its securities, capital stock, and obligations on which it was able to earn a dividend and to pay interest, respectively, constituted the value of its total holdings. The stock was then selling at \$80 a share, the par being \$100,—but in the calculation it was put at \$70. There are 107,000 shares. At \$70 a share, the appeal tax court carried out the aggregate as \$7,500,000. In addition, the company owed several millions of dollars, represented by outstanding bonds, which were valued at \$7,700,000. Then the company owed \$1,500,000 in certificates, which were put down at \$1,350,000. Still another item was \$1,000,000 of $4\frac{1}{2}$ per cent general mortgage bonds, which were included at par. The aggregate of all these items footed up \$17,550,000, of which \$10,050,000 represented debts due by the company on bonds and certificates held by creditors of the company. Then from this total aggregate the appeal tax court deducted the assessed value of the company's real estate, namely \$4,300,000, and there remained the sum of \$13,250,000. The company was assessed with \$150,000 of personal property, but, in deducting that personal property from the above-mentioned sum total, the appeal tax court increased the valuation of the same personalty to \$1,500,000, from which they at once subtracted \$250,000, and took the remainder—\$1,250,000—from the \$13,250,000, leaving exactly \$12,000,000, which sum, it is insisted, represents the value of the company's franchises derived from the state, and also the increased value of its mains by reason of the enjoyment of the easements in the street. This result was then divided by two, and \$6,000,000 were added to the assessed value of the mains and pipes, to include the value of the easement enjoyed by the company in the highways. Was that process a lawful method, under existing statutes, to reach a valuation of the street easements for taxation purposes? The city contends that it is, and relies in support of that contention on the case of Simpson v. Hopkins, 82 Md. 478, 33 Atl. 714.

It must be borne in mind that there are two distinct elements which enter into the question as to whether the method pursued by the appeal tax court in making the assessment now under review was lawful.

and they are, first, the right of the assessors, under the Maryland statutes, to measure the value of a corporation's property, for the purposes of taxation, by adding thereto, and including therein, and charging against the company the bonded indebtedness due by the corporation; and, secondly, the peculiar and apparently arbitrary, as distinguished from juridical, ascertainment of the values apportioned amongst the component factors reckoned and comprised in the sum total of the assessment. The case of *Simpson v. Hopkins*, 82 Md. 489, 33 Atl. 714, does not deal with or pass upon either of these two elements, because neither of them was then before the court for decision. These are the facts: Hopkins, the collector of state and city taxes, sued Mrs. Simpson and her husband to recover the amount of taxes levied for the years 1891, 1892, and 1893 upon 12 bonds of the Consolidated Gas Company owned by Mrs. Simpson. Three grounds of defense were relied on, namely: First, that § 88 of article 81 of the Code (Code Pub. Gen. Laws 1888), as then in force, and under which the tax was levied, was in conflict with article 15, Declaration of Rights, and unconstitutional, because it subjected to taxation, in the hands of the holders, all bonds of the corporation, even though the bonds were secured by a mortgage on real property wholly within the state, whilst § 4 of the same article of the Code exempted from taxation similar mortgages and mortgage debts due by individuals; secondly, that, by reason of the facts just stated, § 88 of article 81 was void, under the 14th Amendment to the Federal Constitution; and, third, that, by the above named section, 88 bonds of the description held by Mrs. Simpson were declared to be liable to assessment and taxation to the owners thereof in the same manner as like bonds secured by a mortgage on land partly in this state and partly beyond it; and that, as there was no provision for the assessment of the last-named class of bonds, there could be no taxation on those owned by Mrs. Simpson. There was no question raised as to whether the gas company should have been assessed with the bonds. Dealing with the first and second of the three defenses, and with a view of showing that there was no unreasonable discrimination made between the bonds issued by a corporation and the mortgage debt created by an individual, this court said: "An individual's true worth for the purposes of taxation consists of his real and personal property; but, in the case of a corporation, its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of a corpora-

tion is its bonded indebtedness, together with its stock. In support of this, Justice Miller, in *State Railroad Tax Cases*, 92 U. S. 605, 23 L. ed. 670, said: 'It is therefore obvious that, when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who, above all others, can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock.' We then added: "It is quite apparent, then, that this exemption of the mortgage debt of an individual and taxation of the mortgage bonds of a corporation in the hands of the respective creditors is not an arbitrary and unreasonable discrimination between the same classes of property." Whilst we thus quoted from the *State Railroad Tax Cases*, 92 U. S. 605, 23 L. ed. 670, which concerned and interpreted the Illinois system of taxation, that differs from ours, the citation was made, not as referring to our tax system in its application to corporations, but to show that there was no unreasonable or arbitrary discrimination involved in the exemption of individual mortgage debts, under § 4, art. 81, Code Pub. Gen. Laws 1888, and the taxation of corporate bonds, under § 88, in the hands of the owners thereof; but we did not say, or imply, that, under the Maryland statutes, the indebtedness of a corporation formed an assessable part of its taxable value, or could be included in the assessment of its property. That question was not involved. It may not be amiss to note, in passing, the view entertained of the Illinois system by Judge Cooley, though the supreme court reached a different conclusion. In a note to page 136, Cooley on Taxation, evidently written before the *State Railroad Tax Cases* were decided by the Supreme Court, Judge Cooley said: "A franchise may have a distinct value by itself, irrespective of any debts that may be owing by the corporation or persons possessing it, as a farm may have irrespective of the mortgage upon it; but there is certainly some difficulty in understanding how the capital stock of a corporation can be valued without taking into account its indebtedness, or how, if the corporation owes so much that its capital stock is absolutely worth nothing and could be sold for nothing, it could have for any legal purposes a 'fair cash value' given it by taking as the measure of its value that which renders it valueless. It may be that if, by enforcing the debt, the capital stock should become the property of the creditors, it would then

have a value equal to the previous value of the debt, but this would be by the substitution of one thing . . . for another. Before that time, certainly, the debt is no part of the capital stock." However this may be, it is perfectly apparent that *Simpson v. Hopkins* did not hold that the bonded indebtedness of a corporation might be added to the market value of its stock in order to ascertain by that process the corporations actual worth for the purposes of taxation, under the then existing laws of Maryland. The opinion does say, "The taxable value of a corporation is its bonded indebtedness, together with its stock," but it does not say the corporation may be taxed on account of that indebtedness. Doubtless the general assembly could prescribe such a rule. The question is not, Can it validly do so? but, Has it done so?

The answer to that question must be sought in the provisions of the Code relating to assessments and taxation, and to those provisions we now turn. Naturally, the first inquiry which suggests itself in this connection is, What are the statutory requirements with regard to the valuation of bonds which constitute the indebtedness of a corporation, and to whom, by the declared will of the legislature, are such bonds directed to be assessed for the purposes of taxation? To the corporation, to the bondholder, or to both? Let us see. Section 2 of article 81, Code Pub. Gen. Laws of 1934, among other things, provides: "All bonds made or issued . . . by any corporation whatsoever belonging to the residents of this state, . . . shall be valued and assessed for . . . state, county, and municipal taxation to the owners thereof in the county or city in which such owners may respectively reside." Further on the same section also declares: "All bonds and certificates of indebtedness bearing interest, issued by any railroad or other corporation of this state secured by mortgage of property wholly within this state, belonging to residents of this state, shall be subject to valuation, assessment, and taxation to the owner or owners thereof, in the same manner as like bonds or certificates of indebtedness bearing interest and secured by mortgage of property partly in this state and partly in some other state or states are now subject to valuation and assessment under the laws of this state. . . ." Section 92 of article 81 is in almost the same language as the above quotation, but it concludes with these words: "And it shall be the duty of the county commissioners of the several counties and the appeal tax court of Baltimore city to assess all such bonds or certificates of debt to the owner or owners thereof resi-

1 L.R.A. (N.S.)

dent in their several counties, or in the city of Baltimore, respectively." The plain and explicit terms of these sections of the Code make it the imperative duty of the county commissioners and the appeal tax court to assess to the holders thereof the bonds and certificates of indebtedness issued by the Consolidated Gas Company. The holders therefore, are to be assessed with them. Now, § 210, art. 81, declares: "All bonds, certificates of indebtedness, or evidence of debt, in whatsoever form, made or issued by any public or private corporation, . . . owned by residents of Maryland, shall be subject to valuation and assessment to the owners thereof in the county or city in which such owners may respectively reside. . . . and upon such valuation the regular rate of taxation for state purposes shall be paid, and there shall also be paid on such valuation 30 cents (and no more) on each \$100 for county, city and municipal taxation in such county or city of this state in which the owner may reside." This section distinctly limits the amount which may be exacted on each \$100 of the assessed value of such bonds. By the prior sections the bonds are to be assessed to the owners thereof, and by this section the rate is restricted, outside of the state tax, to 30 cents, "and no more," on each \$100 of their assessed value. Primarily, therefore, the creditor, who owns the bonds, and not the debtor company, which issued them, pays the tax on them; and, unless there is some explicit and unequivocal provisions of law subjecting the same bonds to an additional imposition as part of the taxable value of the assets of the indebted corporation, the appeal tax court was without authority to charge the Consolidated Gas Company with \$10,050,000 of the company's own outstanding obligations. Is there any such provision to be found upon the statute book? A diligent search has failed to discover it, and in the admirable and instructive arguments at the bar it was not even suggested that an enactment of that kind existed in Maryland. Very cogent reasons were assigned, and dwelt on with great force, to sustain such a scheme of assessment. Those reasons would doubtless have much weight with the legislative department of the state government, but we have no right or power to supply by judicial interpretation measures of administrative detail or systems of valuation which the legislature has not yet seen fit to adopt. "A distinction must be noticed," said the Supreme Court, "between the state law and the power of a state." *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 221, 41 L. ed. 977, 17 Sup. Ct. Rep. 604. We are dealing now with the construction

our existing statutes, and not in any way with the power of the state to enact this particular a different scheme of taxation. In the case last cited the Supreme Court, after illustrating the inequality resulting from the imposition of a tax on only the tangible assets of a corporation, whilst its intangible and perhaps most valuable property was suffered to escape, observed: "Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. . . . But that a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale \$16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market—the amount for which its stock can be bought and sold—is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its powers to produce income or for purposes of sale." The power of the state to levy taxes on values thus computed is one thing. The question as to whether it has, by enactments now in force, done so, is another and a widely different thing. With the first we have no concern, because the method of taxation, and what shall be taken as the measure of the tax, are in the discretion of the legislature. *Cooley, Taxn. 273.* As to the second, we have reached the conclusion that no such legislation has yet been adopted. It follows, then, that the method pursued by the appeal tax court in this instance was without warrant of law, and that the assessment was irregular.

But there is, in addition, an equally serious objection to the validity of the assessment, though it rests on a different foundation. Whilst it is true this court cannot be required to sit as a board of review to revise the amount of the valuation placed by assessors or other tax officials upon property for purposes of taxation (*Baltimore v. Bonaparte, 83 Md. 159, 48 Atl. 735; State Railroad Tax Cases, 92 U. S. 610, 23 L. ed. 672*), yet, when the record shows that a valuation had been imposed upon property in a capricious or whimsical or unwarrantable way, instead of by the exercise of judgment, then such a valuation would not be an assessment at all. "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the

district. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them." *Cooley, Taxn. 258; New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; 3 Cyc. Law & Proc. p. 1111.* Taxes by valuation cannot be apportioned without an assessment. "Without an assessment, they have no support, and are nullities." *Thayer v. Stearns, 1 Pick. 482.* It is shown by the evidence that the \$6,000,000 figure was fixed tentatively in the notice sent to the company, and that it was arrived at by the method hereinbefore indicated. But, inasmuch as the result actually reached by the process followed by the appeal tax court produced a sum, as the value of the easement in the streets and of the franchises, nearly \$1,000,000 in excess of the total par value of the capital stock, the appeal tax court proceeded at once to cut the sum down, first by deducting an inflated and confessedly erroneous valuation of the personal property, and then by dividing the residuum by 2. The inflation of the value of the personal property purely for the purpose of augmenting the amount of the subtrahend in the calculation detailed by the witness—an inflation having not a pretense of fact nor a shadow of justification to rest on—necessarily diminished the remainder; but, as thus diminished, it was still too high to permit even the semblance of judgment in its ascertainment to be predicated of it, and it was summarily split in two. The arbitrary inflation of the value of the personal property—arbitrary because done without the suggestion of a valid reason—tainted the whole calculation. It will be remembered that the value of the personal property was fixed at \$150,000; that this sum, without any suggestion that it was too low, and without any intimation that it was erroneous, was raised to \$1,500,000. But when it appeared that the result obtained by deducting this last-named sum would not be represented in round numbers, \$250,000 were subtracted from the \$1,500,000 so as to make the remainder an even \$12,000,000. In all this there is not an element of judgment as respects the value of the easement. Any other combination of figures might just as well have been employed, and, by subtracting here and adding there, \$6,000,000—the sum named in advance in the notice—could have been as readily and precisely reached. That is not the kind of judgment which the law contemplates shall be exercised by an assessor. The method of valuation was wrong, and the appellant

asked the court to so rule; but, by rejecting the company's fourth prayer, the trial court refused to grant that instruction. In this there was error.

There was also error in granting the appellees' sixth and eighth instructions. The sixth declares that the burden of proof was on the company to show by a preponderance of testimony that the assessment was erroneous. Presumptions are in favor of the correctness of assessments. 27 Am. & Eng. Enc. Law, 2d ed. p. 728. But there must be an assessment before there can be a presumption in favor of its accuracy. In this case there was no assessment; hence no presumption can be invoked. The theory underlying the eighth prayer is that there had been a valid assessment of \$6,000,000 on the easements. As that theory is unsupported, the prayer must fall.

This disposes of all the questions raised in the case, and it will be seen that, whilst we hold the easements in question to be taxable, we determine that the method followed in valuing them cannot obtain under the statutes now in force.

For the errors indicated, the order sustaining the action of the appeal tax court will be reversed, and the alleged assessment as to the \$6,000,000 will be, and hereby is, vacated.

Order reversed, with costs above and below.

MARYLAND COURT OF APPEALS.

GANS SALVAGE COMPANY, Appt.,

v.

ROBERT BYRNES to Use of JAMES HIGGINS.

(.... Md.)

1. Unsafe walls—fall as evidence of negligence.

The mere fall of a square brick stack, erected in a building to provide safety vaults on different floors, after the building

has been destroyed by fire and while salvors are at work in the *débris*, is not sufficient to show negligence on the part of the master salvor, so as to render him liable for injury thereby caused to his employee.

2. Injury to servant—unsafe working place—standing walls.

That the cellar of a burned building was unsafe as a working place for salvors is not shown by the mere fact of the fall of a square brick stack placed in the building to provide safety vaults on the different floors and which was left standing after the fire.

3. Master and servant—salvaging from fire debris—assumption of risk.

One who engages to work in saving property from the *débris* left by a fire assumes the risk of injury from falling walls, when the peril is open and obvious.

4. Same—injury from falling walls.

An employee of one engaged in salvaging property from the *débris* of a fire cannot hold his employer liable for injuries caused by falling walls; since, if the danger was obvious, he assumed the risk of injury; and, if it was not obvious, the master did not violate his duty to use ordinary care to provide a reasonably safe working place.

(November 23, 1905.)

APPEAL by defendant from a judgment of the Court of Common Pleas of Baltimore City in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Carroll T. Bond, George Weems Williams, and William L. Rawls, for appellant:

The master is not an insurer of the servant's safety.

Wood v. Heiges, 83 Md. 269, 34 Atl. 872.

No one is responsible for injuries resulting from unavoidable accidents while engaged in a lawful business.

United R. & Electric Co. v. Fletcher, 95 Md. 536, 52 Atl. 608; Baltimore v. War, 77

Case Note.—Dresser, on Employers' Liability, § 95, states the general rule as to a servant's assumption of risk as follows: "The servant assumes the obvious risks arising from the condition of affairs. Dangers of such a character that this servant, either through the common knowledge he is presumed to possess, or through the intelligence and experience it appears that he has, must have known and appreciated, or have been guilty of contributory negligence in failing to know and appreciate them."

With reference to risks which are incident to specially dangerous employments, Labatt, on Master & Servant, vol. 1, § 286, says: "A doctrine frequently recognized in the formal statements of the courts is that the principle which charges a servant with an assumption of the ordinary risks of an employment is applicable whether that employment may or may not be described as being inherently dangerous. It is, in fact, quite clear that any other position would be entirely illogical and unreasonable. Provided the risk from which the injury results is, as a matter of fact, obviously incident to the employment undertaken by the servant, it is impossible to argue, with any show of reason, that the essential elements from which an assumption of that risk is predicable are not present. It is not easy to see what useful purpose is served by enunciating the doctrine of assumption of risks in terms which recognize a distinction between occupations which are inherently dangerous and those which are not so." And in a note to this section the same author says: "There are many kinds of work in which danger is necessarily inherent, where precautions such as would insure safety to the workmen are either

may not be described as being inherently dangerous. It is, in fact, quite clear that any other position would be entirely illogical and unreasonable. Provided the risk from which the injury results is, as a matter of fact, obviously incident to the employment undertaken by the servant, it is impossible to argue, with any show of reason, that the essential elements from which an assumption of that risk is predicable are not present. It is not easy to see what useful purpose is served by enunciating the doctrine of assumption of risks in terms which recognize a distinction between occupations which are inherently dangerous and those which are not so." And in a note to this section the same author says: "There are many kinds of work in which danger is necessarily inherent, where precautions such as would insure safety to the workmen are either

1004, 27 Atl. 85; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338.

The fall of the wall has by itself no proximate effect.

Merio v. Murphy, 99 Md. 556, 105 Am. St. Rep. 316, 58 Atl. 435; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560, 53 Atl. 605; Baltimore & P. R. Co. v. State, 75 Md. 152, 32 Am. St. Rep. 372, 23 Atl. 310; Nason v. West, 78 Me. 253, 3 Atl. 1; Texas & P. R. Co. v. Barrett, 166 U. S. 41, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; Mon v. Texas & P. R. Co. 179 U. S. 661, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; First v. Carnegie Steel Co. 173 Pa. 166, 33 Atl. 1102; Quinn v. Baird, 49 App. Div. 270, N. Y. Supp. 237; Larich v. Moies, 18 R. 513, 28 Atl. 661; 2 Labatt, Mast. & S. 2314-2320.

Plaintiff assumed the risk.

Griffin v. Ohio & M. R. Co. 124 Ind. 326, 24 E. 888; Pederson v. Rushford, 41 Minn. 442, N. W. 1063; Mielke v. Chicago & N. W. R. Co. 103 Wis. 1, 74 Am. St. Rep. 874, N. W. 22; Kanz v. Page, 168 Mass. 213, 1 E. 620; Olson v. McMullen, 34 Minn. 24, N. W. 318.

When a servant is employed by the master in a certain kind of work, the nature of which is such that certain dangers may arise from time to time as the work progresses, the master has discharged his full duty if he provides his servants with the means of protecting themselves against those dangers. Coal & Min. Co. v. Clay (Consolidated) & Min. Co. v. Floyd, 51 Ohio St. 557, 1 L. R. A. 856, 38 N. E. 610; Cleveland, C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 1 U. S. App. 759, 73 Fed. 974; Heald v. Wallace, 109 Tenn. 346, 71 S. W. 84; Union R. Co. v. Jarvi, 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Armour v. Hahn, 111 S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; Minneapolis v. Lundin, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; Gulf, C. & S. F.

possible, or would only be attainable at expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own care and skill; and in the absence of express stipulation to the contrary, the risk is to be with him, and not with the employer."

The doctrine thus stated was recognized in *Byrnes v. Packer*, 99 Pa. 405, in which it was held that, when a servant undertakes dangerous duties, he assumes such risks as are incident to their discharge from causes apparent and obvious, the dangerous character of which causes he has had opportunity to ascertain. The same doctrine was applied with approval in *Southwest Improv. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Louisville & N. R. Co. v. Banks*, 104 Ala. 516, 16 So. 1 L.R.A.(N.S.)

R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 510; *Carlson v. Oregon Short Line & U. N. R. Co.* 21 Or. 450, 28 Pac. 497; *Batty v. Niagara Falls Hydraulic Power & Mfg. Co.* 79 App. Div. 466, 79 N. Y. Supp. 734; *Oleson v. Maple Grove Coal & Min. Co.* 115 Iowa, 74, 87 N. W. 736; *Fraser v. Red River Lumber Co.* 45 Minn. 235, 47 N. W. 785; *Moore v. Pennsylvania R. Co.* 167 Pa. 497, 31 Atl. 734; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262; *Petaja v. Aurora Iron Min. Co.* 106 Mich. 467, 32 L. R. A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; *Durst v. Carnegie Steel Co.* 173 Pa. 165, 33 Atl. 1102; *Perry v. Rogers*, 157 N. Y. 254, 51 N. E. 1021; *State use of Eckhardt v. Lazaretto Guano Co.* 90 Md. 192, 44 Atl. 1017.

Mr. James Fluegel for appellee.

McSherry, Ch. J., delivered the opinion of the court:

The appellant is a body corporate engaged in the prosecution of a general salvage business. After the great fire, which caused a vast destruction of property in Baltimore city, on February 7 and 8, 1904, the appellant contracted to remove a quantity of canned goods from the cellar of a building which, before the fire had consumed it, had stood on South street. The plaintiff, who is the appellee on this record, was one of a number of men employed by the appellant to do the work of removal. Several walls, or parts of walls, of the building were standing after the fire was extinguished and at the time the salvage work was commenced. In the declaration it is alleged that "the building was dangerous and unsafe to work in," and that the "dangerous condition of said building was known to the defendant, but unknown to the plaintiff; that the plaintiff, while using due care and caution in the

547; *Louisville & N. R. Co. v. Stutts*, 105 Ala. 376, 53 Am. St. Rep. 127, 17 So. 29.

In *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021, the doctrine of assumption of risk in a dangerous employment is illustrated. The facts show that a servant was engaged to work on a construction train, which was run upon an unfinished track, in the service of unloading ties along the track, and while so employed was injured by the derailment of the train while running at the rate of 15 or 20 miles an hour. The court held that such an accident was one of the dangers incident to the service which the servant assumed. The court said: "It is an elementary principle of law, governing the relation of master and servant, that, when a servant enters upon an employment which is, from its nature, necessarily hazardous, the servant assumes

said building, was, by the negligence of the defendant in thus having him work in the said dangerous and unsafe premises, . . . seriously and permanently injured . . . by the collapsing of a wall and other parts of the said building." The case went to trial before a jury upon the issue joined on the plea of not guilty, and resulted in a verdict against the defendant. From the judgment entered on that verdict, the pending appeal was taken. During the progress of the trial five exceptions were reserved. Four of them relate to rulings concerning the admissibility of evidence and the fifth brings up for review the action of the trial court on the prayers submitted for instructions to the jury.

As this is a suit by a servant against the master to recover damages for a personal injury sustained by the former in the course of his employment, negligence is the gravamen of the action. The negligence averred in the declaration consisted, if it existed at all, not merely in a failure of the appellant to exercise ordinary care to provide its servant, the appellee, with a reasonably safe place in which to perform the labor he had been employed to do, but in deliberately

the usual risks and perils of the service; and this is especially true as to all those risks which require only the exercise of ordinary observation to make them apparent. In such cases, there is an implied contract on the part of the servant to take all the risks fairly incident to the service, and to waive all right of action against the master for injuries resulting from such hazards. This waiver includes, on the part of the servant, all such risks as, from the nature of the business, usually and ordinarily conducted, he must have known when he embarked in the master's service, and, also, those risks which the exercise of his opportunities for inspection, while giving diligent attention to such service, would have disclosed to him. . . . Where the danger is equally open to the observation of both the master and the servant, both are upon common ground, and the master is not liable, as a general rule, for resulting injuries." In *Manning v. Chicago & W. M. R. Co.* 105 Mich. 260, 63 N. W. 312, the same rule finds application.

In *Kennedy v. Manhattan R. Co.* 145 N. Y. 288, 39 N. E. 956, it was held that an employee of an elevated railroad company, who had been employed for more than three weeks in a yard elevated some distance above the ground, and who had actual knowledge that it was not in a completed state, and that carpenters were constantly employed in covering it with plank, assumed the risk of working there while there were uncovered spaces.

In *Connelly v. Hamilton Woolen Co.* 163 Mass. 150, 39 N. E. 787, it was held that one who voluntarily undertakes to whitewash the ceiling above rapidly revolving danger-

putting him to work in the ruins of a building known by the appellant, but unknown by the appellee, to be in a dangerous condition. The alleged negligence relied on to sustain a recovery was therefore not simply an omission to discharge some duty which the master owed to the servant, but involved an affirmative act of commission in the assignment of the servant to a situation which the master knew and the servant did not know to be perilous and insecure. Under the declaration, it was incumbent on the appellee to prove by legally sufficient evidence, first, not only that some of the walls of the building in question, which were standing after the fire, were in a dangerous condition and liable to fall, but that the identical wall which, by falling, caused the injury complained of, was also in that condition when the appellee was placed and retained at work in close proximity to it; secondly, that the appellant had knowledge of the dangerous condition of the wall which, by collapsing, injured the appellee, and that, at the time, the appellant, possessed that knowledge prior to the occurrence of the accident; and thirdly, that the appellee was ignorant of the danger, and by the exercise of pro-

vident machines, assumes the risk of injury from being caught by the key of a revolving shaft.

In *Judkins v. Maine C. R. Co.* 80 Me. 414, 14 Atl. 735, the court held that the enhanced risk created by the defective condition of a rolling stock which is set apart to be taken to the repair shop will, as regards a servant, be treated as an ordinary one, which he will be deemed to have assumed.

In *Louisville & N. R. Co. v. Boland*, 96 Ky. 626, 18 L. R. A. 260, 11 So. 667, the court held that the extra hazard to a brakeman by use of cars with couplings of different patterns was one of the risks assumed when entering such employment.

The same doctrine was applied by the same court, in later decisions, to the servant's assumption of the risks of using cars having double bumpers. *East Tennessee & G. R. Co. v. Turvaille*, 97 Ala. 125, 12 So. 63; *Davis v. Western R. Co.* 107 Ala. 63, 11 So. 173; *Southern R. Co. v. Arnold*, 114 Ky. 189, 21 So. 954. And a similar decision has been rendered in *Indiana*. *Whitcomb Standard Oil Co.* 153 Ind. 518, 55 N. E. 414.

In *King v. Morgan*, 48 C. C. A. 507, 1 Fed. 446, the court held that one who is employed to blast rock in a mine by the use of dynamite assumed the risk of injury resulting from his use of an iron bar, instead of a wooden one, to tamp down the charge.

A workman assumes the risk of injury while working near a dam having an angle of about 135 degrees with the surface of the water, where the current is so swift that he cannot swim out of it, if there is nothing to prevent his seeing and appreciating the danger. *Bullivant v. Spokane*, 14 Wash. 577, 45 P. 42.

prudence and care could not have discovered before the wall fell upon him.

A brief outline of the facts appearing in the bills of exception must be given before turning to a consideration of the legal principles which underlie and will control the final decision of the several questions presented to this court by the record. The building, in the cellar of which the appellee and others were working when the accident happened, had been completely destroyed by the fire. Some partition walls and a brick vault, which extended from the cellar to the top story, were left standing. All of the wood material had been consumed by the flames. The fragments of the walls still standing and the brick vault were not supported by any of the timbers which had formerly tied the outer and the inner walls together. The ruins showed merely a heap of *débris*, a few fragments of walls, and the remnant of the brick vault. This vault was built of brick, and was about 4 or 5 feet square, with openings into it on each floor. These openings in the face of the vault had iron doors attached. Thus the tenants of each floor were provided with a vault for the protection of their books and papers. After the fire this vault stood for a height of 30 or 35 feet, and presented the appearance of a square stack or chimney with iron doors opening into it at each floor. The cellar of the house was divided up into arched compartments, and in these the cases of canned goods were closely packed. In order to get them out after the fire, it was necessary to dig through the arched tops of the compartments, and this was done by the appellee and the other laborers engaged in the work of removing the goods. The work of removing the cases had progressed for several days under these conditions. There was a foreman who had charge of the hands, and both the foreman and the hands worked under a man named Ratinger, who had full charge of and supervision over the salvage work for the appellant company. Several days before the accident happened James W. McCuen, an inspector of furnaces, who was a subordinate of Building Inspector Preston, went to the premises where the appellee and the other employees of the salvage company were working, and told the foreman "to take care of the walls as they were coming down, as it was dangerous for the men to go further down without taking care of them, and he said he would." This message was delivered to the foreman, because Building Inspector Preston, who had not seen the condition of the walls, and who had no personal knowledge concerning them, had been informed "that there were some men working in a cellar on South street, where it was dangerous." The building in-

spector directed McCuen "to go down there and notify them to take care of the walls if they continued working there," and McCuen, without making any minute or even casual inspection of the walls, because, as he says, he did not have time to do so, merely communicated to the foreman the warning sent by Mr. Preston. The foreman thereafter repeated to Ratinger the message delivered to McCuen. After McCuen had left, and after Ratinger had learned from the foreman what the building inspector had directed to be done, one of the walls was thrown down under the supervision of Ratinger, but the vault stack was allowed to remain. There is not a particle of evidence in the record to show that the vault walls, the four walls forming the 4 or 5 feet square vault stack, were unsafe or dangerous, or even impaired. On the contrary, three witnesses examined on behalf of the appellee, they being the foreman and two of the 18 men employed by the appellant, distinctly and emphatically say they thought the vault walls perfectly safe because they were solid. McCuen did not tell the foreman that the vault walls were unsafe. He did not go into the cellar; he made no special inspection of the vault walls; he is not a builder, but a furnace inspector; and he testified that he thought in his judgment "if they would attempt to clear that *débris* out without protecting the walls, before they could get away from them, they would weaken and would fall down." He further testified: "The way it looked to me, to clear the *débris* out that was there without first protecting the wall, it might possibly fall after the *débris* was away. I wasn't making any particular inspection of that particular work. I was going around delivering messages to them who had charge of the gangs pulling down different walls." On March 7, 1904, it rained and no work was done by the men on the premises in question, though they had worked there several days the previous week. On the following day, March 8th, work was resumed, and whilst the appellee and other laborers were in the cellar, and whilst Ratinger was standing within a few feet of the vault, the vault walls fell and injured the appellee and another workman. There is nothing in the record to show what caused the vault walls to fall. To all appearances they were solid and safe, and, though McCuen, when testifying in the case a year after the accident had happened, stated that, in his judgment, "when they got all this *débris* and stuff out of the cellar, it seemed to me it would so weaken the wall, there being nothing to support it, it would fall," he did not venture to say how much of the *débris* would have to be removed before the walls would give

away, nor was any evidence whatever adduced to show that the removal of the *débris* actually caused the walls to fall. This vault stack, as has been remarked, extended up the height of the building, and the upper half toppled over and fell inwards, leaving about a story and a half of it undisturbed. It certainly could not have been foreseen by anyone that the upper part of this quadrilateral brick structure would separate from the lower part about midway of its entire elevation, and that the top portion would fall in the way it did.

It is a general rule, not, however, without very important exceptions, at least one of which will be alluded to later on, that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his services. *State use of Eckhardt v. Lazaretto Guano Co.* 90 Md. 192, 44 Atl. 1017; *Armour v. Hahn*, 111 U. S. 318, 28 L. ed. 440, 4 Sup. Ct. Rep. 433. A failure of the master to do this, in the instances where it is his duty to do it, is negligence, and, if an injury to the servant results therefrom and is the direct consequence thereof, an action will lie. A master is not an insurer of the servant's safety. *Wood v. Heiges*, 83 Md. 289, 34 Atl. 872. His liability, if any liability attaches at all, depends altogether upon a breach by him of some imposed duty. Laying aside for the moment all the exceptions to the general rule requiring the master to exercise ordinary care to provide a reasonably safe place for the servant to work, what evidence is there in this case of a breach of the duty imposed by the rule? The concession by the appellee of the appellant's fifth prayer, which instructed the jury that the mere falling of the wall by itself was not sufficient evidence of negligence on the part of the appellant, excluded any inference of negligence from the naked act which caused the injury. *Serio v. Murphy*, 99 Md. 556, 105 Am. St. Rep. 316, 58 Atl. 435. The concession of the prayer made the legal proposition which it announced the law of the case, whether that proposition was right or wrong. *Baltimore Consol. R. Co. v. State*, 91 Md. 510, 46 Atl. 1000. But the legal proposition contained in the conceded prayer was right. *South Baltimore Car Works v. Schaefer*, 96 Md. 105, 94 Am. St. Rep. 500, 53 Atl. 605. The case at bar is distinguishable from *Treusch v. Kamke*, 63 Md. 278. That was an action to recover damages for an injury sustained by the fall of a house which had been so carelessly and negligently erected, and with such insufficient and improper materials, that in consequence it suddenly fell, and in falling injured the plaintiff. It was held that "the fact of the fall itself was at least

prima facie evidence of improper construction, and entitled the plaintiff to call upon the defendant to explain it to the satisfaction of a jury." Here, however, we have no inquiry concerning a faulty or negligent construction. A house properly and carefully built, with sufficient and suitable material, would not suddenly fall, and the owner who built it, if it did so fall, would be bound to explain the cause of the collapse, if he wished to free himself from the consequences resulting from conditions for the existence of which he was himself responsible. The case in 63 Md. was not one between master and servant. In the case now before us no question as to improper or negligent construction is concerned, no suit is pending against the builder of the vault walls, and no inference as to the dangerous condition of the walls can be drawn from the mere fact that the walls fell, unless it be assumed that they could not have fallen had they not been in a unsafe and dangerous condition. But to assume that would be to assume as true the precise thing to be proved, and that assumption, when adopted, would then be substituted for evidence tending to establish the fact to be proved. Such a process would permit negligence to be inferred from the simple happening of the accident. In a case like this that cannot be done.

Something else, then, in addition to the mere falling of the vault walls, must be found in the record before it can be held that there was evidence tending to prove that the place where the appellee was employed to work was dangerous. One wall of the building had been torn down by city employees, and, after the warning message delivered by McCuen, had been communicated to Ratinger by the foreman, another wall was demolished by the appellant's workmen; but neither the city employees nor the appellant's workmen disturbed the vault walls. If the vault walls had presented any indications of being in a dangerous condition at the time the other walls were leveled, it is scarcely probable that they would have been allowed to remain standing. Indeed, it is reasonably certain they would also have been destroyed or strengthened. They appeared to be solid and secure, and the fact that they formed a square, cornered column which had stood firmly for a month after the fire, seemingly unaffected by it, and without exhibiting any signs of weakness whatever, was calculated to induce a belief that it was not necessarily or even probably hazardous to remove the cases of canned goods from the cellar before either razing the walls or shoring them up. The evidence does not show what caused the vault walls to fall. The conjecture of Mc-

When that, if the *débris* were removed, the walls would fall, is, at best, a mere speculation, because there is nothing in the record to show either that the *débris* had been removed, or, if removed, to what extent it had been taken away, or what causative relation existed, if any, between its removal and the collapse of the walls. Nor does the testimony of Emerich, the district chief of the fire department, tend to show that the walls were dangerous before the accident happened. He was summoned to the scene after the walls fell, and he knew nothing concerning them prior to that time. He aided in rescuing the men imprisoned by the *débris*. He found it necessary then to shore up the portions of the walls left standing before he would permit his subordinates to extricate the appellee. But the condition of the remnants of the walls after the upper half of them had toppled over gave no indication of their condition before their collapse. The physical appearance and the actual status had wholly and completely changed.

But, if it be assumed, or for the moment be conceded, that there was some legally sufficient evidence tending to prove that the walls which fell, and which by falling caused the injury complained of, were in a dangerous and unsafe condition when the appellee was put to or retained at work in the cellar, then it is certain, in the absence of any proof as to what caused them to fall, that the means of knowing the danger and the peril incident to the removal of the canned goods were as open and obvious to the appellee as to the appellant. It will not do to say that the information imparted by McCuen to the foreman, and by the latter to Rätinger, apprised the appellant of a hazard and a risk of which the appellee was ignorant; because, in the last analysis, all that McCuen definitely said to the foreman was to repeat Mr. Preston's instructions "to all people cleaning out *débris*" that they should "take care of all dangerous walls before getting the *débris* out." The dangerous walls were not pointed out, and Rätinger, the foreman, and the 18 men at work under the latter, each had precisely the same opportunity to see, and to judge as to, the peril involved in doing the work in which they were engaged, under the then existing surroundings. An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open or obvious, the dangerous character of which he had an opportunity to ascertain. *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291. One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew or had an op-

portunity of knowing, must be considered as having assumed such risks, and, if injured in consequence thereof, has no claim against the employer. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *Yates v. McCullough Iron Co.* 69 Md. 370, 16 Atl. 280. This doctrine, firmly grounded in the law of this state, in the law of England, and of probably every state in the Federal Union, though usually stated as a general rule, constitutes in reality, an exception to or qualification of the broad principle which requires the employer to use ordinary care to provide a reasonably safe place in which the servant may perform his work. It may be taken, then, as a postulate, that a servant, who, on entering into a contract of employment, knows of the dangers of the premises or place of work, or by the use of ordinary care could see and understand them, assumes the risks which arise therefrom. 20 Am. & Eng. Enc. Law, p. 114. Knowledge by the servant of defects in appliances has been held in legal contemplation to carry with it knowledge of the risk and danger incident to the use of such appliances; and in such instances the law imputes and presumes knowledge of the risk and danger, and will not allow the injured workman to aver or prove that he had no actual knowledge thereof. *Yates v. McCullough Iron Co. supra*.

Whatever danger or hazard there was in performing the work which the appellee had been employed by the appellant to do was the danger or risk that unsupported and isolated walls, which had been subjected but recently before to the effects of the intense heat produced by a mighty conflagration, would, without warning and without the intervention of other forces than those set in motion by the laws of nature, suddenly collapse and fall, and in falling occasion the precise injury which actually befell the appellee. He saw the denuded walls rising up to a height of 35 feet above the place where he was working,—they confronted him as he stepped upon the premises,—and he had aided in throwing down one of the walls because it was more threatening than the others, and he must have known that a gale of wind or a vibration produced by the dynamiting of other walls in proximate sections of a burnt district, or a jar resulting from the fall of other walls in the vicinity, or the absorption of rain by the exposed mortar might cause the vault walls to totter and fall. He must have known all this, because we are bound to assume he was a man of average intelligence, as there is "no proof that he was stupid or dull of intellect, that any of his senses were impaired, or that he was not possessed of ordinary powers of observation." *Yates v.*

McCullough Iron Co. *supra*. If the place was really dangerous, the appellee must have known that it was, because the means of knowledge were as open and obvious to him as to the master, and by voluntarily working there he assumed the risks of being injured by causes which were open and obvious, and he cannot hold the employer responsible in damages, if those open and obvious causes produced the injury. If, on the other hand, the place where he worked was not a hazardous one, if the walls which in falling injured him were not in a dangerous condition, then there was no breach by the master of the duty owed to the servant to use ordinary care to provide a reasonably safe place in which the servant might perform his service; and, there being no breach of that duty, no action can be maintained, even though, in consequence of an accident resulting from some unexplained cause, an injury has been sustained. In either event, upon either hypothesis, there was no adequate cause of action. Such being the situation, the eighth prayer presented by the appellant, withdrawing the case from the consideration of the jury, ought to have been granted. That prayer sought to take the case from the jury because of a failure on the part of the appellee to adduce any legally sufficient evidence to show that the appellant had violated any of the duties it owed to the appellee. Holding as we do, for the reasons that have been given, that the prayer should have been granted, it becomes unnecessary to allude to or discuss the instructions which were given or the questions which are raised by the other bills of exception. As no recovery can be had, the judgment will be reversed without awarding a new trial.

Judgment reversed, with costs above and below, without awarding a new trial.

OREGON SUPREME COURT.

WALTER F. MUNDHENKE By Guardian,
Respt.,
v.

OREGON CITY MANUFACTURING COMPANY, Appt.

(.... Or.)

1. Minor servant—assumption of risk.

A youth sixteen years old, upon taking employment in a mill, assumes the risk of injury which is plainly apparent from coming in contact with exposed gears upon machines adjoining a passageway, notwithstanding he is not expressly warned as to such danger.

2. Same—imputation of negligence.

Want of care, precaution, and foresight.
1 L.R.A. (N.S.)

will not, as matter of law, be imputed to youth sixteen years old, who is employed in a mill to distribute bobbins into boxes which are in close proximity to exposed cog gearing, when, in the performance of his work he slips on the floor, which is covered with a variable quantity of grease from day to day, and falls against the uncovered gear to his injury.

3. Unsafe working place—question for jury.

Whether or not it is negligence for a manufacturer who employs boys to perform part of his work to permit the floor to become so slippery in close proximity to exposed gears as to afford insecure footing is question for the jury.

4. Negligence of minor employee.

A sixteen-year-old boy, in taking employment in a mill, assumes no risk of injury from defective machinery and passageway that would not have been avoided by the precaution common to other boys of like age and experience, and cannot be charged with negligence for conduct which is common to such boys.

(August 15, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Clackamas County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Wolverton, Ch. J.:

This is an action for the recovery of damages for a personal injury sustained by the plaintiff, a minor. He was, at the time of the accident, about the age of sixteen years and eight months. The injury of which he complains consists in the loss of parts of two fingers on the left hand. The defendant was engaged in operating a woolen mill, and the plaintiff was in its employ, charged with the duty of carrying yarn which was in the form of bobbins, and distributing it to the looms. The particular acts of negligence upon which plaintiff predicates the action are stated in the complaint in substance as follows: That the defendant carelessly and negligently placed the box used for receiving yarn or filling next to exposed gearing on the side of one of the weaving looms, which said gearing the defendant carelessly and negligently permitted to be exposed in a dangerous, defective, and unsafe condition; that the defendant knowingly, carelessly, and negligently allowed the floor of said room next to the box where the plaintiff was employed to carry yarn or filling to become oily and slippery, and in an unsafe and defective condition; that the plaintiff was inexperienced in the matter of his employment, and unacquainted with the

dangerous, defective, and slippery condition of the floor, and of the defective and dangerous condition of said machinery, and of the dangers incident to said employment; but it was the duty of the defendant herein to instruct the plaintiff as to the dangers incident to and in connection with his said employment, and of the dangerous and slippery condition of said floor, and of the dangerous condition of said exposed gearing; but the defendant failed and neglected to instruct and inform plaintiff of the dangerous and slippery condition of said floor and of the dangerous and defective condition of said exposed gearing, and, because of such failure to so instruct plaintiff, he was injured and damaged as hereinafter set forth; and that while plaintiff was so perform-

ing his duties as aforesaid, being engaged in putting said yarn or filling in the said box prepared by defendant, and by reason of defendant's negligence in allowing said floor to become oily and slippery, and in allowing said gearing to be and remain exposed, and without fault on plaintiff's part, he slipped, and his hand came in contact with said exposed gearing, whereby he was injured,—describing the injury. The answer joins issue with these alleged matters of negligence, and sets forth two separate defenses: (1) That the danger, whatever existed, was open and obvious, and that plaintiff assumed the risk; and (2) that he was himself negligent, and contributed to the injury. When plaintiff rested, defendant moved for a nonsuit, which motion being

Case Note.—The court in *MUNDHENKE v. OREGON CITY MFG. CO.*, in holding that a minor assumes the risks incidental to the business so far as he is competent to understand them, discusses with approval the case of *Bohn Mfg. Co. v. Erickson*, 5 C. C. A. 41, 12 U. S. App. 260, 55 Fed. 943. This case has been cited frequently in other cases, but on entirely different questions. It was, however, referred to with approval in the case of *Glenmont Lumber Co. v. Roy*, 61 C. C. A. 506, 126 Fed. 529, in which the court held that a young man, twenty years old, who had worked about sawmills for some time, assumed the risks incidental to his duties, where the risks were open and visible, and where he testified that he was aware of them all, but did not recognize the danger. The same case was also cited in *Omaha Bottling Co. v. Theiler*, 59 Neb. 564, 90 Am. St. Rep. 673, 80 N. W. 821, in which the court held that a nineteen-year-old boy of average intelligence, who had worked at the bottling business five years, could not be considered ignorant of the hazards of the business, and consequently assumed the risk of injuries resulting from the explosion of bottles filled with carbonated cider.

Dubiver v. City & Suburban R. Co. 44 Or. 227, 74 Pac. 915, 75 Pac. 693, and *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 258, 45 C. C. A. 515, 106 Fed. 645, were also cited by the court and discussed with approval; but they have not been referred to in other cases on the questions involved in *MUNDHENKE v. OREGON CITY MFG. CO.*

The court also cites the case of *Rummel v. Dilworth, P. & Co.* 131 Pa. 509, 17 Am. St. Rep. 827, 19 Atl. 345, 346, which held that a seventeen-year-old boy who had lately been engaged did not assume the risks of injury resulting from being caught between the gears of an iron roller which no one but a skilled employee could operate with safety. The court said that in the case of young persons it is the duty of an employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. (L.R.A.(N.S.)

posed. This duty to instruct grows out of the ignorance or inexperience of the employee.

To similar effect in *Bowers v. Star Logging Co.* 41 Or. 301, 68 Pac. 516, it was held that an eighteen-year-old boy did not assume the risks attendant on filling the position of a brakeman on a logging train. The same rule is applied in *Doyle v. Pittsburgh Waste Co.* 204 Pa. 621, 54 Atl. 363.

The case of *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182, 4 Am. St. Rep. 307, 15 N. E. 579, is also cited as an authority. But in this case it was held that a twelve-year-old boy of average intelligence, who had worked for nearly two months in the same room with machines used for rubbing up the nap of cloth, could not recover for an injury which he sustained while obeying the overseer's order to go between the machines to look for a tool. The court said that the duty of the employer did not extend so far as to require the giving of special caution on every occasion when the boy might be called upon to pass near the machines. This case was cited in *Williamson v. Sheldon Marble Co.* 66 Vt. 427, 29 Atl. 660, but there, also, it was held that a boy fifteen years old assumed the risks and understood the dangers attendant upon climbing an icy ledge of rock to shut off air from a drilling machine.

In *Brazil Block Coal Co. v. Young*, 117 Ind. 525, 20 N. E. 423, the court held that the same rules as to assumption of risk which apply to men do not apply to boys. In *James v. Rapides Lumber Co.* 50 Ia. Ann. 729, 44 L. R. A. 52, 23 So. 469, which also cited the *Ciriack Case*, the court held the master liable for the negligence of the foreman of a sawmill, who suddenly called a young boy to assume a dangerous position, without giving him any instructions or explanation as to the movements of the machinery or the risks to which he was exposed. And in *Day v. Achron*, 23 R. I. 627, 50 Atl. 654, it was held that a sixteen-year-old girl who was accustomed to operating a mangle in a laundry assumed the risk of injury.

As another authority the court cites the

denied, the trial proceeded, resulting in a verdict and judgment for plaintiff, and the defendant appeals.

Messrs. Hogue & Wilbur and Hedges & Griffith, for appellant:

An employee in a mill assumes the risk of injury from a fall upon a floor that is slippery in its normal condition.

Cudahy Packing Co. v. Marcan, 54 L. R. A. 258, 45 C. C. A. 515, 106 Fed. 645; Herold v. Pfister, 92 Wis. 417, 66 N. W. 355; Tinkham v. Sawyer, 153 Mass. 485, 27 N. E. 6; Cunningham v. Bath Iron Works, 92 Me. 501, 43 Atl. 106; Williamson v. Sheldon Marble Co. 66 Vt. 427, 29 Atl. 669; Kleinst v. Kunhardt, 160 Mass. 230, 35 N. E. 458; Murphy v. American Rubber Co. 159 Mass. 266, 34 N. E. 268; Fitzgerald v. Elsas Paper Co. 30 Misc. 438, 62 N. Y. Supp. 597; Labatt, Mast. & S. 400, and note, page 1082.

case of Dowling v. Gerard B. Allen & Co. 74 Mo. 13, 41 Am. Rep. 298, which was reaffirmed in 102 Mo. 213, 14 S. W. 751, and in which the court held that a seventeen-year-old boy who was hired to run errands did not assume the risk of injury resulting from obeying an order to stop the engine, and, who, while obeying such order, was caught by a set-screw and collar revolving with a certain countershaft which was operated by the engine. This case was cited with approval in Missouri P. R. Co. v. Perego, 36 Kan. 428, 14 Pac. 7, in which the court held the master liable for the injury to an unskilled apprentice who was called upon to assist other employees, who were also unskilled, in the handling of a dangerous drilling machine, where they were not instructed as to the danger. The case was also referred to with approval in Turner v. Norfolk & W. R. Co. 40 W. Va. 692, 22 S. E. 83, in which the same doctrine was applied.

The doctrine is well stated in Texas & P. R. Co. v. Brick, 83 Tex. 602, 20 S. W. 511, in which the court said that the great weight of authority supports the rule that if a servant is under the age of twenty-one years, and has not been instructed by the master as to the dangers of his employment, it is a question for the jury whether he has acquired sufficient knowledge of the dangers to exempt the master from liability. It is the duty of the master to inform him, not only that the work is dangerous, but also as to the extent of the danger, and how to avoid it. If this is done, he assumes the risk, and in case he is injured by reason of the risks so assumed, he cannot recover. If he knows not only of the danger, but also of its extent, and has the capacity to appreciate it, he then assumes the risk, and the master cannot be held liable. It is not sufficient that he knows the employment is dangerous, but he must also be aware of the extent of the danger, and have the discretion to understand the risk, before he can be held

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An instruction to a servant is only necessary where the servant does not know or appreciate the dangers of his employment.

Bohn Mfg. Co. v. Erickson, 5 C. C. A. 34, 12 U. S. App. 260, 55 Fed. 943; Coulter v. Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Ciriack v. Merchants' Woolen Co. 14 Mass. 182, 4 Am. St. Rep. 307, 15 N. E. 573; Pratt v. Prouty, 153 Mass. 333, 26 N. E. 1002; Truntle v. North Star Woolen-Mill Co. 57 Minn. 52, 58 N. W. 832; Mackin v. Alaska Refrigerator Co. 100 Mich. 276, 58 N. W. 999; Sullivan v. India Mfg. Co. 113 Mass. 396; Tinkham v. Sawyer, 153 Mass. 485, 27 N. E. 6; Cunningham v. Bath Iron Works, 92 Me. 501, 43 Atl. 106; Olson v. McMurray Cedar Lumber Co. 9 Wash. 504, 37 Pac. 679; Goodridge v. Washington Mills Co. 160 Mass. 234, 35 N. E. 484; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Merryman v. Chicago, R. I. & P. R. Co. 85 Iowa 638, 52 N. W. 545; Evans v. Josephine Mills

to have assumed it; citing Dowling v. Gerard B. Allen & Co. *supra*. The same doctrine is recognized in Emma Cotton Seed Oil Co. v. Hale, 56 Ark. 238, 19 S. W. 600, and Fisk v. Central P. R. Co. 72 Cal. 44, 1 Am. St. Rep. 22, 13 Pac. 144. Also Labatt (Mast. & S. § 291) and Bailey (Master's Liability for Injuries to Servants, p. 114) lay down the same rule and cite the cases referred to in MUNDHENKE v. OREGON CITY MFG. CO.

A child who is employed in a factory contrary to statute, because of his immature age, is not, as matter of law, chargeable with having assumed the risk of employment, in case he is injured while so employed. Marino v. Lehmaier, 173 N. Y. 539, 61 L. R. A. 811, 66 N. E. 572.

A minor who is directed by his superior to perform a task without the range of his employment does not necessarily assume the increased risk from the defective plant, although he is aware of the defect, and an adult with the same knowledge would be held to have assumed such increased risk. Foley v. California Horseshoe Co. 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42.

In Davis v. St. Louis, I. M. & S. R. Co. 5 Ark. 117, 7 L. R. A. 283, 13 S. W. 501, a youthful employee was held not to assume unappreciated risks.

Shearman & Redfield on the Law of Negligence, § 219, state that it is the duty of one who employs young persons to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate; and this is a duty which cannot be delegated. The master must instruct young servants in their work, and warn them against dangers, and he must put this warning in plain language. It is not enough that he do his best to make children understand; citing Dowling v. Gerard B. Allen & Co. *supra*; Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838; and Hoffman v. Adams, 106 Mich. 111, 64 N. W. 7.

119 Ga. 448, 46 S. E. 674; Sitts v. Waionthe Knitting Co. 94 App. Div. 38, 87 N. Y. Supp. 911; Dubiver v. City & Suburban R. Co. 44 Or. 227, 74 Pac. 915, 75 Pac. 693.

Messrs. U'Ren & Schuebel, for respondent:

A minor is not held to the same degree of responsibility as an adult. The question of negligence is generally one of fact, and not of law.

Hedin v. City & Suburban R. Co. 26 Or. 155, 37 Pac. 540; Dubiver v. City & Suburban R. Co. 44 Or. 227, 74 Pac. 915, 75 Pac. 693; Merrifield v. Maryland Gold Quartz Min. Co. 143 Cal. 54, 76 Pac. 710; Wallace v. City & Suburban R. Co. 26 Or. 178, 25 L. R. A. 663, 37 Pac. 477; Anderson v. North Pacific Lumber Co. 21 Or. 281, 28 Pac. 5.

As to whether or not the plaintiff understood and appreciated the risks and dangers to which he was exposed, the question is pre-eminently for the jury.

Roth v. Northern Pacific Lumbering Co. 18 Or. 205, 22 Pac. 842; Jancko v. West Coast Mfg. & Invest. Co. 34 Wash. 556, 76 Pac. 78.

Wolverton, Ch. J., delivered the opinion of the court:

It is first necessary to understand the nature of the machinery and the attending conditions before alluding to the facts touching the manner in which the accident occurred. At the end or side of the looms, facing on an isle or passageway, is a set of gearing, consisting of two cogwheels working into each other, the lower being much the larger. The point of contact of the gearing is from 2 feet to 2 feet, 6 inches above the floor. Immediately at the end of the looms, boxes were placed for receiving the yarn or filling. These stood against the lower cogwheel of the gearing, and, when being filled, the person doing the work would naturally stand in the passageway in front of the box and opposite the gearing, so that the width only of the box would intervene between him and the gearing, which was otherwise exposed, without guard or other protection to prevent contact with it. The plaintiff testified that he was carrying filler for the weavers, and had been so occupied for three months; that neither the foreman of the mill nor anyone else had instructed or cautioned him relative to the danger of coming into contact with the machinery; that he slipped, and was caught in the cogwheels of the loom, and his fingers were crushed. Describing the incident further, he says: "I slipped with my left foot, and threw up my hand so I wouldn't fall, as a person naturally will throw out his hand when

he slips;" that he was taking the bobbins from the basket in which he had carried them to the box, and putting them into the box, which was full, or nearly so, when his foot slipped, he having all his weight on one foot at the time; that the floor was "greasy and slippery;" that he had slipped and fallen upon it before, and that he always tried to do his work carefully; that neither the foreman nor anyone else had cautioned him to be careful in standing about the boxes, or that he might slip upon the floor; that the only instructions given him were as to where to get the yarn and where to deposit it, and that nothing was said to him about the danger of slipping or falling or of getting his fingers in the cogwheels.

On cross-examination he testified that he had about twenty boxes to fill altogether, and further, as interrogated:

Q. You saw those cogs, you knew where they were?

A. Yes, sir.

Q. You saw those when you first went there?

A. Yes, sir.

Q. Did you see them as they came to gether in the mesh—right where they came together—those cogs?

A. Yes, sir.

Q. Did you know at that time that if you would get your fingers caught in them you would get hurt?

A. Anybody would know you would get hurt if you would catch your fingers in there, but I don't think anybody was intending to get hurt there, though. . . .

Q. You knew it would be dangerous if you would get your fingers in there?

A. If you would think about it, yes, sir. . . .

Q. What was the condition of this floor when you went there, along that isle and about this loom?

A. The same as it always is.

Q. Has it always been that way?

A. Yes, sir.

Q. Just as it was to-day?

A. If they didn't clean it up right away, it was. . . .

Q. You say you had slipped a number of times there in the mill. Say how soon after you went there was the first time you slipped?

A. I might have slipped the same day. . . .

Q. How often did you slip?

A. I couldn't say how often.

The witness further testified that the company swept and cleaned the floor once a week, on Saturdays; that the accident

occurred on Friday, and that the floor grew more slippery toward the end of the week than it was at the beginning, and that it becomes oilier when it has not been swept for a long time. This testimony was corroborated by other witnesses. Fred Hoag, another "filler boy," testified that the "floor was pretty oily in some places," and that he had himself slipped and fallen thereon. It was later shown that the box was from 1½ to 2 feet deep and perhaps 2 feet wide, and that the top of it was from 4 to 6 inches below the point of contact of the cogs.

That it was the duty of the defendant to provide safe machinery and a reasonably safe place in and about which to work for plaintiff and other employees to discharge the duties assigned them is conceded; but it is contended that defendant was not required to provide and furnish the very best and safest, and that if what was provided and furnished was defective, and not so well equipped and guarded as it might have been to render it more safe and secure against the liability of accident and injury, plaintiff knew and fully appreciated the exact conditions, and that, by engaging and continuing in the employment, he assumed the risk, and, injury having resulted to him in the course of his employment, defendant is not liable. This is the strong contention of defendant, and it has been urged by its counsel with signal ability. There is in this case the element of the youth of the party injured. It has been determined by this court that only such care and caution to avoid the dangers of accident can be expected or required of a person of immature age as is common to other persons of his years, of prudence, forethought, and discretion. *Dubiver v. City & Suburban R. Co.* 44 Or. 227, 74 Pac. 915, 75 Pac. 693. This must necessarily be so, because infancy and youth spring into manhood and maturity by degrees only, and responsibility develops accordingly. In general the servant assumes the ordinary risks and dangers incident to the employment in which he engages to the extent, and only to such extent, as they are known to him; but if the employee be of immature years, the assumption of risk is commensurate only with his age, experience, and capacity. As is said by Judge Sanborn in *Bohn Mfg. Co. v. Erickson*, 5 C. C. A. 341, 12 U. S. App. 260, 55 Fed. 943, 946; "He does not assume latent dangers known to the master that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care." Again, he continues: "Risks and dangers that are apparent to the man of long experience and of a high

order of intelligence may be unknown to the inexperienced and ignorant; hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of or does not appreciate the ordinary risks of his employment it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor not only to know the dangerous nature of his work, but also to understand and appreciate its risks and avoid its dangers." The doctrine is reaffirmed much later by the same learned judge. *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 258, 45 C. C. A. 515, 106 Fed. 645. So it is that a minor assumes the ordinary hazards or risks of his engagements that he, though his degree of intelligence, known or should know and appreciate, and consequently he assumes those dangers also that are so open and obvious to the senses that one of his age, capacity, and experience would, in the exercise of the ordinary care and prudence common to persons of like age and experience, know and appreciate, and would be expected to be sufficiently attentive and alert to avoid. In other words, the minor's assumption of the hazards and dangers attending his employment is to be determined by his capacity to know, understand, and appreciate them, and his caution, alertness, and aptitude as well to avoid them. The test is what would ordinarily be expected, in a general sense, of persons of the minor's age and experience, whose conduct is under scrutiny; and this is so even if the child is *sui juris*.—that is, has reached years of discretion, and has become, as a matter of law, responsible for his conduct. No higher degree of care will be expected of him than is usually exercised, by persons of similar age, judgment, and experience. 1 Labatt, Mast. & S. §§ 291, 398; 7 Am. & Eng. Enc. Law, 2d ed. pp. 405, 407; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506; *Dowling v. Gerard B. Allen & Co.* 74 Mo. 13, 41 Am. Rep. 298; *Rummel v. Dilworth*, P. & Co. 131 Pa. 509, 17 Am. St. Rep. 827, 19 Atl. 345, 346; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114.

With this exposition and understanding of the law relating to the assumption of risks by minors, we may turn to the facts of the case. As it pertains to the exposed gearing at the end of the loom, that pre-

ated a danger so open and obvious that plaintiff, considering his age, must surely have known and fully appreciated it. He could not have been so stupid as not to have known that if he got his hand between the cogs he would get hurt. He must have known also how to avoid the danger, which was simply not to come into contact with it, and the responsibility was his, notwithstanding he was not warned of a result which he must have understood and appreciated as well without the warning. *Cirick v. Merchants' Woolen Co.* 146 Mass. 82, 4 Am. St. Rep. 307, 15 N. E. 579; *Carlington v. Mueller*, 65 N. J. L. 244, 47 Atl. 64. This in the abstract, unconnected with the condition of the passageway and floor upon which plaintiff was required to walk and stand while in the discharge of the duty assigned him. Plaintiff's evidence tended to show that the way was swept and cleaned but once a week, that it was allowed to become greasy and oily, and consequently slippery, insecure, and unsafe for use. Plaintiff had slipped and fallen perhaps a number of times, and so had Hoag, another "filler boy," attesting unmistakably its insecurity. The accident occurred on Friday, and the sweeping and cleaning was usually done on Saturday, so that it would be but a reasonable inference that the way was in a bad condition at the time of the accident. The proximate cause of the accident, according to plaintiff, was the circumstance that he slipped on the floor, thus causing him to throw out his hand, which came in contact with the gearing. He was not warned as to the condition of the passageway, but, notwithstanding, he must have known much about it. This he admits. It was, however, a variable condition that he had to contend with. Sometimes the way would be less safe than others, and it would be going quite beyond the authorities to say as a matter of law that he did not use or observe the care, precaution, and foresight common to one of his age, intelligence, and experience that would be expected of him to avoid getting his hand between the cogs. The condition and pertinent fact are so peculiarly a matter for the jury that we are not disposed to take it away from them. The gearing was very near the place in which plaintiff was depositing the filling, and a misdirection of the hand in but a few inches would carry it to the point of danger; and it is reasonably inferable that the slipping of the foot was the adequate proximate cause of the accident. It is but a humane duty that the employers of youth about factories should observe every reasonable precaution to protect the comparatively unwary from accident and disaster. If the gearing in

1 L.R.A. (N.S.)

the present case had been covered or hooded, which could have been done at a trifling expense, no accident could have happened; and if the aisle had been kept clean of grease, it is quite probable that the result would have been avoided. The condition of the passageway was a variable one, as we have seen, and was surely out of condition at times, as the carrier boys were slipping and falling occasionally. This presents a matter for the jury to say, in the first place, whether or not it was negligence in the defendant to allow it to get into an unsafe condition, and, in the second place, it was also manifestly pertinent for them to determine whether plaintiff used the precaution that boys of his age are wont to observe to avoid the danger. It is a matter of common knowledge that a boy of the age of plaintiff would not be as careful and cautious in going to and from upon a slippery way as an adult, and it was for the jury to say whether he acted with that precaution in the premises as is common to other boys of his age and experience; for, if he did so act, negligence could not be imputed to him, and he assumed no risk that he would not have avoided by the observation of like precaution.

Both these inquiries being decided against the defendant, the judgment of the circuit court should be affirmed, and it is so ordered.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

WILLIAM MILLER, Appt.,

v.

MORAN BROTHERS' COMPANY, Resp't.

(....Wash....)

1. Master and servant—Independent contractor—injury to servant—liability.

An employee cannot hold his master liable for injuries caused by the master's breach of duty to furnish to one who has taken an

Case Note.—The court, in the above case, in denying the liability of a master to his servant for an injury resulting from the former's failure to provide an independent contractor with safe appliances, cites only the case of *Steeple v. Panel & Folding Box Co.* 33 Wash. 359, 74 Pac. 475, on this proposition. This case holds that a night watchman, who fell from a second-story platform, is guilty of contributory negligence, as matter of law, where he had worked about the place for two months, and had frequently been on the platform before, and who neglected to use the light which it was his

independent contract to perform a certain portion of the work in which the master is engaged, safe appliances for the performance of such work.

2. Same—-independent contract—existence of.

The retention, by the master, of general supervision of the work to be performed by an independent contractor will not change the contractor's relationship to the work.

3. Same—liability of contractor.

One who takes an independent contract to perform a portion of the work which his employer has undertaken to do is responsible for injuries caused to the employer's servants by his negligent use of appliances in the performance of his work.

4. Same—unsafe working place.

A servant cannot hold his master liable for injuries caused by the fact that the working place was unsafe, if he was in as good position to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, as the master.

5. Same—supervision.

A master is not bound to give continual attention to a servant to protect him from situations made dangerous by occurrences unusual and unexpected by either master or servant.

6. Same—assumption of risk.

A servant assumes the risk of injury from

duty to prepare. The doctrine as to furnishing a safe place to work, or providing safe appliances, did not enter into the case.

The obligation of the master to furnish an independent contractor with safe appliances, or to see that those used by the latter are safe, and so protect his own servants, grows out of his duty to provide his servants a safe place in which to work. Thus, in *Trainer v. Philadelphia & R. R. Co.* 137 Pa. 148, 20 Atl. 632, the master was held liable for injuries to its servant, caused by being hit by the fall of an appliance used for the storage of coal, which was erected on its right of way and operated by an independent contractor.

In *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538, a railroad company was held liable for the death of one of its employees, caused by defects in the appliances used on its right of way by an independent contractor.

But in *Conway v. Furst*, 57 N. J. L. 645, 32 Atl. 380, the master was held not to be liable for injuries to one he employed as a night watchman in an unfinished building, and who fell into an elevator shaft which an independent contractor had not yet completed. This decision was based on the doctrine that the risk was incident to such service. The case of *Kennedy v. Manhattan R. Co.* 145 N. Y. 288, 39 N. E. 950, is to the same effect.

In the case of *Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482, 101 Fed. 530, a more positive personal duty is imposed upon the master. The court held that the master

remaining without necessity under a heavy steel plate while it is being hoisted in the air by means of a tackle.

7. Same—information of servant.

A master is not bound to inform his servants that a portion of the work is under the charge of an independent contractor for whose conduct he is not responsible.

(September 1, 1905.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover damages for personal injuries for which defendant was alleged to have been responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Benson & Hall, for appellant:

The act of selecting the appliance was that of the master.

Bailey v. Cascade Timber Co. 32 Wash. 319, 73 Pac. 385; *Toledo Brewing & Malting Co. v. Bosch*, 41 C. C. A. 482, 101 Fed. 530; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Moran v. Corliss Steam Engine Co.* 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874; *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Lake Superior Iron Co. v. Erickson* 39 Mich. 492, 33 Am. Rep. 423; *Herdler v.*

cannot escape from the positive personal duty which he is under to his servant by letting work to a contractor; and liability for injury to a servant, due to the dangerous condition of the appliances which he was required to use, cannot be avoided on the ground that their dangerous condition was caused by the negligent acts of an independent contractor.

In the case of *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. 82, a railroad company was held liable which furnished to a contractor engaged in constructing an extension of a railroad, an engine and train upon which there was a fireman who was already in the service of the company, and who was injured by defects in the engine, attributable to the company's negligence while obeying the latter's order, although the track in progress of construction was in possession of the contractor, and the operation of the train under the latter's exclusive control. But this case is to be distinguished from *MILLER v. MORAN BROS. Co.* in that, in the former, while the servant was injured by the appliances furnished to an independent contractor, yet he was acting pursuant to an order of the master when he was injured.

And in *Jacobs v. Fuller & H. Co.* 67 Ohio St. 70, 65 L. R. A. 833, 65 N. E. 617, it was held that an employer who furnishes a dangerous machine to an independent contractor, and who neglects to give instructions as to the dangerous character of the machine, is liable to one who is injured while operating it. The court held that the de-

ock's Stove & Range Co. 136 Mo. 3, 37 S. 7, 112.

Messrs. Kerr & McCord, for respondent:

If it was not one of plaintiff's duties to assist in raising the plate, and was outside of the line of his employment, then the defendant in no event is responsible to him.

2 Labatt, Mast. & S. § 633, p. 1834.

If the defendant furnished reasonably safe appliances, and if competent men to handle the same were provided, there was no liability.

Metzler v. McKenzie, 34 Wash. 470, 76 Pac. 14; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 17.

If the plaintiff suffered an injury by reason of any negligence on the part of the servants and employees of Kelly, this defendant cannot be held to respond.

Cooper v. Seattle, 16 Wash. 462, 58 Am. R. Rep. 46, 47 Pac. 887; 2 Thomp. Neg. § 2, p. 899; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Kansas C. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Rome & D. R. Co. v. Thasteen*, 88 Ala. 591, 7 So. 94; *Forsyth v. Hooper*, 11 Allen, 419; *Riedel v. Moran*, *Fitzsimmons Co.* 103 Mich. 202, 61 N. W. 509;

Fulton County Street R. Co. v. McConnell, 87 Ga. 750, 13 S. E. 828; *Reier v. Detroit Steel & Spring Works*, 109 Mich. 244, 67 N. W. 120; *Nugent v. Atlas S. S. Co.* 51 Hun, 306, 3 N. Y. Supp. 861, 40 N. Y. S. R. 927, 16 N. Y. Supp. 66, 147 N. Y. 709, 42 N. E. 724.

Root, J., delivered the opinion of the court:

Appellant was employed as a carpenter by respondent, a corporation engaged in building the battleship Nebraska for the United States government. Respondent had in its employ over 700 men; some working by the hour, some by the day, and some by contract on certain portions of the work for fixed amounts. Appellant's duties required him to go from place to place about said ship, putting in and changing stanchions or shores used to support the vessel in position. One Kelly had a contract from respondent to place upon the sides of the ship certain steel plates. He was to be paid a gross sum for doing said work. He was given full power to hire and discharge men, and had the control and supervision of them while engaged in the work; they all being subject, however, to the general rules of the shipyard. The work was required to be satis-

fense that the plaintiff was an employee of an independent contractor was not available, as it was a case in which the resulting injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its employment. The theory on which the doctrine of this decision rests is illustrated in *Conlon v. Eastern R. Co.* 135 Mass. 195 in which a railroad company was held liable to a third party who was injured in consequence of the parting of a guy in a defective derrick furnished by it to a contractor. The court said that the contractor ought to have discovered the unfitness of the derrick, but did not; but, however this may be, the defendant would be responsible for the natural consequences of the use of the derrick in the manner in which it contemplated that it should be used.

In the case of *Devlin v. Smith*, 89 N. Y. 42 Am. Rep. 311, the liability of the master is limited. In this case a painter who had a contract to paint the inside of the dome of a courthouse, having no experience in scaffold building, let that work to an experienced independent contractor. While a servant of the painter was using the scaffold, it fell killing the latter. The court denied the liability of the master on the ground that he was not liable for the failure of the independent contractor to construct a sufficient scaffold, but held that the independent contractor was responsible.

The doctrine laid down in the New York case is applied with approval in *Norfolk & W. R. Co. v. Stevens*, 97 Va. 631, 46 L. R. A. 11 L.R.A.(N.S.)

367, 34 S. E. 525. in which it was held that the negligence of a bridge company, as an independent contractor, in removing too soon, the false work on a new railroad bridge which it had contracted to substitute for the old one. in consequence of which the new bridge fell with a train, causing the death of a fireman, did not render the railroad company liable if it had made a proper contract with the bridge company, and if the latter was a reputable concern.

The general rule requiring the master to furnish reasonably safe appliances is stated in Labatt on Master & Servant, vol. 1. § 22a, as follows: "The master is in default, as respects his servants, unless the appliances furnished are such as would commend themselves to a reasonably prudent man. . . . In order to discharge this obligation, he must see that the instrumentalities which he furnishes are 'in proper condition.' . . . The doctrine is now regarded as axiomatic, that the employer is bound to furnish adequate materials . . . [including premises reasonably safe] to accomplish the work."

With reference to the master's obligation to furnish a safe place, as an absolute duty, Thompson's Commentaries on the Law of Negligence, § 4928, states that the duty which the law imposes upon a master, of exercising reasonable care, to the end that the premises committed by him to his servant shall not subject the servant to greater dangers than those which necessarily flow from the nature of the employment, is an absolute duty, but not in the sense that the master is an insurer of its performance.

factory to respondent and the United States government, both of whom had superintendents about the premises. The appliances used by Kelly were furnished by respondent, although the written contract between them (which appears to have been the only contract governing them) is silent as to who should furnish the tools and appliances. On the 16th day of November, 1903, while appellant was working in the vicinity of some of Kelly's workmen, he was seriously injured by the falling of a steel plate weighing about 2,000 pounds. In raising this plate a chain and tackle were fastened to an iron bar placed lengthwise across a manhole, extending about 9 inches on each side of said opening, which was 18 inches in diameter. By chains extending from the tackle to the plate, the latter was raised from the floor to the side of the ship, where said plate was to be adjusted. While the plate was suspended in the air appellant helped shove and "steady" it awhile, and then proceeded to do something about his own work under said suspended plate. In attempting to get the plate into proper position on the side of the vessel, one of the workmen, in using a wrench as a lever to push the plate along, let said wrench slip, which caused the plate to swing back on the chain, and by its swinging motion and momentum to occasion a slipping of the iron bar supporting the tackle. One end of the bar thereupon came through the opening, releasing the tackle, and permitting the plate to fall. It appears by the evidence that an appliance known as a "grappling hook," or as a "clamp," could have been used, instead of the iron bar, and, if properly adjusted, would have avoided this accident. Two of the workmen went to the toolhouse to get such an appliance, but were told by the keeper in charge thereof that there was no such appliance there at that time. It appears by the evidence that there were probably such appliances about the yard. No request for such was made of any superintendent, foreman, or officer of respondent. The workmen selected the iron bar from certain of respondent's material found near by. Appellant instituted this action against respondent to recover damages occasioned by reason of the injuries sustained as aforesaid. At the close of his case a motion for nonsuit was sustained by the trial court. From the judgment of dismissal, this appeal is taken.

It is claimed by appellant that it was respondent's duty to furnish a reasonably safe appliance to Kelly for raising these plates, and that, inasmuch as it did not do so, it must respond in damages to appellant for the injuries he sustained. In the first place, the only contract shown to exist between respondent and Kelly does not place upon re-

spondent any obligation to furnish any tool or appliances. In the next place, it does not appear that respondent, or any of its officers, superintendents, or foremen, refused to furnish necessary and safe appliances. The unsafe appliance was not furnished to respondent. There is no evidence that respondent, or any of its agents, knew anything about Kelly's men having taken or used the iron bar in question. These men went upon their own motion and selected the bar in question. There is nothing to show that grappling hooks could not have been obtained, if requested of respondent's officers or foremen. It appears that there were doubtless some of these appliances on the premises. If there was any obligation on the part of respondent to furnish Kelly with appliances, it was a duty due to Kelly, and for any breach thereof it would be held against Kelly, and not to appellant. That Kelly was an independent contractor is shown by the written contract in evidence. This relationship was not changed by the fact that general supervision was exercised over his work by respondent and the government, to both of whom the result of his work was required to be satisfactory. The choice of men, appliances, and methods was left to him, and for any negligence touching any of these matters he, and not respondent, was answerable. Even conceding it to have been the duty of respondent to furnish Kelly with appliances (and this is not shown by the evidence), this duty would be fulfilled by delivering suitable appliances to Kelly upon his request therefor. If there were such appliances provided in the yard where Kelly could secure them upon demand, it was a sufficient compliance with the duty in *Steeple v. Panel & Folding Box Co.*, 10 Wash. 359-364, 74 Pac. 475. It appears that respondent, by some official, gave Kelly's workmen an order on the keeper of the toolhouse for one of these grappling hooks. None was there at the time. Instead of going to some foreman and asking as to where such an appliance could be found, these men went to a pile of iron near by and selected the bar which was used. It was not the duty of respondent to keep watch of Kelly and deliver his appliances at the place of use.

As an independent contractor, Kelly owed his servants the duty of furnishing reasonably safe appliances. Toward others working in his vicinity he owed the duty of ordinary care. Respondent had the right to presume that Kelly would observe these obligations in the conduct of his work. If it were respondent's duty to furnish suitable appliances, it would have the right to presume that Kelly would request them from someone having authority when they were

needed, if they were not at hand. As the written contract did not require respondent to furnish appliances, the fact that respondent had been doing so would not render it liable in a given instance where the contract or his servants selected an unsafe device. We can find nothing in the evidence showing any breach of duty on the part of respondent in the matter of furnishing, or neglecting to furnish, appliances. Such a breach must be shown before negligence is established. *Singleton v. Felton*, 42 C. C. A. 57, 101 Fed. 626.

A breach of respondent's duty to furnish appellant a safe place to work is suggested. That the master is under obligations to give the servant a reasonably safe place to work is, of course, a well-established principle of law. But, where the servant is in as good a position as the master to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, he cannot be heard to complain from injuries sustained by working therein. *Wilson v. Northern P. R. Co.* 31 Wash. 67, 71 Pac. 713; *Anderson v. Inland Teleph. & Teleg. Co.* 19 Wash. 585, 41 L. R. A. 410, 53 Pac. 657; *Tham v. J. T. Steeb Shipping Co.* 39 Wash. —, 81 Pac. 711. In the case of *Wilson v. Northern P. R. Co.* *supra*, this court speaking by Mount, J., said: "If defendants are liable at all, they are liable because of some neglect of duty owing from defendants to plaintiff. . . . They were not obliged to guarantee the safety of the place, but they were in duty bound to make a reasonable inspection. . . . His [the servant's] inspection was the inspection of a reasonably careful man. The foreman, no doubt, also inspected the ground in the same way for the same purpose, and saw the same as the plaintiff saw, and came to the same conclusion. . . . When the danger is not known, and not suspected, and where there are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger, where the knowledge is not shown in fact. When reasonably careful men conduct their business in a reasonably careful manner, there is no negligence." In *Anderson v. Inland Teleph. & Teleg. Co.* 19 Wash. 575-584, 41 L. R. A. 410, 53 Pac. 657, 660, this court, speaking through Dunbar, J., said: ". . . If the employee does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding." And the following quotations were made with approval: "Where the danger is alike open to the observation of all, both the master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business,"—taken from *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888. A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the dangers incident to its use, as the master, or if, in the exercise of due care, he ought to have such knowledge.—quoted from *Wood, Master and Servant*, § 366. "Knowledge on the part of the employer and ignorance on the part of the employee are of the essence of the action,"—quoted from *Beach, Contributory Negligence*, § 346. In the case of *Tham v. J. T. Steeb Shipping Co.* *supra*, this court upheld an instruction of the trial court given in the following language: "If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."

In the case before us there was no occasion for respondent's supposing that Kelly would be using the iron bar mentioned. Respondent was concerned with the results of Kelly's work, but not with the details of its performance. It was not required to know that he was using an unsafe appliance at that particular time, and there is no evidence that any of its officers or agents did know. Appellant was at the place. So far as the evidence shows, he was in a better position to know of the character of this appliance and its dangers than any officer or agent of respondent. Appellant's work was constantly being changed from place to place in removing and adjusting the shores about the ship. This particular place was rendered unsafe only at the moment when they began to elevate this heavy plate. The entire situation may have been thoroughly inspected and found safe a minute before, so far as the evidence shows. Respondent was under no obligation to have an officer constantly follow appellant around to protect him from situations made dangerous by occurrences unusual and unexpected by either master or servant. It was daylight, and appellant could have seen this iron bar as well as any foreman. Seeing it, he would know that there was more or less danger in its use. The very nature of the work of building a ship necessitates constant changes. A place perfectly safe one minute may become extremely dangerous the next by the ordinary and necessary operation of the work, and without fault on the part of anyone. A servant working in the capacity of this appellant knows all this, and must be held to be, to a certain extent, his own in-

jury resulting from the dangers of the business,"—taken from *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888. A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the dangers incident to its use, as the master, or if, in the exercise of due care, he ought to have such knowledge.—quoted from *Wood, Master and Servant*, § 366. "Knowledge on the part of the employer and ignorance on the part of the employee are of the essence of the action,"—quoted from *Beach, Contributory Negligence*, § 346. In the case of *Tham v. J. T. Steeb Shipping Co.* *supra*, this court upheld an instruction of the trial court given in the following language: "If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."

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spector. He cannot complain because the master, with less opportunity than he, has failed in a given instance to detect or anticipate an unexpected occurrence. *Weideman v. Tacoma R. & Motor Co.* 7 Wash. 517, 35 Pac. 414; *Decker v. Stimson Mill Co.* 31 Wash. 522, 72 Pac. 98; *Cully v. Northern P. R. Co.* 35 Wash. 241-247, 77 Pac. 202. There is no evidence to show that respondent knew or had any reason to suspect that appellant's working place had been made dangerous by Kelly or anyone. It therefore follows that appellant's action cannot be sustained on that ground.

The defenses of contributory negligence and assumed risk are interposed by respondent, and are not without support in the evidence. Appellant offers no good reason for standing under the suspended steel plate. He knew its tendency to swing, as he admits that he helped to "steady" it. It would seem that common prudence ought to suggest to any person of ordinary intelligence the propriety of "standing from under" while a 2,000-pound weight was swinging over his head in the air. Where a heavy steel plate is being handled with chains and other metallic appliances, in the manner open and apparent as was this, the risk of danger from standing under it would be evident to anyone. To be sure, there was no certainty of injury, perhaps no probability; but there was an obvious possibility, and the serious character of the danger in case the heavy plate should fall would be apparent to any person of ordinary intelligence. It is inconceivable that any person of ordinary prudence would have stood under such a swinging mass of steel. No emergency, direct orders, or unusual occurrence is shown in justification of appellant's presence in a place of such danger.

It is urged by appellant that he did not know that Kelly was an independent contractor, and that he had a right to suppose that Kelly's men were servants of respondent, and that it was respondent's duty to furnish them with safe appliances. We are shown no facts or law making it the duty of respondent to inform appellant that Kelly was such contractor. None such occur to us. Neither has our attention been called to any authority giving a servant a right of action for a breach of duty on the part of the master toward an independent contractor and his men; said servant not working for, or under the direction of, said contractor.

Perceiving no error in the ruling of the trial court, its judgment is affirmed.

Mount, Ch. J., and Rudkin, Crow, and Hadley, JJ., concur.

Petition for rehearing denied.
1 L.R.A. (N.S.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SOUTHERN PACIFIC COMPANY, Plf. in Err.,
v.

P. R. HETZER.

(68 C. C. A. 26, 135 Fed. 272.)

1. Personal injury—damages—mental pain.

In actions for personal injury the plaintiff may recover for the bodily suffering and mental pain which are inseparable, and which necessarily and inevitably result from the injury. But mortification and distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows—that mental pain which is separable from the bodily suffering caused by the injury—is too remote, in definite, and intangible to constitute an element of the damages in such a case; and evidence of it is inadmissible.

2. Master and servant—employment of co-servants.

It is the duty of the master to exercise reasonable care to employ competent servants; and, when he has exercised this care this duty is discharged.

3. Same—discharge of incompetents.

Another duty of the master is to discharge a servant when he knows, or by the exercise of reasonable diligence would know, that the servant has contracted the habit or character of negligence, of drunkenness, or of lack of skill, so that he is incompetent.

4. Same—duty to learn habits.

The diligence required of the master to learn the habits or characters of servants employed with due care is not of that degree demanded in his employment of servants, or in his inspection of machinery, because careful and skillful men grow more careful and skillful, and the legal presumption is that servants once competent continue so. The master may rely upon the presumption of competency until he has notice or knowledge to the contrary.

5. Same.

The reasonable diligence and care which the master is required to exercise here is

Headnotes by SANBORN, Circuit Judge.

Case Note.—The general doctrine that a master is bound to keep himself informed as to the fitness of servants already in his employ, so far as this can be accomplished by proper supervision and superintendence, is shown in *Labatt on Master and Servant*, vol. 1, § 195, to be clearly established. The following cases are cited in its support: *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; *Norfolk & W. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Ohio & M. R. Co. v. Collard*, 73 Ind. 261, 38 Am. Rep. 134; *Wabash R. Co. v. McDaniel*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Holland v. Tennessee Coal, Iron, & R. Co.* 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. But it is also the rule that,

of that high degree of care which a prudent business man would use if the want of endangering his own person. It is that degree of care which prudent railway officials exercise under like circumstances; that are which such officials charged with the duty of discharging servants employed with due care commonly exercise as soon as they know, or by the exercise of reasonable diligence would know, that such servants have become incompetent.

Same—assumption of risk.
Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them; but the servants may, by notice, cast the risk of the habitual negligence of their coemployees upon the master.

Evidence—carelessness of servant.
Evidence of specific acts of negligence known to the master, and of acts of negligence like those which cause the death of messengers, so notorious that the master must have known of them if he had exercised reasonable diligence, is admissible to prove the habit or character for incompetence of a servant who is employed with due care.

Same—specific acts.
Specific acts of negligence, of drunkenness, or lack of skill, or of incompetence, of which the master had no notice, are inadmissible to prove the incompetence of a servant employed with due care. The proper proof of habit and character, as of reputation, in such a case, is the testimony of witnesses qualified to speak of them, subject to proper cross-examination relative to the facts upon which their testimony is based.

Same—general reputation.
After proof of the incompetence of a servant, his general reputation among those acquainted with him or his work is competent to prove notice of the habit of incompetence to the master. But reputation among a particular class, which obviously includes but a part of those who knew his character or work, is inadmissible for this purpose.

Exception—general—several instructions.

When suitable and competent persons have been employed, good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change. *Blake v. Maine C. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Michigan C. R. Co. v. Dolan*, 32 Mich. 510; *Michigan C. R. Co. v. Gilbert*, 46 Mich. 176, 1 N. W. 243; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Chapman v. Erie R. Co.* 55 N. Y. 579.

In the Chapman Case the court said: "Good character and proper qualifications, once possessed, may be presumed to continue; and I see no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or, at least, such as would put a reasonable man

A single exception to a refusal to give a number of requests to submit to the jury several propositions of law and of fact is futile, if any of those propositions is erroneous or inapplicable.

(Hook, Circuit Judge, dissents from proposition 5.)

(January 25, 1905.)

ERROR to the Circuit Court of the United States for the District of Utah to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion. Argued before Sanborn and Hook, Circuit Judges, and Lochren, District Judge.

Mr. Martin L. Clardy, with Mr. Henry G. Herbel, for plaintiff in error.

Messrs. H. H. Henderson and H. R. Mac-Millan, for defendant in error:

Mental suffering caused by an injury, such as alleged in the complaint in this action, is an element for which the jury should assess damages.

District of Columbia v. Woodbury, 136 U. S. 459, 34 L. ed. 475, 10 Sup. Ct. Rep. 990; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 105, 18 L. ed. 591, 594; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290, 3 Am. Rep. 549; *Smith v. Holcomb*, 99 Mass. 552; *Holyoke v. Grand Trunk R. Co.* 48 N. H. 541; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Smith v. Overby*, 30 Ga. 241; *Cox v. Vanderkleed*, 21 Ind. 164; *Lynch v. Knight*, 9 H. L. Cas. 577.

Evidence of specific acts of negligence may be introduced for the purpose of proving incompetency.

1 Labatt, Mast. & S. pp. 412 *et seq.*; *Baulec v. New York & H. R. Co.* 59 N. Y. 361, 17 Am. Rep. 325; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111; *Wharton*, Neg. § 238, and notes;

upon inquiry." The court added, as to the presumption of the servant's continued fitness: "If competent when employed, additional experience would naturally render him more so; and, while his habits might change for the worse, there is no such depravity in human nature as, in law, requires special vigilance on the part of the employer to prevent it." Even the fact that the employer had some information to indicate that the servant has become unfit for his duties, or unreliable, does not require him to discharge the servant without investigation; but he should, in such case, make proper investigation on this subject, so as to keep informed. *Michigan C. R. Co. v. Gilbert*, and *Lake Shore & M. S. R. Co. v. Stupak*, *supra*; *Baulec v. New York & H. R. Co.* 62 Barb. 623, Affirmed in 59 N. Y. 356, 17 Am. Rep. 325.

Southern P. Co. v. Huntsman, 55 C. C. A. 368, 118 Fed. 412; Gier v. Los Angeles Consol. Electric R. Co. 108 Cal. 129, 41 Pac. 24; Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 244; Baltimore & O. R. Co. v. Henthorne, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 634.

General reputation is admissible for the purpose of proving notice to the master of the incompetency of a fellow servant.

Baltimore & O. R. Co. v. Henthorne, *supra*; Gier v. Los Angeles Consol. Electric R. Co. 108 Cal. 129, 41 Pac. 23; Western Stone Co. v. Whalen, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 245; Coppins v. New York, C. & H. R. Co. 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 916; Hiltz v. Chicago & G. T. R. Co. 55 Mich. 437, 21 N. W. 882; Driscoll v. Fall River, 163 Mass. 105, 39 N. E. 1003; Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 25 L. R. A. 710, 47 Am. St. Rep. 392, 29 Atl. 994; Southern P. Co. v. Huntsman, *supra*; Wabash Western R. Co. v. Brow, 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 952; Scott v. Utah Consol. Min. & Mill. Co. 18 Utah. 486, 56 Pac. 305; 1 Labatt, Mast. & S. § 181, note 5, p. 399; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 674, 42 L. ed. 1188, 1192, 18 Sup. Ct. Rep. 777.

The degree of care and foresight which it is necessary to use should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively.

New York v. Bailey, 2 Denio, 440; Northwest Transp. Co. v. Boston Marine Ins. Co. 41 Fed. 799; Central R. & Bkg. Co. v. Ryles, 84 Ga. 420, 11 S. E. 499; Hoffman v. Tuolumne County Water Co. 10 Cal. 417; The Nitro-Glycerine Case (Parrott v. Wells), 15 Wall. 524, 538, 21 L. ed. 206, 212; Wabash R. Co. v. McDaniels, 107 U. S. 460, 27 L. ed. 608, 2 Sup. Ct. Rep. 932; Harley v. Buffalo Car Mfg. Co. 142 N. Y. 31, 36 N. E. 813; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 58; Sykes v. Packer, 99 Pa. 465; Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 58; Brymer v. Southern P. Co. 90 Cal. 498, 27 Pac. 371; Sappenfeld v. Maine Street & Agri. Park R. Co. 91 Cal. 56, 27 Pac. 590.

Sanborn, Circuit Judge, delivered the opinion of the court:

About 5 o'clock in the afternoon of July 23, 1902, P. R. Hetzer, the plaintiff below, was the brakeman on the rear of a train of 22 cars which Tom Delano, one of the engineers of the Southern Pacific Company, was backing into a gravel pit. As this train approached a switch which it was Hetzer's duty

to throw, he gave the slow signal, and his fellow brakeman gave the stop signal to the engineer. Delano applied the air. Hetzer fell to the track, one of the wheels of the rear car passed over his leg, and the train stopped. The injury to the leg necessitated its amputation above the knee. He sued the company for causal negligence for employing and keeping in its employment an incompetent engineer. At the trial there was no evidence to sustain his averment that the company was guilty of negligence in selecting and employing Delano, this charge was withdrawn from the jury by the court and the only issues submitted to them were the question whether or not the defendant was guilty of any want of ordinary care in continuing Delano in its employment at the time of the accident, and the amount of plaintiff's damages. There was a verdict and judgment against the company for \$11,450.

It is assigned as error that, at the trial of the action, more than fifteen months after the accident, in answer to questions of his counsel relative to the effect upon his mind at that time of the injury to his leg, the plaintiff testified that the fact that other people looked down upon him because he was crippled, and seemed to shun him, made him feel very badly and distressed him mentally. There is a conflict of authority upon the question which this assignment presents. In some states, notably in Wisconsin and Michigan, evidence of mental pain caused by disfigurement, apart from the physical suffering produced by an injury, is admissible to enhance the damages in an action for personal injury. *Heddes v. Chicago & N. W. R. Co.* 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115, 116, and cases there cited; *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 374, 46 N. W. 773, 776. The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that, in actions for personal injury, the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows—that mental pain which is separable from the physical suffering caused by the injury—is too remote, indefinite, and intangible to constitute an element of the damages in such a case, and evidence of it is inadmissible. *Chicago, R. I. & P. R. Co. v. Caulfield*, 11 C. C. A. 552, 555, 27 U. S. App. 358, 63 Fed. 396, 399; *Kennon v. Gilmer*, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; *Bovee v. Danville*, 53 Vt. 183; *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299, 302, 303; *Saline*

Trosper, 27 Kan. 544, 564; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 2, 3 So. 36; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313, 321; Joch v. Dankardt, 85 Ill. 331, 332; Johnson v. Wells, & Co. 6 Nev. 224, 236, 3 Am. Rep. 245. Mental pain of this character, the suffering from injured feelings, is intangible,—incapable of test or trial. The evidence of it, like that which convicted the alleged itches, rests entirely in the belief of the sufferer, and it is not susceptible of contradiction or rebuttal. Many other causes, the location, temperament, and sentiment of the sufferer, the mental attitude, the acts and words of his friends and acquaintances, concur with the accident to cause this mental distress, in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant. And the amount of the mental pain caused by any disfigurement necessarily varies so with the character, temperament, and circumstances of the injured person that no just measure of the damages from it can be found. Such mental suffering is too remote, intangible, and immeasurable to form the basis of any just adjudication, and the objections to the testimony of the plaintiff concerning it should have been sustained.

One of the counsel for the plaintiff asked him if there was any other occurrence of sudden stopping or jerking of the train while Delano was acting as engineer during the day of the accident. Defendant's counsel promptly objected to the testimony which the question was intended to elicit, upon the ground that it was evidence of a specific act other than the one pleaded. The witness testified that, about three hours before the accident, Delano stopped his train in a very rough manner, so that the plaintiff staggered around, but did not fall. Evidence of another act of Delano of a similar character was admitted, under a like objection; and these rulings of the court are assigned as error. The issue of law which these rulings present is not without importance, and it may be well, before entering upon its discussion, to place clearly before the mind the legal relation of the plaintiff and the defendant, and the exact question to be decided. It is the duty of the master to exercise reasonable care to employ competent servants to work with his employees. When he has exercised this care, he has fully discharged this duty. There is another duty of the master. It is to discharge a servant whom he has employed with due care when the employee has contracted the habit of negligence or of lack of skill, so that he has become incompetent, and the master knows, or by the exercise of reasonable care would have known, of this habit. This duty, however,

is not imposed until the habit has been formed, nor until the master knows, or by the exercise of reasonable care would have known, of its existence. It is not invoked by occasional acts of negligence. Wood's Mast. & S. 2d ed. § 432. Moreover, the master is not required to exercise that degree of care to ascertain this habit which is imposed upon him in reference to the selection of employees or the inspection of machinery which deteriorates with its use, because careful and skilful men become more careful and skilful with the practice of their occupations or professions, and the legal presumption is that competent servants continue to be so, and because servants assume the risk of the negligence of their fellows, a risk which, when that negligence becomes habitual, they may cast upon their master by a simple notice of their incompetence. When the master has exercised due care to employ a servant, he may rely upon the presumption of his competency until he has notice or knowledge to the contrary. Walkover v. Penokee & G. Consol. Mines, 115 Mich. 629, 634, 41 L. R. A. 33, 73 N. W. 895; Weeks v. Scharer, 49 C. C. A. 372, 378, 111 Fed. 330, 336; Chapman v. Erie R. Co. 55 N. Y. 579, 585, 586; 1 Bailey, Personal Injuries Relating to Master & Servant, § 1413; 1 Labatt, Mast. & S. p. 428; Wood, Mast. & S. 2d ed. § 433, p. 841.

One who enters the service of another assumes all the ordinary risks and dangers of that service. One of those risks is the danger of injury from the negligence of his fellow servants. The association of a servant with his coworkers, as in the case at bar of a brakeman in the same crew with an engineer, is often closer, his knowledge of their characters, habits, and competence more intimate and more exact, than that of his master can be. As he generally has a better knowledge of the characters, habits, and negligence of his fellow servants, he is better able to protect himself against their negligence than the master can be; and for this reason the law charges him with the risk. So it is that, under the law, the duty of employing fit servants is imposed upon the master, and, when that duty is discharged, the duty of protecting themselves against the negligence of their fellow servants is imposed upon the employees.

The claim of the plaintiff is that his master was negligent because it retained in its employment one whom it engaged with due care after he had become incompetent by reason of his habitual negligence in the use of the air to stop his trains. But the risk of the negligence of this servant was prima facie that of the plaintiff. One who would charge the master with negligence here must

prove not only that the servant was incompetent, but that the master knew, or by the exercise of reasonable diligence would have known, of his unfitness. A habit of negligence that is known, or that, by the exercise of reasonable care, would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of trains and the death of passengers, may render a servant incompetent, and impose upon the master the duty of discharging him. A single specific act of ordinary negligence, however, has no tendency to prove incompetence, and imposes no such duty upon the master, because perfection is not an attribute of humanity, because ordinary care implies occasional forgetfulness, and hence the risk of the casual negligence of his fellow servant is that of the servant, and not that of the master. *Wharton, Neg. § 238; Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338, 343; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364; *Moss v. Pacific R. Co.* 49 Mo. 167, 8 Am. Rep. 126; *Wood, Mast. & S. § 432*.

Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetence; and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant. In the case at bar there was no evidence that the master knew, or that by the exercise of reasonable care it would have known, of the two specific acts of negligence, the evidence of the commission of which is here challenged; and the question is, Are specific acts of negligence of which the master has no notice admissible to prove the incompetence of his servant whom he has exercised due care to employ?

The burden of proof was upon the plaintiff to show (1) that the engineer had contracted the habit of negligence in the use of the air to stop his trains, to such an extent that he was an incompetent operator, and (2) that he had so notorious a reputation for this incompetence that the defendant, by the exercise of reasonable diligence, must have known it. The contention of counsel for the plaintiff is that specific acts of negligence are admissible to prove the habit, the character, and hence the fact, of incompetence. Counsel for the defendant insist that this fact is properly evidenced by the testimony of those who knew the habit or character alone, and that isolated acts are inadmissible to establish it, because the habit or character is conditioned, not by a few sporadic deeds, but by all the acts of the employee which relate to the charge against him. In support of their position, counsel for the plaintiff have cited the following cases: *Cosgrove v. Pitman*, 103 Cal. 1 L.R.A. (N.S.)

268, 275, 37 Pac. 232; *Gier v. Los Angeles Consol. Electric R. Co.* 108 Cal. 129, 131, 41 Pac. 22, 23, 24; *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 9, 38 N. E. 241, 244; *Baulec v. New York & N. H. R. Co.* 59 N. Y. 356, 358, 360, 17 Am. Rep. 325; *Southern P. Co. v. Huntsman*, 55 Cal. 366, 367, 118 Fed. 412, 413; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 113, 123-124, 4 Am. Rep. 364; *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L. R. A. 710, 47 Am. Rep. 392, 29 Atl. 995, 996; *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. Rep. 2, 23 N. E. 228; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246, 24; *Baltimore & O. R. Co. v. Henthorne*, 19 Cal. 623, 627, 43 U. S. App. 113, 73 Fed. 637, 638, 1 Labatt, Mast. & S. §§ 411-412. The learned author of the work has cited expresses an opinion favorable to the contention of plaintiff's counsel, but the authorities to which he refers in his notes in support of his view present cases in which notice of the specific acts was brought home to the master, such as *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 298, 318, 10 Am. Rep. 11; *Couch v. Watson Coal Co.* 46 Iowa, 17, 5 Grube v. Missouri P. R. Co. 98 Mo. 330, 1 L. R. A. 776, 14 Am. St. Rep. 645, 11 S. W. 736; *Sutton v. New York, L. E. & W. R. Co.* 50 N. Y. S. 514, 21 N. Y. Supp. 33; *Barkley v. New York C. & H. R. R. Co.* 1 App. Div. 228, 54 N. Y. Supp. 766, 769; *Morris v. Mt. Morris Electric Light Co.* 41 App. D. 574, 53 N. Y. Supp. 659; and *Consolidated Coal Co. v. Seniger*, 179 Ill. 370, 53 N. E. 733,—cases in which the remarks of the courts upon the admissibility of the acts were *obiter dicta*, as in *Gier v. Los Angeles Consol. Elec. R. Co. supra*, and even where the habit of drunkenness, or of negligence, was proved, presumably by competent witnesses who knew it, and no question of the admissibility of specific acts to establish it was considered or decided, as in *Hill v. Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878, 882; so that the argument of *Labatt* is not as persuasive as it would have been if it had been supported by decisions of courts which had necessarily considered and decided the question.

Bearing in mind, now, that it is conceded that specific acts of incompetence of a servant, notice of which was brought home to the master before the accident, are admissible on the issue of his negligence in failing to discharge him, and that the question before is not whether acts known to the master, so notorious that they ought to have been known, are admissible, but whether or not specific acts of which he had no notice or knowledge are competent to establish the incompetence of the servant, let us consid-

authorities upon which counsel for the plaintiff rely.

In *Cosgrove v. Pitman*, *supra*, evidence of several specific acts of drunkenness of which the master had no notice was introduced, and the court held that an instruction that, as an engineer was unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess, he was not a competent motorer, was erroneous, and reversed the judgment which had been rendered for the plaintiff, because the specific acts did not constitute competent evidence of the incapacity of the servant. The court said: "Proof of specific acts is not equivalent to proof that Murphy had either this reputation or this habit. 'Character for care, skill, and truth of witnesses, parties, or others must all alike be proved by evidence of general reputation, and not of special acts.' 1 Greenl. 7. §§ 461-469. Character grows out of special acts, but is not proved by them, though, indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established, and sometimes the very frailties that are proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character." *Frazier v. Pennsylvania R. Co.* 38 Pa. 110, 80 Am. Dec. 467."

In *Gier v. Los Angeles Consol. Electric R. Co.*, *supra*, the conductor of a motor car sued his master for retaining a careless motorman. Evidence that the motorman's reputation for care was bad was introduced, but there was no evidence that he had the habit of negligence, or that he had been guilty of any specific acts of negligence before the accident. The court reversed the judgment for the plaintiff, upon the ground that a reputation for negligence was insufficient alone to prove the fact of negligence, and, in the course of its argument, said that evidence of individual acts evincing negligence or incompetence was admissible to prove the fact. This remark, however, was an *obiter dictum*. The question whether or not such acts, unknown to the employer, were admissible for this purpose, was not presented by the record in that action. The decision of that question was neither necessary nor material to the determination of the case, and the court which decided that case, in *Cosgrove v. Pitman*, where the decision of the question was necessary to the adjudication of the case, expressly held that specific acts were not admissible to prove the alleged unfitness of the employee.

In *Western Stone Co. v. Whalen*, *supra*, the court remarked, in the course of the opinion, that it seemed to be well settled that proof of specific acts was admissible to establish incompetency. But that ques-

1 L.R.A.(N.S.)

tion was not before the court for adjudication, and its *dictum* is without authority. The question the court was considering in that case, and the one it decided, was whether or not evidence of reputation was admissible to show notice to the master. No other opinion cited by counsel for the plaintiff either discusses or decides the question before us for determination.

In *Lake Shore & M. S. R. Co. v. Stupak*, *supra*, the habit of recklessness was alleged and proved; and in *Baltimore & O. R. Co. v. Henthorne*, and *Norfolk & W. R. Co. v. Hoover*, *supra*, the habit of drunkenness was proved. But there is nothing in the reports of either of these cases to indicate that specific acts of negligence, or of drunkenness, were received to establish these habits, or that they were not proved by the testimony of qualified witnesses who were acquainted with them. Indeed, in the case last cited, the court said, "The evidence offered and admitted had no relation to specific or isolated acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care."

In *Monahan v. Worcester*, *supra*, there is no reference to the issue in hand.

In *Baulec v. New York & H. R. Co.*, and in *Southern P. Co. v. Huntsman*, *supra*, notice of specific acts was brought home to the master, and for that reason they were clearly admissible.

And in *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 113, 124, 128, 4 Am. Rep. 364, a judgment in favor of the defendant was sustained, because the knowledge of specific acts of negligence, proof of which was introduced in the case, was not brought home to the master.

This brief review of the opinions to which counsel for the plaintiff have referred us discloses the fact that while there are two *dicta*, there is no adjudication among them in support of the position they have taken. And why should there be such a decision? The issue on trial in a case of this character is the negligence of the master, in that he failed to dismiss a servant who was employed with due care, and whom the law presumed to continue to be competent. Why should specific acts of negligence, or of lack of skill, of such a servant, of which the master has no knowledge or notice, and of which every servant subject to the infirmities of human nature must necessarily sometimes be guilty, be admitted in evidence to establish the negligence of the master in failing to discharge him? The employer is not liable for such acts. The fellow servant has assumed the risk of them. It is only when they have become so grave and numerous

as to establish the habit and character, and so notorious as to establish the reputation of lack of care or of skill, that any liability for negligence in retaining the servant can attach to the master. The habit, the character, of a man or of a servant is not made, and it ought not to be provable, by isolated, sporadic acts. It is the product of all the acts he performs during his life or his service. If the plaintiff may introduce in evidence two specific acts of alleged negligence of an engineer in stopping his train to prove his habit and character in this regard, and if he has stopped his train a thousand times within a reasonable period preceding the accident, may not the defendant also introduce in evidence the other 998 stops for the same purpose? And may not the parties litigate and submit to the jury the question whether each of these 1,000 stops was careful or negligent? It by no means follows from the fact that a servant was guilty of negligence, or of a lack of skill, on a few specified occasions, that he is not ordinarily a careful and skilful workman; and the investigation of his specific acts to ascertain his character and habits would tend to confuse the case with collateral inquiries, which, if carefully made, would indefinitely prolong the trial, and would lead the court and jury far away from the issue before them.

This is not the only reason why such specific acts should not be received. A defendant is entitled to fair notice of the issues upon the trial of which his liability hinges. A complaint that a servant was incompetent, and that the defendant was negligent in that it did not discharge him, informs the master, indeed, that the habit, character, and reputation of the employee are in issue; but it is no adequate notice that the character of an isolated or specific act which the servant may have committed is to be tried, and that upon the character of that act the liability of the defendant is to hinge; and it gives the master no opportunity to prepare, or to fairly try, any such issue.

These considerations, and the deliberate and carefully considered adjudications of this question in the cases in which it was necessary to decide it, which are cited below, persuasively lead to the conclusion that specific acts of negligence, of drunkenness, or of incompetence, no notice of which was given to the master before the accident, are inadmissible to prove the incompetence of the servant, or the negligence of the master in failing to discharge him. *Hatt v. Nay*, 144 Mass. 186, 187, 10 N. E. 807; *Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860; *Cosgrove v. Pitman*, 103 Cal. 268, 275, 37 Pac. 232; *Frazier v. Pennsylvania R. Co.* 38 Pa. 110, 80 Am. Dec. 467; *Norfolk & W. R. Co.* 1 L.R.A. (N.S.)

v. Hoover, 79 Ind. 253, 25 L. R. A. 710. *Am. St. Rep.* 392, 29 Atl. 995. 996.

The review of the authorities which this decision of this question has invited, and consideration of the reasons upon which the rules relating to the liability of the master for negligence in the employment of and the failure to discharge servants are based, convince that the following rules are well established, and should prevail in the trial of actions to enforce that liability: It is the duty of the master to exercise reasonable care to employ competent servants, and, when he has exercised this care, this duty is fully discharged. Another duty of the master is to discharge a servant whom he has employed with due care, when he knows, or by the exercise of reasonable care would have known, that the servant has contracted the habit or character of negligence or lack of skill, so that he has become incompetent. The diligence or care required of the master to learn the habits or character of servants whom he has employed with due care is not of that degree which is required in his employment of servants or in his inspection of machinery that deteriorate with its use, for the reason that careful and skilful men grow more careful and skilful in the practice of their occupations, and the legal presumption is that servants once competent continue to be so. Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them. The servants may have notice to the master, cast upon him the risk of the habitual negligence of their employees. Evidence of specific acts of negligence known to the master, and of acts of negligence like those which cause the death of passengers, so notorious that the master must have known of them if he exercised reasonable diligence, is admissible to prove the habit or character of a servant, who was employed with due care, for incompetence. But specific acts of negligence, of lack of skill, or of incompetence, of which the master had no notice or knowledge prior to the alleged accident, are inadmissible to establish the incompetence of a servant who was employed with due care.

The court instructed the jury that, after the defendant had used due care to select and employ the engineer, Delano, it was his duty to exercise that degree of care to supervise his subsequent conduct "that an ordinarily prudent business man would use under similar circumstances if the danger to be apprehended from a want of care was his personal danger." This portion of the charge laid too heavy a burden on the defendant: (1) Because the supervision and discharge of the engineer did not constitute the personal danger of those to whom they

were intrusted. The law never requires the impossible, and the imperfection of human nature is such that ordinarily prudent men do not and cannot commonly exercise that high degree of care to insure the safety of others which they instinctively use to protect their own safety. (2) Because the limit of the duty of the defendant was to exercise ordinary care, and the standard of ordinary care is that degree of caution which ordinarily prudent persons commonly exercise under like circumstances,—that is to say, in the case at bar, when the danger to be apprehended from the want of care does not condition the personal safety of those who exercise the care,—while the court directed the jury to test the duty and the liability by the degree of care ordinarily exercised by such persons under different circumstances; that is to say, when the want of care conditions the personal safety of those who use it. *Grand Trunk R. Co. v. Lewis*, 144 U. S. 408, 416, 417, 36 L. ed. 485, 88, 489, 12 Sup. Ct. Rep. 679; *Union P. R. Co. v. Daniels* (*Union P. R. Co. v. Snyder*) 132 U. S. 684, 691, 38 L. ed. 597, 601, 14 Sup. Ct. Rep. 756; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 569, 34 L. ed. 235, 240, 10 Sup. Ct. Rep. 1044; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; *Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 334, 338, 48 L. ed. 207, 210, 24 Sup. Ct. Rep. 102; *Chumock v. Texas & P. R. Co.* 194 U. S. 432, 437, 48 L. ed. 1057, 1059, 24 Sup. Ct. Rep. 671. And (3) because a rule which would require a master to exercise that high degree of care to supervise the conduct of his servants, after their careful employment, which he would commonly exercise to protect his own person from danger, would abrogate the rule that servants assume the risk of the ordinary negligence of their fellows.

Cases may be found in the books in which courts have expressed the opinion that it was the duty of defendants, under certain circumstances, to exercise the same degree of care for the persons and property of others that they would use if their own personal danger was conditioned by it; but they involve other duties due under different circumstances, and no decision has been called to our attention which sustains the application of such a rule to the duty of a master to supervise the conduct of servants once carefully selected. Thus, where the liability of one who erects a structure on his own land for damages to the property of his neighbor is in issue, the declaration has sometimes been made that the former should exercise that degree of care which a discreet, and prudent person would use, or ought to use, if the

whole risk of loss were to be his own exclusively (*New York v. Bailey*, 2 Denio, 433, 440); and "that the question is not what the plaintiffs could have done, but what discreet and prudent men should do or ordinarily do, in such cases, where their own interests are to be affected, and all the risk their own." *Hoffman v. Tuolumne County Water Co.* 10 Cal. 413, 419. This, however, is far from declaring that the degree of care required, even in such cases, is that which one would exercise if his own personal danger was involved; and the statement that the care required is such as a prudent person ought or should be expected to exercise presents a rule that abrogates every criterion of duty and liability, unless these statements are the simple equivalent of the rule that the requisite degree of care is such as ordinarily prudent persons commonly use under like circumstances. Moreover, the degree of care of the property and lives of adjoining proprietors required of those erecting structures on their own land, like the care of passengers which is required of carriers, is much higher than that which a railroad company owes to its employees, who assume the risk of the ordinary negligence of their fellows.

In several cases involving alleged negligence in the selection of appliances, it is said that the master has discharged his whole duty, and has absolved himself from liability, if he has used as much care as a person of ordinary prudence would exercise to protect his own safety (*Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 30 N. E. 750; *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 184; *Sappenfield v. Main Street and Acari Park R. Co.* 91 Cal. 48, 27 Pac. 590; *Brymer v. Southern P. Co.* 90 Cal. 496, 498, 27 Pac. 371), a statement obviously correct, whether ordinary care is that which prudent men commonly exercise under similar circumstances, or that which such men would exercise if the danger from the lack of it was their own personal danger; so that the decisions in these cases do not rule this question.

There are other opinions which treat of the master's duty to exercise care in the selection of tools and machinery, and one in which the care of the place of work was in question, in which declarations have been made that the ordinary care which the master was required to use was such as a man of ordinary prudence would employ, or would be expected to employ, to secure his own safety if he was to do the work. *Westinghouse Electric & Mfg. Co. v. Heimlich*, 62 C. C. A. 92, 127 Fed. 92, 94; *Burke v. Witherbee*, 98 N. Y. 562, 565; *Hoffman v. Dickinson*, 31 W. Va. 142, 152, 6 S. E. 53; *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep.

304; *Central R. & Bkg. Co. v. Ryles*, 84 Ga. 430, 11 S. E. 499; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; *Smoot v. Mobile & M. R. Co.* 67 Ala. 13, 18. These decisions, however, do not commend themselves to our judgment, because they require of employees, the discharge of whose duties does not condition their personal safety, the exercise of a degree of care that is extraordinary and unattainable, and because the courts in those cases did not consider or determine the degree of care required of employees whose duty it is to discharge competent workmen for subsequent negligence, the ordinary risk of which the coemployees assume in the first instance.

For the same reasons, and also because that statement has been repeatedly repudiated by the later decisions of the Supreme Court, the declaration of that court in *Wabash R. Co. v. McDaniels*, 107 U. S. 459, 27 L. ed. 607, 2 Sup. Ct. Rep. 932, to the effect that the ordinary care required of corporations in the selection of employees is not the care which prudent and cautious officials charged with that duty ordinarily exercise in similar circumstances, but that degree of care which such officials ought to exercise in such circumstances, is neither persuasive nor controlling. By what standard could that requisite degree of care be measured under that declaration? What is the test of duty or of liability under it? Does it not abrogate every test, and leave the determination of the degree of care which conditions the liability of masters to their servants to the necessarily varying opinions of courts and juries, formed after the events, as to the care which such masters ought to use, so that neither master nor servant could ever know under it, until long after his action, what the limit of his duty or liability was to be in any case, and so that the degree of care required in any two cases arising under like circumstances would never be the same? This declaration in the *McDaniels* Case was made twenty-two years ago. The question of law which it treated has since been considered, and decided otherwise by the Supreme Court again and again. That court has cited and referred to its decisions of this question which were rendered before and those which were rendered after the opinion in the *McDaniels* Case, but, so far as we have been able to learn, it has never cited or referred to the declaration in that case upon this subject from the year 1882, when it was rendered, to the present day, except in the single case of *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 470, 47 L. ed. 905, 906, 23 Sup. Ct. Rep. 622. In that case the question was not controlling. It received no discussion. The court declared that a charge which made ordinary care—"that is, the care

that a person or ordinary prudence would use under the same circumstances"—the test of liability was right, and then, apparently casually, said that "what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not;" and cited *Wabash R. Co. v. McDaniels*. With this single exception, the decision in the *McDaniels* Case has suffered that silent repudiation which is the accustomed fate of opinions of that court which it subsequently finds to be erroneous.

In *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417, 36 L. ed. 485, 488, 489, 12 Sup. Ct. Rep. 679, the Supreme Court decided that the exact converse of that declaration was the law.

In *Union P. R. Co. v. Daniels* (*Union P. R. Co. v. Snyder*) 152 U. S. 684, 691, 38 L. ed. 597, 601, 14 Sup. Ct. Rep. 756, the charge of the court was that the duty of exercising ordinary care to employ competent servants "was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men engaged in the same kind of business ordinarily exercise," and the Supreme Court failed to suggest that this statement of the law was either erroneous or inaccurate.

In *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 569, 34 L. ed. 235, 240, 10 Sup. Ct. Rep. 1044, that court decided that a charge that one was only bound to use ordinary care and prudence in the selection, arrangement, and care of its machinery was right, and in *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 619, 620, 41 L. ed. 1136, 1138, 17 Sup. Ct. Rep. 707, that a charge that a master was bound to use reasonable care in providing and repairing machinery, and that "by ordinary care is meant such as a prudent man would use under the same circumstances," laid down "the applicable rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in *Hough v. Texas & P. R. Co.* 100 U. S. 211, 25 L. ed. 612; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Washington & G. R. Co. v. McDade*, and *Union P. R. Co. v. Daniels*, *supra*; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978, and other cases."

In *Choctaw, O. & G. R. Co. v. McDade*, 19 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; and in *Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 334, 338, 48 L. ed. 207, 210, 24 Sup. Ct. Rep. 102, the Supreme Court again declared, after the foregoing definition of ordinary care had been repeatedly approved, that an employer is only required to use ordinary care to furnish reasonably safe and secure appliances and machinery

And in *Charnock v. Texas & P. R. Co.* 194 U. S. 432, 437, 48 L. ed. 1057, 1059, 24 Sup. t. Rep. 671, that court laid down the general proposition that "negligence has always relation to the circumstances in which one is faced, and what an ordinarily prudent man could do or omit in such circumstances."

These later decisions of our highest judicial tribunal declare that the degree of care required of masters in dealing with their servants is ordinary care, and affirm the truth of that which seems axiomatic,—that ordinary care is that which is ordinarily prudent and cautious men commonly exercise in similar circumstances. If prudent and humane officials who employ men for their masters partake of the infirmities of our common human nature, and sometimes fail to exercise that high degree of care which they instinctively use to protect their own persons, then that degree of care is not ordinary, but is extraordinary care, and their master is not liable in damages for such a failure. The limit of the legal duty of such officials is the exercise of ordinary care, however so much higher in the varying conceptions of different minds may be their moral or ethical duty. For their failure to discharge the former, damages may be recovered of their master. But their failure, in common with all mankind, to perfectly discharge the latter, furnishes no cause of action in human tribunals. Any departure from this rule, any substitution for it of a test of liability which must necessarily change with the varying conceptions of moral duty, which will be formed after the events by the juries and courts that subsequently try the cases involving it, would put uncertainty, confusion, and injustice in the place of the proximate certainty of the law and its just administration.

In *Grand Trunk R. Co. v. Ives*, *supra*, the Supreme Court decided that a charge to a jury was right which instructed them that negligence was "the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would not have done. . . . You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard." From this rule that court has never since departed. Tested by it, the charge of the court below was erroneous, because it fixed the standard of negligence, not at what ordinarily prudent and cautious men do under like circumstances (that is to

say, when their action does not involve their personal safety), but at what they do under radically different circumstances (that is to say, when their action does condition their personal safety). The true test of the duty and liability of the master is that degree of care which ordinarily prudent, cautious, and humane officials commonly exercise under similar circumstances; not that which they would exercise under different circumstances when their personal safety was involved, and not that which courts and juries, unguided by this test, might think, after the event, they ought to have exercised in view of some ethical standard which they might then approve.

Witnesses who acknowledge that they were not acquainted with the general reputation of the engineer were permitted to testify to his reputation among conductors and brakemen, excluding consideration of the engineers and others acquainted with the workman and his service. The issue to which this testimony was directed was whether or not the reputation of Delano for incompetence was so notorious that the officers of the defendant whose duty it was to hire and discharge its servants would have been aware of it if they had exercised reasonable diligence. Reputation among specific classes of men to which such officials did not belong, and which obviously included only a part of those who were acquainted with the operator or his service, was too restricted to meet this issue. A reputation confined to only a part of those who must be familiar with the man and his service is not general reputation, and it is insufficient to evidence knowledge of that reputation by those who do not belong to the limited class in which it exists. General reputation alone is competent to charge the master with notice in cases where no knowledge of habitual incompetence of the servant is brought home to him.

Counsel for the defendant requested the court to give to the jury a charge which they had prepared, which covers 9 pages of the printed record and is divided into 30 paragraphs. The court refused to grant this request, and the defendant excepted to its refusal to give these 30 paragraphs, which in its exception it termed "instructions." A single exception to a refusal to give a series of instructions is futile if any proposition of law or of fact embodied in the instructions is either erroneous or inapplicable to the case. The only question which such an exception presents is whether or not all the instructions thus requested should have been given; and, if any of them should not have been submitted to the jury, the question of the correctness or applicability of the others is not presented to the appellate

court for decision. In the series of instructions which counsel for the defendant requested there are several propositions of law which are erroneous, and some statements of fact that are inapplicable to the issues which the jury was required to determine. The questions presented by many of the requests which are discussed in the briefs of counsel are therefore not here for our consideration, and they are dismissed. *Union P. R. Co. v. Callaghan*, 161 U. S. 91, 95, 40 L. ed. 628, 629, 16 Sup. Ct. Rep. 493; *Waples-Platter Co. v. Turner*, 27 C. C. A. 439, 441, 49 U. S. App. 592, 83 Fed. 64, 66.

The various objections to the complaint in this action which were argued at the bar and presented in the briefs are purposefully ignored, because this case must be tried again, and there will be opportunity to amend and reform the pleadings, so that any discussion of them now would serve no useful purpose.

The judgment below is reversed, and the case is remanded to the Circuit Court with instructions to grant a new trial.

Hook, Circuit Judge, specially concurring:
I concur in the reversal of the judgment in this case and in the reasons given therefor, excepting those pertaining to the measure of ordinary care, the exercise of which was incumbent upon the company, and the charge of the circuit court upon that subject.

NORTH CAROLINA SUPREME COURT.

M. C. ROSS, Appt.,

v.

DOUBLE SHOALS COTTON MILLS.

(.... N. C.)

1. Negligence—evidence—*res ipsa loquitur*.

Mere proof of facts which call into action the rule *res ipsa loquitur* in an action for negligent injuries does not make a *prima facie* case, or raise a presumption of negligence, but merely furnishes an element to be considered by the jury as part of the plaintiff's case.

2. Master and servant—negligence—question for jury.

An employee who shows that, having shifted the belt running the machinery which he was operating, he attempted to

clean the machine by putting his hand inside, when the machine suddenly started from a cause of which he has no knowledge, and injured him; and who further shows that the belt shifter was imperfect, the accident being one which, in the ordinary course of things, does not happen to those who have the management of the business use due care,—has a right to have the jury say whether, in the light of the rule *res ipsa loquitur*, he has made out actionable negligence on the part of his employer.

(November 28, 1905.)

A PPEAL by plaintiff from a judgment of the Superior Court for Cleveland County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Connor, J.:

Action for personal injury sustained by plaintiff while operating a lapper in defendant company's mill. Plaintiff introduced Alfred Gilliam, who testified that he was sixty-seven years of age, had worked at defendant's mill since he was fifteen and up to two years ago. The lapper was purchased and put in mill six or seven years ago; examined, and found to be very good; nothing wrong with it; was not new. It was a 36-inch lapper, had been taken out of a mill to give place to a 40-inch one. It run very well. The worm gear gave out, and it gave trouble,—a good deal first and last. The shaft, the coupling from the evenner plates, broke once; was off when left there. The belt-shifter fork was wider than the belt, and put on a piece of wood to make it correspond with the width of the belt. Think put the piece of wood next to the tight pulley; am not certain. Have worked in cotton mills fifty-two years. Was superintendent of defendant mill thirty-two years. Nothing wrong with the machine. Evenner plates under the feed rolls, then the beater gars,—two arms or bars. Beater shaft revolves 1,400 or 1,500 times a minute. Bars cannot be seen when cap is down,—arched cap on hinges. Could not get hurt when cap is down. Worm gear has no connection with beater or blinding. If plaintiff got hurt by beater bars,

Case Note.—A result different from that arrived at in the case in hand is found in *Dingley v. Star Knitting Co.* 134 N. Y. 554. 32 N. E. 35, where it was held that there was no presumption of negligence on the part of the defendant, arising from the fact that the machine which the employee was cleaning at the time of his injury started suddenly, from some unknown cause. The method of stopping the machine in question was by pressing the hand against the driv-

ing belt, and running it off from the tight pulley onto the loose one; and of starting it by pressing the belt back onto the tight pulley. The testimony showed that the machine had started suddenly on three other occasions. This case differs in one respect from the case in hand, in that there was evidence in the latter case that the belt shifter was defective, while in the *Dingley Case* it appeared that an examination of the machine after the accident failed to show any

the worm gear could not have affected it. Stop-motion rod has no connection with beater bar. Beater bars are stopped by throwing the belt from the tight to the loose pulley by means of the belt shifter. There is no danger of operating machine that know of. The shaft, pulleys, belt, and beater shifter were brought into court, and used by witness in explaining testimony to the jury. Plaintiff testified that he was hurt July, 1904, working for defendant. Had been a card hand. Ran machine an hour and a half, when it choked down and belt ran off big pulley. Carded the belt off, and put belt grease on it to prevent belt from running off. Ran five or ten minutes and choked again. Moved the belt shifter, stopped machine, and carried two loads of cotton back to the hopper. Jim Champion came along; went

to opposite side, and raised cap from beater. "I put my hand over feed roll into beater bars to get cotton out. Machine started by some means, and tore off my arm to my elbow; knocked me numb or paralyzed. Had run lapper three months before I was hurt. Belt ran off pulley, which runs beater, when I got hurt. Am certain that I changed belt shifter, and stopped machine when it choked, but cannot tell how it started. When I went to unclog it, know of nothing that could have put the belt on tight pulley." At the close of the evidence defendant demurred, and moved the court to dismiss the action. Motion allowed. Judgment and appeal.

Messrs. Webb & Mull and D. F. Morrow, for appellant:

The evidence tends to show that the belt

defect. As will hereafter appear, this distinction is an important one. The Dingley Case was cited, and this distinction pointed out, in *Towle v. Stimson Mill Co.* 33 Wash. 305. 74 Pac. 471, where the court refused to disturb a verdict in favor of the plaintiff, who had been injured by the automatic starting of a 10-block shingle machine, where it appeared that the defendant knew that the machine had previously started automatically owing to defects in the clutch; the court pointing out the fact that in the Dingley Case no defect in the machine was shown, while in the case at bar there was testimony that the clutch and clutch band were defective at the time of the accident. It was also cited in *Ross v. Pearson Cordage Co.* 164 Mass. 257, 49 Am. St. Rep. 459, 41 N. E. 284, where it was held that the mere fact that a machine started suddenly, injuring an employee who was cleaning it, is not sufficient to show a breach of duty on the part of the employer in the absence of a defect in the machine.

The latter case was cited in *Kenneson v. West End Street R. Co.* 168 Mass. 1, 46 N. E. 114, where it was held that the mere fact that an electric car started suddenly while the motorman was fixing the fender was not sufficient to go to the jury. It was also cited and distinguished in *Gregory v. American Thread Co.* 187 Mass. 242, 72 N. E. 962, where the court held that the sudden starting of a machine, to the injury of the plaintiff, was some evidence that it was defective; to which proposition it cites *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496, 56 N. E. 704.

In *Vorbrich v. Gendler & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434, a decision similar to that in the Dingley Case was rendered. It was there held that, while a presumption of negligence, as matter of law, might arise from the fact that a personal injury was caused by the unexpected revolution of a stamping machine which had made a similar revolution the day before, such presumption is completely overcome, as a matter of law, 1 L.R.A. (N.S.)

by proof that the machine or thing was not defective or out of repair at the time. The opinion in this case, in elaborating the distinction above pointed out, states that there is a class of cases where the facts are such that the mere proof of the accident creates a presumption of negligence; to which it cites the following cases: *Byrne v. Boodle*, 2 Hurlst. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596; *Briggs v. Oliver*, 4 Hurlst. & C. 403; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870; *Hogan v. Manhattan R. Co.* 149 N. Y. 23, 43 N. E. 403; *Lvons v. Rosenthal*, 11 Hun. 46; *Morton v. Detroit*, B. C. & A. R. Co. 81 Mich. 423, 46 N. W. 111; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Connors v. Durite Mfg. Co.* 156 Mass. 163, 30 N. E. 559; *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675; *Martineau v. National Blank Book Co.* 166 Mass. 4, 43 N. E. 513; *Dixon v. Plums*, 98 Cal. 384, 20 L. R. A. 698, 35 Am. St. Rep. 180, 31 Pac. 931, 33 Pac. 268; *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 48 Am. St. Rep. 146, 40 Pac. 1020; *Howser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154, 45 Am. St. Rep. 332, 30 Atl. 906; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550; *Cummings v. National Furnace Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Kurz & H. Ice Co. v. Milwaukee & N. R. Co.* 84 Wis. 171, 53 N. W. 850; *Stacy v. Milwaukee, L. S. & W. R. Co.* 85 Wis. 225, 54 N. W. 779. The opinion then refers to another class of cases holding that this presumption is completely overcome by merely proving, by competent experts, that the machine or thing at the time was not defective or out of repair, or that the conditions were such as to preclude negligence; and cites *Read v. Morse*, 34 Wis. 315; *Gibbons v. Wisconsin Valley R. Co.* 62 Wis. 546, 22 N. W. 533; *Menominee River Sash & Door Co. v. Mil-*

shifter and machine were defective; and from these facts and circumstances negligence on the part of the master should be inferred, the familiar doctrine of *res ipsa loquitur* applying.

Craft v. Norfolk & S. R. Co. 136 N. C. 49, 48 N. E. 519; *Cox v. Norfolk & C. R. Co.* 123 N. C. 604, 31 S. E. 848; *Coley v. North Carolina R. Co.* 129 N. C. 407, 57 L. R. A. 817, 40 S. E. 195; *Hopkins v. Norfolk & S. R. Co.* 131 N. C. 463, 42 S. E. 902; *Butts v. Atlantic & N. C. R. Co.* 133 N. C. 82, 45 S. E. 472; *Purnell v. Raleigh & G. R. Co.* 122 N. C. 832, 29 S. E. 953; *Capital Printing Co. v. Raleigh*, 126 N. C. 516, 36 S. E. 33; *Gibbs v. Lyon*, 95 N. C. 146; *Springs v. Schenck*, 99 N. C. 551, 6 Am. St. Rep. 552, 6 S. E. 405; *Brittain v. Westhall*, 135 N. C. 492, 47 S. E. 616; *Kinney v. North Carolina R. Co.* 122 N. C. 961, 30 S. E. 313; *Trenton Passenger R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 64 Am. St. Rep. 592, 37 Atl. 730; *Hartford Deposit Co. v. Solitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; *Womdle v. Merchants Grocery Co.* 135 N. C. 474, 47 S. E. 493; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 64 Am. St. Rep. 922, 28 S. E. 733; *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321; *Hicks v. Naomi Falls Mfg. Co.* 138 N. C. 319, 50 S. E. 703.

Messrs. O. F. Mason and Ryburn & Hoey, for appellee:

In actions for injuries sustained on ac-

waukee & N. R. Co. 91 Wis. 447, 65 N. W. 176; *Brymer v. Southern P. Co.* 90 Cal. 406, 27 Pac. 371; *Duffy v. Upton*, 113 Mass. 544; *Badger v. Janesville Cotton Mills*. 95 Wis. 599, 70 N. W. 687; *Redmond v. Delta Lumber Co.* 96 Mich. 545, 55 N. W. 1004.

The cases cited in the *Vorbrich* Case are presented for the purpose of comparing the two phases of the rule there discussed, and, of course, are not confined to any particular class of accidents.

In *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675, where the plaintiff was injured by the sudden starting of a machine which she was cleaning, it was held that, where it appeared that the cause of the machine starting of itself, if it did so start, must have been the shifting of the belt from the loose pulley to the fixed pulley, the jury might properly find that this was the cause of the starting of the machine at the time of the injury to the plaintiff, and that a proper construction and arrangement of the pulleys and adjustment of the belt would have prevented such shifting; and they might, therefore, infer negligence on the part of the defendant.

In *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407, 28 N. E. 352, it was held that the jury were justified in finding the defendant negligent, where it appeared that

count of defective machinery or appliances, it is presumed that the master discharged his duty by providing suitable machinery and appliances for the use of his servant in his employment, and by keeping them in proper condition. No presumption of negligence in failing to discharge this duty arises from the mere fact of accident, until facts appear which authorize a conclusion that he wrongfully violated his duty.

20 Am. & Eng. Enc. Law, p. 87; *Wood, Mast. & S. 2d ed. § 382*; *Duntley v. Inman*, 42 Or. 334, 59 L. R. A. 785, 70 Pac. 529; *Clegg v. Southern R. Co.* 133 N. C. 303, 45 S. E. 657; *Minty v. Union P. R. Co.* Idaho, 471, 4 L. R. A. 409, 21 Pac. 660.

Connor, J., delivered the opinion of the court:

We did not have a model of the machine or any of its parts before us by which to illustrate the testimony and argument. The plaintiff in the employment of defendant was, on the day of the injury, operating a lapper in defendant's cotton mill. The motive power was applied by a belt running over a pulley on the machine, attached to another pulley overhead, working upon shafting connected with the power. When it was desired to stop the machine for any purpose, the belt was removed or shifted from the tight to the loose pulley by means of the belt shifter. If the machine became choked with the cotton passing through the beater, and it became necessary to clean it, or remove the cotton, it

the plaintiff was injured by the sudden starting of the carriage of a sawing machine, and that the machine had acted in a similar manner on a previous occasion.

In *Shaughnessy v. Sewall & D. Cordage Co.* 160 Mass. 331, 35 N. E. 861, it was held that the plaintiff, who was injured while oiling a machine which suddenly and unexpectedly started into motion, had the burden of proving that the machine started of itself, and that he could not recover unless he proved this; and, in case the jury were unable to decide what caused the machine to start, plaintiff would be unable to recover.

In *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149, the plaintiff, who was a skilled mechanic, was injured by the sudden starting of a grinding mill which he was attempting to clean. He was unable to assign any specific cause for the sudden movement of the machinery, and the same was not explained on the trial. The court held that where such a machine as this starts into motion entirely out of the usual manner of its operation, as shown in the case at bar, its action affords prima facie evidence of some want of care in its original construction or then condition, calling for explanation from the party responsible therefor.

stopped by throwing the belt from the tight to the loose pulley; this being done by a shifter. If in proper condition, it will remain motionless until the belt is thrown back onto the tight pulley. While machine is in motion, there are parts in which the hand of the operator may be put without injury. There are other parts in which the beater shaft revolves very rapidly. Plaintiff's witness Gilliam says that two years ago, when he left the mill, the lapper was all right and in good condition. The plaintiff says that on the 11th day of July, 1904, he was operating the lapper; that it became choked, and "the belt ran off the big pulley;" that he carded the belt off, and put belt grease on it to prevent belt from running off; in five or ten minutes it choked again; that he stopped the machine with the belt shifter, and carried some cotton back to the hopper. Champion went to the opposite side, raised the cap from the beater, and the plaintiff put his hand into the beater bars to get the cotton out. The machine, by some unknown means, started, and tore his arm off. The plaintiff's witness refers to some defects in parts of the machine, which, he says, could not have had any connection with the plaintiff's injury. The immediate cause of the injury was that by some means the belt was thrown back on the tight pulley. The only testimony which throws any light on the condition of the belt shifter is that of Gilliam, who says: "The belt shifter fork was wider than the belt, and I put on a piece of wood to make it correspond with the width of the belt." There is no suggestion as to what effect, if any, this would have on the movement of the belt.

With the light afforded us, but one of three possible explanations of the unexpected starting of the machine occurs to our minds. Either Champion accidentally struck the shifter, and threw the belt onto the tight pulley; or the plaintiff, in moving about the machine, did so; or there was some defect in the belt or shifter. It is elementary learning that the defendant is not liable for the movement of the belt, unless, either by the negligent conduct of some employee not a fellow servant, or by some defect in the condition of the shifter, it worked back and threw the belt onto the tight pulley. In this condition of the case, what shall be done? The defendant has charge of the machinery and its operation, except in so far as the plaintiff, in the discharge of his duty, had such charge. The plaintiff is suddenly and unexpectedly caught in the machine, struck dumb, his arm torn off, paralyzed. Conceding that there is no direct evidence of a defect in the machine or any of its parts, is the

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plaintiff driven to a nonsuit, or may he, upon the doctrine of *res ipsa loquitur*, have his case submitted to the jury to say whether there be actionable negligence which is the proximate cause of his injury?

To prevent any misconstruction of the circumstances under which, or the manner in which, this principle applies in the trial of causes, we wish to restate what was said in *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493: "The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether, upon all of the evidence, the plaintiff has sustained his allegation." It does not, in any degree, affect or modify the elementary principle that the burden of the issue is on the plaintiffs. Walker, J., in *Stewart v. Van Deventer Carpet Co.* 138 N. C. 60, 50 S. E. 562, clearly states the law in this respect: "The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it: The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant to 'go forward with his proof.' The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor." The suggestion has been made in argument of cases at this term that, when the rule applies, it is the duty of the court to instruct the jury that proof which calls the rule into action constitutes a *prima facie* case, or raises a presumption of negligence. This is a misapprehension, both of the principle upon which the rule is founded and its application. It must be conceded that expressions are used in cases, some of which are cited in the opinion in *Womble's Case*, 135 N. C. 474, 47 S. E. 493, which give color to the suggestion. These cases were cited as illustrations of the rule. The author of the opinion was not advertent, as he should have been, to this inaccuracy. The conclusion which is drawn from the cases and quoted herein does not contain the error. Mr. Justice Walker, in *Stewart's Case*, puts the subject in its true light. So learned and accurate a jurist as Judge Gaston, in *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138, being the first time that we find the rule declared in this court, refers to it as making out, when applicable, a *prima facie* cause. Smith, Ch. J., in *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 323, quotes with approval the

language used in *Ellis's Case*, 24 N. C. (2 Ired. L.) 138. The correct application of the rule is as stated in *Stewart's Case*, 138 N. C. 60, 50 S. E. 563. In *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 780, 19 S. E. 344, the court held that permitting a live wire to lie upon the street was negligence,—a breach of duty. In that case it was not necessary to invoke the rule. The defendant, by permitting the live wire to be upon the street, became liable for any injuries sustained thereby, unless it showed that it was there through no fault of its agents and servants. The learned justice, writing in that case, was of the opinion that the rule applied. When, as in that case, a breach of duty is shown, which is the proximate cause of the injury, a verdict follows for the plaintiff unless exculpatory circumstances are shown. It is only, as here, when there is no direct evidence of a defect in the machine, and the physical conditions surrounding the transaction do not ordinarily produce injury, that the occurrence speaks for itself. Such conditions are shown to exist in this case. A machine operated as this one, with the adjustment of the belt, etc., does not ordinarily resume its motion after being disconnected with the motive power. The evidence shows that it did start suddenly, and, so far as the plaintiff is able to say, from some unknown cause. The defendant says that it was an accident. That may be true, and, in the absence of any other testimony, a jury would be justified in so finding. But, on the other hand, the jury may infer that this is not a satisfactory explanation; that the difference between the width of the belt fork and the belt in some way caused the machine to start; that the piece of wood put upon it to make it correspond had worn or dropped out, and that caused the movement of the belt on the pulley. We do not suggest that either of the hypotheses is true. We are not sufficiently advised to have any opinion in regard to it. We merely say that a properly adjusted belt, removed from the tight pulley onto a loose pulley, does not usually get back onto the tight pulley and start the machine at so rapid movement as to tear a man's arm off. It is for this reason the law says that the plaintiff is entitled to have a jury pass upon the physical facts and condition, and to say whether, in their opinion, he has made good his allegation of actionable negligence. The defendant may or may not introduce evidence, as it is advised. By failing to do so, it admits nothing, but simply takes the risk of nonpersuasion. This is what is meant by going forward with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence. 1 L.R.A. (N.S.)

While the rule has not been, in express terms, often applied in this state, it is by no means new or of unusual application. Professor Wigmore says that, for a generation at least, in England it has been conceded to exist "for some classes of cases at least." In 1865, Erle, Ch. J., in *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 601, said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The limitations governing the application of the rule are thus stated in Wigmore on Evidence (§ 2509): "(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected, unless from a careless construction, inspection, or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrence or condition must have happened, irrespective of any voluntary action at the time by the party injured." The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured. *Stewart's Case*, 138 N. C. 60, 50 S. E. 563. It is for this reason that in some cases the legislature has made the fact of injury "presumptive evidence," and in others a "prima facie" case. *Aycock's Case*, 89 N. C. 323.

The learned counsel for defendant insists that the plaintiff cannot recover, because there is no evidence that, if defective, the defendant had notice, or could by reasonable care have known, of such defect. It is well settled that this is essential to the plaintiff's recovery. The question is not, in the present condition of the record, presented. We cannot tell in what respect, if at all, the jury would find the shifter or other part of the machine defective. Their attention would be directed to this element in the plaintiff's case, either by a specific issue or by instruction. *Hudson v. Charleston, C. & C. R. Co.* 104 N. C. 491, 10 S. E. 669. Other questions will probably arise upon the trial. If the belt was thrown upon the tight pulley by an accidental contact with the plaintiff or some other person, or if it was the result of the negligence of a fellow servant, the court would instruct the jury in respect to the law. The question of the plaintiff's own conduct, and its effect upon his right to recover, are to be pre-

ted by proper instructions. Our ruling confined to one question,—whether the se should have gone to the jury upon the physical conditions disclosed by the evidence. It does not appear what the plaintiff proposed to show by the rejected question. Hence we cannot pass upon the exceptions to His Honor's rulings. The judgment of nonsuit must be set aside and a new trial had.

ARKANSAS SUPREME COURT.

M. D. SHELBY, Appt.,

v.

C. C. BURROW.

(.... Ark.)

Contract—by agent—suit on.

A contract made by an agent in his own name, without disclosing his principal, is not void, but may be enforced by the agent in the absence of objection by the principal; and it is immaterial that the signature to the contract is actually affixed by a sub-agent, where his act was authorized by all parties in interest.

(October 14, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Conway Coun-

Case Note.—The right of an agent to sue on a contract which he has entered into in his own name without disclosing his agency, if the principal makes no objection, seems hardly to have been questioned, and is said to be the rule, in different text-books on agency, including 2 Clark & Skyles, Agency, § 614; Mechem, Agency, § 755, and Tiffany, Agency, p. 387. Many cases are cited in support of such rule. All of those directly in point sustain the agent's right to sue.

Coburn v. Phillips, 13 Gray, 64, sustains the right of an agent contracting for the purchase of goods to sue for breach in charging more than the price agreed on.

In Stockbarger v. Sain, 69 Ill. App. 436, and Cogburn v. Simpson, 22 Mo. 351, the right of an agent, selling the principal's goods as his own, to recover on the contract, was sustained; while in Davis v. Harness, 20 Ohio St. 397, he was permitted to recover for a breach of the contract. In Alsop v. Gaines, 10 Johns. 396, and Gardiner v. Davis, 2 Car. & P. 49, the agents who sold the goods as their own, while carrying on the principal's business ostensibly in their own names, were also permitted to recover the purchase price.

In Tustin Fruit Assn. v. Earl Fruit Co., 111 Cal. 53 Pac. 693, the right of an agent, contracting, as principal, that the other party to the contract should market for it all fruit under control of the former, to sue thereon, is sustained.

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ty in favor of plaintiff in an action brought to enforce a contract for the sale of cotton. Affirmed.

The facts are stated in the opinion.

Messrs. Sellers & Sellers, for appellant:

Even if the contract had been a bona fide contract between Burrow and appellant, and by Burrow assigned to the Moose Gin Company, suit could not have been maintained under the Code in his name, but would have to be brought in the name of the assignee.

15 Enc. Pl. & Pr. pp. 709-715; Kirby's Digest, § 5099; Gamblin v. Walker, 1 Ark. 220; Roberts v. Jacks, 31 Ark. 597, 25 Am. Rep. 584; Purdy v. Brown, 4 Ark. 535.

Appellee cannot sue as one in whose name a contract is made for the benefit of another.

Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Burton v. Larkin, 36 Kan. 250, 59 Am. Rep. 541, 13 Pac. 398; Thomas Mfg. Co. v. Prather, 65 Ark. 30, 44 S. W. 218; Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 523.

Without mutuality and evidences of "meeting of minds," lacking which no valid contract can be made, the courts refuse to allow a third party to maintain an action.

Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Howsmon v. Trenton Water Co. 119 Mo. 304, 23 L. R. A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440;

In Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201; Bird v. Daniel, 9 Ala. 302; Grigsby v. Nance, 3 Ala. 347, and Barbee v. Williams, 4 Heisk. 522, an agent to whom a note was made payable individually was held entitled to sue thereon in his own name.

And Dawson v. Burrus, 73 Ala. 111, holds that an agent intrusted with the exclusive use and management of the money of another to lend on interest, who makes a loan without disclosing his principal, taking a note therefor in his own name, secured by a mortgage to himself, may maintain an action to foreclose the mortgage for the purpose of reducing the money loaned to his possession, as an active duty imposed on him by the agency.

Joseph v. Knox, 3 Campb. 320, holds that the agent of consignors, who is stated in the bill of lading to have shipped the goods, and who pays the freight, may maintain an action for failure to deliver according to the contract.

And Blanchard v. Page, 8 Gray, 281, holds that persons named in the bill of lading as shippers may maintain an action for damage to the goods during transportation, though they had no interest in such goods, but simply forwarded them at the request of the owner.

And Carter v. Southern R. Co. 111 Ga. 38, 50 L. R. A. 354, 36 S. E. 308, sustains the right of an agent to maintain, in his own name, an action against a carrier for dam-

Parker v. Jeffery, 26 Or. 186, 37 Pac. 712; Street v. Goodale, 77 Mo. App. 318; Martin v. Peet, 92 Hun, 133, 36 N. Y. Supp. 554; Linneman v. Moross, 98 Mich. 178, 39 Am. St. Rep. 528, 57 N. W. 103.

Appellant not having agreed to contract with or for the benefit of the Moose Gin Company, the alleged contract is void.

Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Meynell v. Surtees, 3 Smale & G. 101; Consumers' Ice Co. v. E. Webster, Son & Co. 32 App. Div. 592, 53 N. Y. Supp. 56; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Boulton v. Jones, 2 Hurlst. & N. 564; Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 387, 32 L. ed. 248. 8 Sup. Ct. Rep. 1308; Humble v. Hunter, 12 Q. B. 310.

A contract made by an agent claiming to represent one person, while in reality he represents another, is absolutely void.

Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; 1 Am. & Eng. Enc. Law, 2d ed. p. 418; Cundy v. Lindsay, L. R. 3 App. Cas. 459; Barcus v. Dorries, 64 App. Div. 109, 71 N. Y. Supp. 695; Paine v. Loeb, 37 C. C. A. 434, 96 Fed. 164.

Mr. Charles C. Reid, for appellee:

Burrow was the real party in interest.

Lanigan v. North, 69 Ark. 66, 63 S. W. 62;

Perciful v. Platt, 36 Ark. 456; Little Rock & Ft. S. R. Co. v. Clark, 58 Ark. 490, 25 S. W. 504; Kent v. Dana, 40 C. C. A. 281, 100 Fed. 56; Brown v. Powers, 53 App. Div. 251, 65 N. Y. Supp. 733.

The action may be maintained by Burrow though he made the contract for the benefit of the Moose Gin Company.

Dickenson v. Harris, 48 Ark. 355, 3 S. W. 58; 16 Enc. Pl. & Pr. pp. 890, 897; Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Bishop. Contr. § 356; Mechem, Agency, §§ 754, 755; Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062.

Battle, J., delivered the opinion of the court:

On the 25th day of June, 1900, M. D. Shelby and C. C. Burrow entered into a written contract in the words and figures following:

Morrilton, Ark., June 25, 1900.

This contract, entered into this 25th day of June, by and between M. D. Shelby and C. C. Burrow & Co., of Little Rock, witnesses:

That C. C. Burrow & Co. have this day bought of M. D. Shelby one hundred round bales at seven and forty-hundredths (7.40) cents per pound, to be delivered at Morrilton on or before the 15th day of December, 1900.

ages from a breach of the contract to transport the goods.

Neal v. Andrews (Tex. Civ. App.) 60 S. W. 459, holds that a broker buying notes in his own name may maintain an action against the seller, on his refusal to deliver, for the damages resulting from the breach, although he acted as agent for another in making the purchase, and the seller knew of his intention to resell, but did not know who the principal was.

And United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519, holds that a broker, acting for an undisclosed and unknown principal in sending a telegram directing the sale of gold, for which he is to receive a commission from his principal, may maintain an action against the telegraph company for damages due to its failure to deliver the message.

But Evrit v. Bancroft, 22 Ohio St. 172, holds that an agent for the sale of land for which he is to receive all over a specified price per acre cannot maintain an action against one to whom he sold the land in his own name, for the amount above such price as damages for breach of the agreement, where the land was worth more than the contract price; as the principal himself could not have maintained such an action.

In *SHELBY v. BURROW* it is said that the statutes of the state have made no change in the law allowing an agent to sue on a contract made in his own name; and in *1 L.R.A. (N.S.)*

several cases cited in 2 Clark & Skyles on Agency, § 615, and Tiffany on Agency, p. 388, the right of an agent to sue in his own name on a contract entered into in his own name is held not to have been affected by the provisions of the Codes of different states that every action must be prosecuted by "the real party in interest," as such provisions give a right of action to "the trustee of an express trust," and define such trustee as "a person with whom, or in whose name, a contract is made for the benefit of another;" thus including an agent in the definition. Thus, *Cremer v. Wimmer*, 40 Minn. 511, 42 N. W. 467, holds that an agent taking in his own name a contract for the purchase of land may sue the holder for breach of the contract to convey.

And *Beard v. Sloan*, 38 Ind. 128, sustains the right of an agent, contracting in his own name for the purchase of merchandise, to sue for damages from a breach of the contract.

And *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359, sustains the right of an agent, contracting in his own name for the sale of goods, to maintain an action against the purchaser on the contract.

And *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335, holds that a chattel mortgage and note secured thereby, made directly to one who is the agent of the equitable owner of the debt, may be enforced in the name of the agent.

Cotton to be gathered in good condition off of the farm of M. D. Shelby in bottom.

M. D. Shelby.

C. C. Burrow & Co. (Heagan).

J. M. Heagan, by the express authority of Burrow, made this contract in his name. In this way the cotton was purchased for the Moose Gin Company. At the time the contract was entered into no principal was disclosed to Shelby by Burrow, or Heagan acting for him. Shelby thought and believed he was selling, and intended to sell, the cotton to Burrow for his use and benefit. He would not have sold to Moose Gin Company, because he believed it was insolvent. Shelby failed to deliver the cotton and refused to perform the contract. Burrow brought this action to recover damages sustained by the nonperformance. The question is, Can he maintain the action? Shelby insists that he made no contract with Moose Gin Company, or for its benefit, and, Burrow having purchased the cotton for it, the sale is void.

In this case Burrow was the agent of Moose Gin Company, and Heagan acted as his agent with the express consent of his principal. Heagan was the subagent of Burrow. The cotton was purchased by Burrow in his own name, without disclosing his principal. Shelby believed that he was purchasing for his own benefit. This did not render the contract invalid. "An agent can make a valid contract with a third person in his own name, without disclosing his principal. Such contract is binding upon the agent in his individual capacity, and either party to it can enforce it against the other independently of the undisclosed principal. . . . In such case the agent is, in contemplation of the law, the real contracting party, to whom the promises of the other party were made and who is entitled to enforce them." He can sue upon the contract, and can, unless the principal intervenes, "recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal." *Mechem, Agency*, §§ 755, 763; 2 *Clark & Skyles, Agency*, pp. 1331, 1341.

The fact that the contract was made by a subagent does not alter the case. The subagent acted for the agent with the consent of the principal, and his acts as such were valid and binding.

The statutes in this state make no change in the law allowing an agent to sue on a contract made in his own name. *Kirby's Digest*, § 6002; 2 *Clark & Skyles, Agency*, § 615; *Considerant v. Brisbane*, 22 N. Y. 389.

This case is unlike *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, cited by appellant. In that case Potter had had a contract with plaintiff ice company, and had

terminated it and made another with the Citizens' Ice Company. The Citizens' Ice Company sold out its business to the plaintiff company, who continued to supply ice to the defendant without informing him of the change. On an action on account for ice actually delivered and used, the court held that no recovery could be had, saying: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract; as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into."

In that case the defendant made no contract with the plaintiff as principal or agent. In this case he selected and determined with whom he would contract, and made a contract which is binding on both parties and can be enforced by either party against the other. *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519, another case cited by appellant, is unlike this. In that case, one Rohnen represented to Hamet that he was the agent of Letcher & Company, a firm who were buying hogs, and as such agent bought a lot of hogs from Hamet, paying him part of the purchase price. Hamet delivered the hogs to him, and he sold them to Letcher & Company as his own, they paying him full value for them. Letcher & Company were ignorant of the fraud by which they were obtained. Hamet sued Letcher & Company for their value, and recovered. In that case there was no sale of the hogs. They were not sold to Rohnen, nor Letcher & Company, because Rohnen was not their agent; and they were still the property of the plaintiff.

We hold that the contract of Burrow and Shelby is valid, and that Burrow can lawfully sue and recover thereon.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

W. T. HUGHES et al., Appts.,

v.

PEPER TOBACCO WAREHOUSE COMPANY.

(139 N. C. 158.)

Contract—guaranty.

No guaranty of payment for property

Case Note.—The rule governing the construction of contracts of guaranty is stated

shipped is effected by a reply by a warehouseman to a letter requesting information about a broker, that he considered him reliable, with whom samples and sales would be safe, and doubly so, since all shipments would come to the warehouse, and payment for all such property "would be made by us to you for all sales."

(September 26, 1905.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Franklin County sustaining a demurrer to the complaint in an action brought to hold defendant liable on an alleged guaranty. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. F. S. Spruill and William H. Ruffin, for appellants:

A guaranty is a mercantile instrument, to be construed according to what is fairly

to be presumed to have been the understanding of the parties.

Beach, *Modern Law of Contracts*, 51; *Davis v. Wells, F. & Co.* 104 U. S. 159, 26 L. ed. 686; *Mauran v. Bullus*, 16 Pet. 523, 10 L. ed. 1056; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508.

The words used are to be accepted and received in the strongest sense against the party using them.

Shine v. Central Sav. Bank, 70 Mo. 524; *Shelton v. Reynolds*, 111 N. C. 525, 16 S. E. 272; *Times Co. v. North Carolina Steel & I. Co.* 114 N. C. 224, 19 S. E. 147.

This letter was an absolute guaranty.

Hutchins v. Planters Nat. Bank, 130 N. C. 285, 41 S. E. 487; 14 Am. & Eng. Enc. Law, 2d ed. p. 1141; *Jenkins v. Wilkinson*, 107 N. C. 707, 22 Am. St. Rep. 911, 12 S. E. 630; *Jones v. Ashford*, 79 N. C. 173.

in *Brandt, Suretyship & Guaranty*, 3d ed. § 103, as follows: "The . . . generally received opinion . . . is that this contract should be construed the same as any other contract, and that the same rules should be applied to ascertain the true intention of the parties." Citing *inter alia* the following cases in point: *Creamer v. Mitchell*, 162 N. Y. 477, 56 N. E. 977; *Hernley v. Brannum*, 23 Ind. App. 388, 55 N. E. 512; *Dobell v. Green* [1900] 1 Q. B. 526; *Kastner v. Winstanley*, 20 U. C. C. P. 101; *White v. Reed*, 15 Conn. 457; *Locke v. McVean*, 33 Mich. 473; *Crist v. Burlingame*, 62 Barb. 351; *Weiler v. Henarie*, 15 Or. 28, 13 Pac. 614. See also *Moore v. Holt*, 10 Gratt. 284.

In *Stearns, Suretyship*, § 17, the language of the court in *Belloni v. Freeborn*, 63 N. Y. 388, is adopted: "In guaranties . . . the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties, as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. . . . But in such instruments the meaning of written language is to be ascertained in the same manner and by the same rules as in other instruments; and, when the meaning is ascertained, effect is to be given to it."

In view of the fact, therefore, that each case rests upon its peculiar circumstances, little is to be gained by a comparison of decisions. A few cases resembling *HUGHES v. PEPER TOBACCO WAREHOUSE Co.* in that the alleged guaranty was contained in a letter replying to an inquiry as to the third party's financial condition are, however, subjoined.

In *Switzer v. Baker*, 95 Cal. 539, 30 Pac. 761, in which the question arose upon demurrer to the complaint, it was held that a guaranty cannot be inferred from a letter written by the lessor of land to one contemplating work for the lessee, in response to an inquiry whether he would be paid for his work, which states: "You may rest as-
1 L.R.A. (N.S.)

sured that you will get your pay for all work done."

A letter written in reply to an inquiry from the buyer concerning the responsibility of the seller, made after the contract had been concluded, by the brokers who had negotiated the sale, saying: "We are very much interested in seeing you get the goods, and from the position we occupy we would say that the contract is good, and that we will look after the same, both to your interest and for our own," does not amount to a guaranty of performance. *Kenneweg Co. v. Finney*, 98 Md. 118, 56 Atl. 482 (Citing *Switzer v. Baker*, 95 Cal. 539, 30 Pac. 761).

No guaranty is made by a letter written in answer to an inquiry as to the financial standing of an applicant for credit, in which it was stated: "I have no fear in becoming responsible for the goods, but dislike to be troubled with the settlement of other merchants' bills. I know he has bought a great many liquors from you, and has paid you up promptly. I see no reason why you should doubt him and ask for security. I recommend him as being a safe man to sell to, and I think you ought to allow him some credit, as he has never deceived you. His credit is good here, as I furnish him all his groceries and supplies. I hope you will ship his goods at once, as I see no good reason why you should not. I will look to your interest in this matter." *Thomas v. Wright*, 98 N. C. 272, 3 S. E. 487.

A corporation which was furnishing ore to a certain iron company, feeling doubtful about the latter's solvency, wrote to its president, saying: "We thought it best to write to you and get the information whether you would not guarantee us," to which he replied, "All right, send the ore. *Moselem* [the iron company] will pay it. She is not involved." This correspondence was held to constitute a guaranty. *McDowell v. Lehigh Valley Iron Co.* 8 W. N. C. 137.

Messrs. T. W. Bickett and Smith P. Galt for appellee.

Clark, Ch. J., delivered the opinion of the court:

This action is upon an alleged guaranty, as proof of which the plaintiff relied upon the following letter:

St. Louis, Mo., Mar. 19, 1897.

Messrs. W. T. Hughes & Co.,
Louisburg, N. C.

Gentlemen:—

Your letter of the 11th inst. making inquiry about the general standing of J. E. M. Walker, received. We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe and doubly so, as all tobacco of yours that might be shipped would come direct to the Pepper Tobacco Warehouse Co., and the payment of all such tobacco would be made by us to you for all sales.

Yours truly,
Nicholas N. Bell, Manager,
Per Hall.

Bell was manager of the defendant company. The defendant demurred, giving as its first ground that the letter did not constitute a guaranty, and hence the plaintiffs' complaint did not set forth a cause of action, and the court below so held.

We do not think that this letter constituted a guaranty by the defendant to Hughes & Company of payment of all tobacco which they should ship J. E. M. Walker. A guaranty is a contract,—an *aggregatio mentium*. This letter is, on its face, merely a response to a letter of inquiry to ascertain the general standing of J. E. M. Walker, and not to a request for them to guarantee purchases made by him. The reply contains what was asked for,—information, and nothing more. This reply states that the defendant "regarded" Walker as a reliable and trustworthy gentleman, with whom Hughes & Company's samples and sales would be entirely safe, and doubly so because Hughes & Company's tobacco would come direct to the defendant's warehouse, and payment for all sales of such tobacco would be made by the defendant to the plaintiffs. This was merely a statement of the defendant's opinion of Walker's reliability, and of the matter in which the defendant would handle the tobacco, and the additional safety this method would be to the plaintiffs. Besides, there was no consideration for the guaranty. The tobacco was already being shipped to the defendant for Walker, as it would seem from the letter, and there certainly is no agreement shown to so ship, nor an indication of any

benefit to accrue to the defendant. Neither in the letter nor in the attendant circumstances is there anything to justify holding this letter to be a guaranty. The purport of the letter depends upon its intent, as derived from its perusal; and cases cited upon the construction of other papers, differently worded, could be of no assistance to us.

As the letter is not a guaranty, it becomes entirely unnecessary to consider the other exceptions.

The judgment sustaining the demurrer is affirmed.

CALIFORNIA SUPREME COURT.

FRANK W. JOHNSON et al., by Guardian
ad Litem, Appts.,

v.

SOUTHERN PACIFIC RAILROAD COMPANY, Respt.

(... Cal. ...)

Railroad—signals at overhead crossing.

An overhead bridge crossing of a highway by a railroad track is within the provision of a statute requiring signals to be given when a train approaches a place where the "railroad crosses any street, road, or highway."

(September 2, 1905.)

APPEAL by plaintiffs from a judgment of the Superior Court for Santa Barbara County in favor of defendant in a suit to recover damages for the alleged negligent killing of plaintiffs' intestate. Reversed.

The facts are stated in the opinion.

Messrs. Richards & Carrier, for appellants:

Railroads must measure their precautions by, and make them reasonably commensurate with, the conditions and circumstances by which they are surrounded.

Florida C. & P. R. Co. v. Foxworth, 41 Fla. 67, 79 Am. St. Rep. 162, 25 So. 338;

Case Note.—As will be seen, the courts differ in the construction which they place upon statutes requiring the giving of signals by locomotives on approaching railroad crossings. This conflict is more substantial than appears from the opinion in *JOHNSON v. SOUTHERN P. R. Co.* Some courts give the statute a broad construction so as to include all crossings, while others limit it to grade crossings. The opinion is somewhat misleading when it states that, in all the cases cited by respondent, either the sections of the statute under examination expressly apply to grade crossings only, or, when carefully examined, show from their phraseology that they were meant to apply only to grade crossings; and it is particularly misleading in its reference to the Wisconsin case of *Jenson v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 589, 22 L. R. A. 680,

Nehrbas v. Central P. R. Co. 62 Cal. 320; Continental Improv. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; Richardson v. New York C. R. Co. 45 N. Y. 846; Weber v. New York C. & H. R. R. Co. 58 N. Y. 458; Cordell v. New York C. & H. R. R. Co. 70 N. Y. 123, 26 Am. Rep. 550; Byrne v. New York C. & H. R. R. Co. 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531; Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 563, 15 N. E. 181; English v. Southern P. Co. 13 Utah, 407, 35 L. R. A. 155, 57 Am. St. Rep. 772, 45 Pac. 47.

It is for the jury to determine the degree of care required.

Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Chicago G. W. R. Co. v. Kowalski, 34 C. C. A. 1, 92 Fed. 312; Thomas v. Delaware, L. & W. R. Co. 19 Blatchf. 533, 8 Fed. 729; Czech v. Great Northern R. Co. 68 Minn. 38, 38 L. R. A. 302, 64 Am. St. Rep. 452, 70 N. W. 791; Pennsylvania R. Co. v. Barnett, 59 Pa. 259, 98 Am. Dec. 346.

57 N. W. 359, of which it says: "The attorney for respondent (plaintiff in the court below) conceded in his argument, and it is so intimated in the opinion, that the statute of that said state did not require a warning to be given at the overhead crossing where the accident occurred." An examination of the Wisconsin statute, which was not set forth in the report of the Jensen Case, shows that it provided as follows: "And before crossing any highway, except in cities and villages, with any locomotive, the whistle shall be blown 80 rods from such crossing, and the engine bell rung continuously from thence until the highway be crossed by the locomotive." Wis. Stat. § 1800. The question was again raised in the Wisconsin courts in Barron v. Chicago, St. P. M. & O. R. Co. 89 Wis. 79, 61 N. W. 303, and the court was there urged to reverse its ruling; but it adhered to its former decision and refused to review the authorities, although it stated that it was aware that contrary views were entertained by some courts.

It also appears that the decision in the JOHNSON CASE is in conflict with an Illinois case which neither court nor counsel referred to. It is the case of Cleveland, C. C. & St. L. R. Co. v. Halbert, 179 Ill. 196, 53 N. E. 623, Reversing 75 Ill. App. 592, and holding that the statute applied only to grade crossings. Carter, Ch. J., dissented. The statute in this case was general in its terms, and provided that railroad companies should equip locomotives with bell and whistle, and should "cause the same to be rung or whistled by the engineer or fireman at a distance of at least 80 rods from the place where the railroad crosses or intersects any public highway; and it shall be kept ringing or whistling until such highway is reached."

An early case, and one which is in accord—
1 L.R.A. (N.S.)

Messrs. Canfield & Starbuck, for respondent:

A railroad corporation is not required by statute to signal the approach of its trains to overhead crossings.

East Tennessee, V. & G. R. Co. v. Feathers, 10 Lea, 103; Wilson v. Rochester & S. R. Co. 16 Barb. 167; Reynolds v. Great Northern R. Co. 29 L. R. A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 908; Melton v. St. Louis & S. F. R. Co. 99 Mo. App. 282, 73 S. W. 231; Williams v. Chicago & A. R. Co. 135 Ill. 491, 11 L. R. A. 352, 25 Am. St. Rep. 397, 26 N. E. 661; Louisville, E. & St. L. Consol. R. Co. v. Lee, 47 Ill. App. 384; Harty v. Central R. Co. 42 N. Y. 468; Louisville & N. R. Co. v. Hall, 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 84, 6 So. 277; Jensen v. Chicago, St. P. M. & O. R. Co. 86 Wis. 589, 22 L. R. A. 680, 57 N. W. 359; Barron v. Chicago, St. P. M. & O. R. Co. 89 Wis. 79, 61 N. W. 303; Missouri, K. & T. R. Co. v. Thomas, 87 Tex. 282, 28 S. W. 343; McElroy v. Georgia, C. & N. R. Co.

ance with the JOHNSON CASE, and which is cited by it, is that of People v. New York C. R. Co. 13 N. Y. 78, where it was held that a general statute requiring the blowing of whistle and ringing of bell at a specified distance from the place where the railroad shall cross any traveled public road or street, applied although the railroad passed over the public road upon a bridge at such a height as to render a collision impossible. The court placed its decision upon the ground that the case was within the evil or danger which the legislature designed to guard against, namely, that the traveler shall have notice, when he is approaching a railroad crossing, of the approach of an engine, so that he may protect himself and team from danger.

The Texas case referred to by the court in the JOHNSON CASE has been followed in Houston & T. C. R. Co. v. Sgalinski, 19 Tex. Civ. App. 107, 46 S. W. 113.

Another case in harmony with the Johnson Case, is that of Toledo & O. C. R. Co. v. Jump, 50 Ohio St. 651, 35 N. E. 1054. There it was held that the signals must be given, even though the crossing is not at grade. The statute involved provided for the giving of the signals on "approaching a turnpike, highway, or town-road crossing, upon the same level therewith, and, in like manner, when the road crosses any other traveled place by bridge or otherwise." It was contended by the railroad company that the last clause did not apply where the road crossed "a turnpike, highway, or town-road." The court, in holding against the railroad company, based its decision upon the ground that the purpose of the statute was for the prevention of accidents, and that the construction contended for would be absurd in its results.

98 Ga. 257, 25 S. E. 439; *Ransom v. Chicago*, St. P. M. & O. R. Co. 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147.

A railroad corporation is not required, by any rule of common law, to signal the approach of its trains to overhead crossings.

Hahn v. Southern P. R. Co. 51 Cal. 605; *Morgan v. Central R. Co.* 77 Ga. 788; *Chicago, B. & Q. R. Co. v. Roberts*, 3 Herdman (Neb.) 425, 91 N. W. 707; *Abbot v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Hendricks v. Fremont, E. & M. Valley R. Co.* 67 Neb. 120, 93 N. W. 141; *Lamb v. Old Colony R. Co.* 140 Mass. 79, 54 Am. Rep. 449, 2 N. E. 932; *Bailey v. Hartford & C. Valley R. Co.* 56 Conn. 444, 16 Atl. 234; *Cincinnati, I. St. L. & C. R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334, 4 N. E. 34, 5 N. E. 746; *Ransom v. Chicago*, St. P. M. & O. R. Co. 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166; *Flint v. Norwich & W. R. Co.* 110 Mass. 222; *Reynolds v. Great Northern R. Co.* 29 L. R. A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; *Melton v. St. Louis & S. F. R. Co.* 99 Mo. App. 282, 73 S. W. 231; *Favor v. Boston & L. R. Corp.* 114 Mass. 350, 19 Am. Rep. 364; *Jenson v. Chicago*, St. P. M. & O. R. Co. 86 Wis. 589, 22 L. R. A. 680, 57 N. W. 359; *Barron v. Chicago*, St. P. M. & O. R. Co. 89 Wis. 79, 61 N. W. 303; *Phillips v. New York C. & H. R. R. Co.* 84 Hun, 412, 32 N. Y. Supp. 299.

Lorigan, J., delivered the opinion of the court:

This action is brought to recover damages for the death of Katherine S. Johnson, wife of the plaintiff Frank W. Johnson, and mother of the other plaintiffs, who are minors, alleged to have been occasioned through the negligence of defendant. The second amended complaint, after stating the corporate existence of defendant, and the maintenance and operation by it of a railroad on July 25, 1901, alleges, as the facts upon which the cause of action for negligence is predicated, that said railroad, "about 5 miles west of the city of Santa Barbara, crosses obliquely the county road known as 'Hollister avenue,' about 90 yards east of the place where the road known as the 'Modoc road' enters said Hollister avenue, the acute angle formed thereby being of about 30 degrees; that the said crossing is an overhead one, the track being upon a bridge over said road, and the public road excavated so as to pass under the bridge, and being flanked by the sides of the cut on each side; that said bridge is supported by three abutments, one on each side of the county road and one in the middle; that the space between said abutments is about 20 feet, and said abutments are about 80

feet in length; that, by reason of trees and other obstacles, the view up and down the track is very much obstructed, so that persons driving along Hollister avenue cannot see approaching trains; that, by reason of the said construction of said crossing, the same is a dangerous one to persons driving to and fro along Hollister avenue; that on the 25th day of July, 1901, Katherine S. Johnson . . . was driving from plaintiff's home, near Goleta, along Hollister avenue, towards the city of Santa Barbara, and, as she approached said crossing, defendant caused one of its locomotives, with a train of cars attached thereto, to approach said crossing at a high rate of speed, and in so doing disregarded its duty to give signal of such approach, but, on the contrary, caused said train to approach negligently and carelessly and without signaling, either by blowing a whistle or ringing a bell, or giving any other signal whatsoever, and without giving any signal by flag or otherwise; that the said Katherine S. Johnson, hearing no signal, was unaware of the approach of said train, and, just as her horse and wagon were under said bridge, said train passed over the same, negligently and carelessly, as aforesaid; that, in consequence of the dangerous character of said crossing as maintained by defendant, and of the failure on its part, by reason of its negligence and carelessness, to give the proper signal as its train approached said crossing, the horse of said Katherine S. Johnson was frightened and ran away, and she was thrown violently out of the wagon and killed." A demurrer to the complaint on the ground that these alleged facts did not constitute a cause of action was sustained, and, plaintiffs declining to further amend, judgment was rendered against them. This appeal is taken from said judgment to test the validity of the order sustaining said demurrer.

It is contended by appellants that the judgment should be reversed on two grounds: First, because they insist that the complaint shows that the crossing was a peculiarly dangerous one, and therefore it became the duty of defendant to take commensurate precautions, and the extent of these precautions was a matter to be left to the jury; second, that it was the duty, under the statute, of the defendant's train to have signaled, either by bell or whistle, before reaching the crossing, and that, having failed to do so, defendant is liable for the damage that ensued.

We do not deem it necessary to discuss the first proposition advanced by appellant, that the allegations of the complaint were sufficient to constitute negligence on the part of the defendant at common law in

failing to give warning of the approach of its train to the highway crossing referred to in the complaint, because we are satisfied that the complaint, in alleging that the defendant failed and neglected to give such warning of the approach of its train, as provided by § 486 of the Civil Code, sufficiently stated a cause of action. The lower court, in sustaining the demurrer, necessarily took the view, which is also insisted on here by respondent, that the section above referred to has application only where a railroad crosses a highway at grade,—upon the same level as the highway. We cannot agree with this construction of the statute, and find no warrant in its language for this limitation placed upon its meaning. The section provides that a bell must be rung, or whistle sounded, at least 80 rods from the place where the “railroad crosses any street, road, or highway.” There is certainly nothing in this language which limits the giving of signals of approach to any particular crossings. The language of the section is plain and unambiguous, and applies in general terms to all crossings. By it the duty is enjoined upon the railroad to signal at a prescribed distance from “where the railroad crosses any street, road, or highway.” This is broad enough to apply to any crossing of a highway by a railroad, whether it is super, sub, or level grade. Nothing is said in the section about signaling only when the railroad crosses a highway at level grade. Nor is there anything in the section which would warrant so construing it. In fact, the language is so plain as not to be subject to construction at all. If the legislature had intended that the railroad should only be required to give signals when crossing highways at grade, it would, as has been done in other states, have readily and clearly expressed that intention. It could not, however, have used more general language than is employed in the section under consideration to express the intention that the required signal should be given at all crossings of highways, whether above, below, or at grade. To construe this language as applying only to grade crossings, when nothing is said about grades, would be to judicially legislate into the section an exemption which its plain and comprehensive language clearly excludes. Nothing is said in the section about crossing at grade; but it is simply provided that signals shall be given whenever the railroad crosses any street, road, or highway. In the case at bar it is alleged that the railroad crosses Hollister avenue, a public highway, upon a bridge. The fact that it crossed it upon a bridge did not make it any the less a crossing within the terms of the statute. It was a crossing at 1 L.R.A. (N.S.)

supergrade, but still a crossing. *People v. New York C. R. Co.* 13 N. Y. 78, 25 Barb. 199.

It is, however, insisted by respondent that, while the language of the section may be broad enough to include all crossings, yet that, when the object sought to be accomplished by requiring such warnings at crossings is taken into consideration, it is evident that the legislature intended to use the phrase “when the railroad crosses any street, road, or highway” in a restricted sense, as applying only to grade crossings. In this connection it is urged that, as the primary object of requiring warning is to guard against the danger of collision at the crossings of highways by railroads, which can only occur at grade, the statute was only intended to apply to prevent such collisions; that this was the object in view in the legislative mind when the section was enacted, and, as such collisions are rendered impossible by overhead crossings, the section was not intended to apply where such crossings existed. While it is true that the primary object of requiring signals at crossings is to prevent collisions, still this was not the only purpose the legislature had in view. It recognized other dangers, and the more general purpose was that, by giving such signals, travelers upon the public highway near the crossing might be warned of the approach of the train, and be afforded an opportunity to guard themselves against any harm or danger by reason of its approach. The construction of an overhead bridge across a highway obviates, it is true, the danger of collision; but it does not remove the danger to persons driving upon the highway, at or near the crossing, which may arise from the sudden and unannounced approach of the train to the bridge, and the consequent frightening of their teams. The liability of horses to become frightened at sudden and unusual noises is matter of common knowledge, and, while the giving of such signals may not remove all danger therefrom, yet, when given at the proper time and place, as provided by the statute, they at least tend to lessen the danger, by putting the traveler approaching the crossing upon his guard, and giving him an opportunity to remain at a safe distance with his team, or to take such precautionary measures with reference to it as may be necessary for his and their safety. As said by the court in *People v. New York C. R. Co.* 25 Barb. 203, confirmed by the supreme court of New York in 13 N. Y. 81, in speaking of the objects to be attained under a section of the New York statute identical with our section under consideration: “The hazards to be provided against were twofold: (1) The danger

of actual collision at the crossing; and (2) that of damage by the frightening of teams traveling upon the public highway; and, to guard against the latter peril, it was as important to provide for a proper warning when the railroad passed over the highway at an elevation, which allowed a passage upon the highway underneath, as when it passed upon the same level, to enable those passing upon the highway to place their teams in such positions of security as would best guard against injury from their fright. But, whatever may have been the reason, it is sufficient that the legislature have deemed the performance of this duty, which is not onerous upon the company, sufficiently beneficial to the public to secure its performance by the imposition of a penalty,"—a penalty which our statute also imposes. Upon this same subject, it is said by the supreme court of Kentucky, in *Rupard v. Chesapeake & O. R. Co.* 88 Ky. 284, 7 L. R. A. 316, 11 S. W. 70: "Injury may occur to the traveler at the crossing in two ways, namely by a collision with him, or by scaring the horse that he is riding or driving, whereby he is injured. It is the duty of the appellee [the railroad], in approaching a crossing, if danger to the traveler in either of the ways above mentioned may be reasonably apprehended, to give timely notice of its approach, in order that the traveler may not only be warned not to come in collision with the train, but secure himself from injury by his frightened horse. By the trains crossing the highway on a trestle, there is no danger of a collision with a traveler on the highway; but, if he should be under the trestle with his horse while the train is passing over it, the danger is increased, for it is well known that a horse is more likely to scare at a sound made over his head than when the same sound is made on the ground."

It is suggested by counsel for respondent that there is no more reason why signals should be given at crossings of the character here involved than when the railroad and the public road run parallel to each other. Aside from the fact that the language of the statute requires these signals at all crossings, it is, we think, quite obvious that a greater reason exists for them in the one case than in the other. It is never absolutely necessary that a public highway, in any case, should parallel a railroad at an unsafe distance. On the other hand, in the very nature of things, there must be points at which public highways and railroads must necessarily intersect each other, and where danger to travelers by team is much more likely to arise than upon the highway paralleling the railroad; and, realizing the greater danger which

must exist from the necessity of having highways crossed by railroads, the legislature has provided for greater precautionary measures to meet the danger which this necessity creates. It is apparent, therefore, from what has been said, that the purpose of the statute is not alone to require warnings so as to prevent collisions, but also to guard against injury to travelers from the frightening of their teams, and to afford as much security as possible against accidents at or on such crossings, by requiring notice to travelers of the approach of the train. If the restricted construction which respondent claims for it should be placed on the section of the Code, this security to the public would be taken away. On the other hand reading the language as it is plainly written, there is extended to the public all the practical protection which can be afforded against the danger at such crossings, and which it is clear the statute was intended to secure. There have been but few authorities cited upon either side bearing directly upon the points we have been discussing. The New York statute, considered in the cases from the courts of that state to which we have referred, is in its essential particulars the same as the provisions of our Code section. It uses the same plain and comprehensive language, requiring warning by whistle or bell to be given when the railroad "shall cross any traveled public road or street," and it was determined by the courts of that state that, under this provision, as the language used in the statute was broad enough to include all crossings, it was required thereby that the railroad give the statutory signals, even when the crossing of the highway by the railroad was overhead. The Kentucky case referred to, and the case of *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, cited by appellants, while not involving the construction of any statute upon the subject, very clearly state the necessity for and reasons why warnings for the protection of travelers with teams at the crossing should be given by a railroad of the approach of its train, where the track crosses the highway above or below grade,—reasons which doubtless the legislature of this state bore in mind when it provided in general terms that such warning should be given at all crossings, without limitation as to grade.

In support of its claim that the sections of the statute should be given the restricted meaning it contends for,—that it only applies to grade crossings,—respondent relies upon the cases of *Favor v. Boston & L. R. Corp.* 114 Mass. 351, 19 Am. Rep. 364; *Jenson v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 589, 22 L. R. A. 680, 57 N. W.

359; Missouri, K. & T. R. Co. v. Thomas, 87 Tex. 282, 28 S. W. 343, and McElroy v. Georgia, C. & N. R. Co. 98 Ga. 257, 25 S. E. 439. All these cases involved the question whether the statutes of the several states in which the cases were determined provided for the giving of warnings at crossings above or below grade. It was held that they did not, and this conclusion was reached from a particular examination of the statute in each state. An examination of the section of the statute referred to in the opinion in the Massachusetts case shows that it provides for signals "80 rods from the place where the road crosses a highway . . . upon the same level therewith." The court held that the statute required signals only at crossings on grade, which, of course, is what the statute plainly says. In the Wisconsin case the attorney for respondent (plaintiff in the court below) conceded in his argument, and it is so intimated in the opinion, that the statute of that said state did not require a warning to be given at the overhead crossing where the accident occurred. In the Texas case, while the statute did not say that the warning should be given at grade crossings, the court, construing the language, held that it must refer only to grade crossings, because it provided that the train should come to a full stop under certain conditions, which could only apply to grade crossings. The Georgia court reached a similar conclusion, based upon a construction of the language of the statute of that state, which provided that the engineer should commence giving warning at a certain distance from the crossing, and simultaneously commence checking and keep checking the speed of the locomotive, "so as to stop in time should any person or thing be crossing said track or said road." The court held that, in requiring a slackening of speed, so as to readily stop if anyone was crossing the track, the section could only apply to grade crossings, and that there could be no occasion for stopping the train for the protection of persons not on, or about to go upon, the track itself. It will be observed that, in all these cases cited by respondent, either the sections of the statute under examination expressly applied to grade crossings only, or, when carefully examined, showed from their phraseology that they were only meant to be applied to grade crossings. Our section, however, is, as we have said, so plain in its language as not to be open to construction. It says nothing about any particular kind of crossing, but speaks of crossings generally. To say that, when it so speaks of crossings generally, it means crossings at grade only, would be to place a limita-

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tion upon the section by construction which can find no warrant from anything in the language of the section itself.

We are satisfied that the demurrer was improperly sustained, and the judgment is accordingly reversed.

We concur: McFarland, J.; Henshaw, J.

Petition for hearing in banc denied October 2, 1905.

CALIFORNIA SUPREME COURT.

HANNAH ANN LOOMIS, Appt.,

v.

E. H. LOOMIS et al., Respts.

(.... Cal.)

1. Homestead—conveyance to wife—gift over.

No constructive trust arises under a deed by a man to his wife of the homestead property with a proviso that after her death it is to go to another, where, under the law, she takes, upon his death, absolute title to the property by right of survivorship.

2. Same—declaration of trust.

A voluntary, express trust is not created by a letter from a widow to the *cestui que trust*, stating that her husband has conveyed their homestead to her on condition that at her death it shall go to the *cestui que trust*, where the law gave her, upon the death of the husband, an absolute title to the property by right of survivorship.

(October 14, 1905.)

Case Note.—No exact precedent for the above case has been found after extensive search, but, under the law of California, which, as the court points out in the above case, gives the homestead property absolutely to the wife in the event of her surviving her husband, the attempt of the husband, in a deed to her, to derogate from her right of survivorship, seems to raise a question similar to that of the right of one of the spouses to survivorship in an entirety estate after the death of the other spouse. The inability of either spouse to derogate from the other's right of survivorship in entirety property is well established, as shown by Varnum v. Abbot, 12 Mass. 478, 7 Am. Dec. 87; Fox v. Fletcher, 8 Mass. 274; Den ex dem. Wyckoff v. Gardner, 20 N. J. L. 556, 45 Am. Dec. 388; Atkison v. Henry, 80 Mo. 151; Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489; Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769; and other cases collected in the note found in 30 L. R. A., on page 328. But the rule which is established in California on this subject for homesteads would obviously not be applicable to homesteads in some of the states created under statutes which do not give such right of survivorship.

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco, and from an order denying her motion for a new trial after rendition of the judgment in defendants' favor in an action brought to set aside a deed. Reversed.

The facts are stated in the opinion.

Messrs. R. E. Ragland and E. A. Bridgford, for appellant:

To be valid, the trust, as expressed in the writing, must be definite and certain as to its "nature, extent, and object."

Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543.

Homestead property cannot be alienated by the voluntary act of either or both of the parties, unless it is done in conformity to the statute.

Flege v. Garvey, 47 Cal. 376; Barber v. Babel, 36 Cal. 18; Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; Gagliardo v. Dumont, 54 Cal. 496; Hart v. Church, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296.

Messrs. Joseph Hutchinson, Frank Otis, and W. B. Treadwell, for respondents:

Where a husband conveys property to his wife upon a prior or contemporaneous promise by her to hold the property, in whole or in part, for the benefit of another, the law fastens upon her a constructive trust for the disposition of the property in accordance with the promise.

Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171.

It is not necessary, even in cases where a trust can be evidenced only by writing, that the writing should be executed at the time of the creation of the trust.

Perry, Tr. 82; Garnsey v. Gothard, 90 Cal. 603, 27 Pac. 516.

The contract and the deed were made at the same time, and as parts of the same transaction, and are, therefore, to be construed together.

Civil Code, 1642; McCroskey v. Ladd, 96 Cal. 455, 31 Pac. 558; Janes v. Throckmorton, 57 Cal. 368.

The existence of the homestead did not prevent the creation of the constructive trust.

Re Lamb, 95 Cal. 397, 30 Pac. 568; Burkett v. Burkett, 78 Cal. 310, 3 L. R. A. 781, 12 Am. St. Rep. 58, 20 Pac. 715.

Angellotti, J., delivered the opinion of the court:

This action was brought by plaintiff to quiet her title to a parcel of real property in San Francisco, found to be of the value of \$5,000, and to have declared void, upon the ground that the execution of the same

was procured by undue influence, a certain deed executed by her to defendant Mary Hawley, in trust to receive the rents and profits of the property, to pay therefrom the taxes, insurance, and repairs, and to pay the balance thereof to the use of plaintiff during her life, and, upon her death, "to convey the said property in fee simple absolute" to one E. H. Loomis. The trial court found against plaintiff upon her allegations of undue influence, but determined that the deed of trust was void under the decision of this court in *Re Fair*, 132 Cal. 523, 4 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000. The correctness of this determination is not disputed here. The trial court, however, found that, notwithstanding the invalidity of said deed of trust, plaintiff was not the owner of any interest in said land other than an estate for her life therein; and that, subject to said estate for life, defendant E. H. Loomis was the owner of "an estate in fee in remainder of said property, commencing at the death of said plaintiff." Judgment having been entered accordingly, the plaintiff appeals from the whole of the judgment, except that portion thereof relating to the invalidity of the deed of trust, and also from an order denying her motion for a new trial.

The theory of counsel for defendant Loomis, adopted by the learned judge of the court below, appears to be that, by reason of a certain transaction between plaintiff and her husband, Barney Loomis, on January 6, 1900, plaintiff received said property from her husband, solely in trust to receive the rents and profits of the same during her life; and that, upon her death, the said property should vest in fee in said E. H. Loomis, a brother of her husband. The transaction in question, viewed in the light of the evidence most favorable to defendant, was as follows, *viz.*: On January 6, 1900, the husband, Barney Loomis, executed and delivered to plaintiff what purported to be an absolute conveyance of said property, which purported to be made in consideration of love and affection. This deed was in fact executed by the husband only upon the promise of his wife that she would contract "to reserve this property for my brother." The wife agreed to this, and thereupon drew up and signed a writing wherein she stated, according to the evidence of a witness who was present, the writing not being produced, "that she would reserve and hold this property for the brother of the husband." On February 2, 1900, the said husband died. On February 5, 1900, she wrote a letter to said brother, in which, after speaking of the death and burial of her husband, she said: "This home is a gift to myself, with the promise that, when I am through with it, it shall be given to his brother, Edwin, who proved

himself the best friend to him he ever found." On February 16, 1900, she executed the void deed of trust, hereinbefore referred to, indicating her understanding of the terms and conditions upon which she had received the deed from her husband. It is claimed by defendants that the foregoing evidence sufficiently shows a constructive trust, in accord with the doctrine of *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171, and similar cases, relating to transactions between husband and wife. It is said by counsel for defendants that it is the settled law of this state, under the decisions, that, where a husband conveys property to his wife, upon a prior or contemporaneous promise by her to hold the property, in whole or in part, for the benefit of another, the law fastens upon her a constructive trust for the disposition of the property in accordance with the promise. It may be conceded here that the rule is correctly stated by counsel, and that the evidence set forth above is sufficient to bring the transaction of January 6, 1900, within the operation of that rule. As to this, it is unnecessary to express an opinion, in view of other facts presented by the record, which make the rule contended for inapplicable here.

The record shows that on that day the premises in question constituted the duly selected and recorded homestead of the plaintiff and her husband. It does not appear whether the property was community property, or the separate property of either spouse, but, owing to the fact, alleged by the pleadings, established by the evidence, and found by the trial court, that the wife had, on February 18, 1881, regularly selected the premises as a homestead, and that the husband, on March 14, 1899, did the same; and, there being no intimation that the homestead so selected had ever been abandoned,—it is unquestioned that on January 6, 1900, the property constituted the homestead of the parties, selected either from the community property, or from the separate property of the person selecting, or joining in the selection of, the same. Under these circumstances, it cannot be doubted that it was then of such a character that it would, unless subsequently abandoned by the concurrent act of both parties, vest absolutely on the death of either husband or wife in the survivor. In the absence of such abandonment, which could only be effected by the mutual concurrent act of the parties, in the mode prescribed by law (Civ. Code, §§ 1242, 1243), the law gave the homestead property absolutely to the wife in the event that she survived her husband. Her husband could not affect her right in this regard by any instrument which he, acting alone, could execute.

It is true that it has been held that a husband may, by deed executed by himself alone, convey his title to the homestead property to his wife, subject to the homestead (*Burkett v. Burkett*, 78 Cal. 310, 3 L. R. A. 781, 12 Am. St. Rep. 58, 20 Pac. 715; *Re Lamb*, 95 Cal. 397, 405, 30 Pac. 568); but such a conveyance cannot affect the homestead character of the estate, nor can it prejudicially affect the wife's right of survivorship thereunder. A wife cannot be held to acquire, under such a deed, any right or interest in the property described therein that she already has under the law; and her absolute right to succeed to such property in the event of her husband's death is such a right. When, therefore, the husband died before her, the property vested absolutely in her under the homestead laws, and the husband's deed added nothing to her title. Whatever interest had been conveyed by that deed, the homestead subject to which the conveyance had been made had taken all of the property, and left nothing to be affected by such deed. From the moment of her husband's death, she held nothing under such deed. Under these circumstances, it follows that there was, subsequent to the death of the husband, no property to which the rule as to constructive trusts contended for by defendants could apply, for clearly such rule is applicable only to such property as is acquired by reason of the transaction relied on. As stated in *Hayne v. Hermann*, *supra*: "Whenever one person acquires from another the title to real estate by a fraud, actual or constructive, practised upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands." It is the property acquired by the fraud as to which the trust is created, and that alone, or, in the language of § 2224 of the Civil Code, "the thing gained." The only property acquired by the wife under the deed was the interest of the husband subject to the homestead. Such interest, it may be assumed, was held by the wife from the date of the deed to her husband's death in trust, by reason of her promise made when the deed was executed; but by his death that interest was absolutely terminated, and thenceforth the deed was ineffectual as a muniment of title.

There is no question, in this connection, as to whether there was such an interest in the husband at the date of the deed as to constitute that deed a sufficient consideration for the promise of the wife; but the question is whether there is property in her hands, acquired by the wife from her husband under a deed made under such circumstances as to create a constructive trust. When it appears that there is no property in her hands, acquired by reason of

such deed, all questions as to a constructive trust are removed from the case. Defendant must then prevail, if at all, only upon the theory that an express trust in favor of defendant Loomis is shown. As to this, it is manifest that no such trust was created while both husband and wife were living. Under the clear and explicit provisions of our homestead law, as uniformly construed by this court, the interest in the homestead property, vested jointly in the husband and wife, cannot, while both live, be thus conveyed, encumbered, destroyed, or impaired, in favor of a third party, except by a single written instrument, executed and acknowledged personally by both husband and wife (Civ. Code, §§ 1242, 1243. See *Hart v. Church*, 126 Cal. 471, 476, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296, and cases there cited; *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138, 62 Pac. 615); and any attempted action in this behalf, not in full conformity with the requirements of the law, is absolutely void and inoperative for any purpose, and acquires no validity, even if the premises subsequently lose their character as a homestead from abandonment or other cause (*Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677). In *Graves v. Baker*, 68 Cal. 133, 8 Pac. 691, an action to declare a trust, it was squarely held, in accord with what has been said, that a deed of homestead property from a husband to a wife, in trust to receive the rents and profits for herself and children during her life, and providing that, after her death, the property should vest absolutely in the children, was, as against a valid declaration of homestead, void, because executed and acknowledged by the husband alone. In this case there was no pretense that the husband and wife joined in a single instrument, or that the writing signed by her at the time of the execution of the deed was acknowledged by her.

Defendant, however, relies upon a letter written by plaintiff to defendant Loomis, after the death of her husband, as creating such a trust. The statement relied on in that letter has already been set forth. There was nothing herein to indicate any intention on the part of the writer to create any trust, and all that the letter constituted at most was a voluntary acknowledgment on the part of plaintiff, made without any consideration whatever, that the property had been given to her by her husband, upon her promise that, when she was through with it, she would give it to defendant Loomis. It afforded very satisfactory evidence that she had made the alleged promise to her husband at the time of the execution of the deed, evidence in support of the claim of 1 L.R.A. (N.S.)

constructive trust; but it had no further effect, and could not, under the circumstances already detailed, operate to create a voluntary trust under the provisions of § 2222, Civ. Code, as claimed by defendant. From what has been said, it follows that the finding of the trial court as to the ownership of this property is not supported by the evidence. It is contended by plaintiff that, upon the findings of the court, judgment should be ordered entered for plaintiff in accordance with the prayer of her complaint; but we are of the opinion that the other findings are not such as to enable us to do this in the face of the findings as to ownership.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: Shaw, J.; Van Dyke, J.

CALIFORNIA SUPREME COURT.

THOMAS MCGARRIGLE, Resp.,
v.

ROMAN CATHOLIC ORPHAN ASYLUM
OF SAN FRANCISCO, Appt.

(145 Cal. 694.)

Deed—words of grant.

No estate is granted by a clause in a deed which, after granting a life estate, declares that it is the purpose of the grantor, by this deed, that, after the death of the life tenant, "said described lands shall become and be the property of" an institution named.

(January 7, 1904.)

Case Note.—In *Devlin on Deeds*, vol. 2, 2d ed., § 854, it is said that, where no present interest passes by a deed, the instrument, "while in form a deed, is in substance a will, possessing all the incidents of a will." Continuing his discussion of the question, when a conveyance is to be regarded as passing a present interest, the same author says (§ 855): "It seems to be impossible to lay down an invariable rule which will apply to all cases. There is, it is to be observed, however, a tendency in the modern decisions to uphold conveyances when not clearly repugnant to some well-defined rule of law." (§ 855a) "But it must be confessed that the rules, as they are applied by the courts, are rather shadowy, and it is almost impossible to lay down a rule with which some well-considered case will not be found to be in conflict."

In the case of *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98, cited in *MCGARRIGLE v. ROMAN CATHOLIC ORPHAN ASYLUM*, it was held that an instrument purporting to convey land, but providing that it shall remain the grantor's property during his lifetime and go to the grantee at his death, should

APPEAL by defendant from a judgment of the Superior Court for Sonoma County in favor of plaintiff in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. Frank J. Sullivan, with Messrs. D. C. Murphy and John L. Seawell, for appellant. Messrs. J. M. Thompson and C. H. Pond, for respondent:

The deed does not purport to be effective as a conveyance to the asylum until after the death of McGarrigle; the deed passed no present interest in the property. The intention of the grantor is to be gathered from the legal import of the words employed; for all parties must be judged by the legal meaning of their words.

Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98; Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522; Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177; Sperber v. Balster, 66 Ga. 317;

said grantee survive, is testamentary in character, and passes no title.

It is also cited in the cases which follow: Tuttle v. Raish, 116 Iowa, 331, 90 N. W. 66, which holds an instrument providing that, in the event of the maker's death without children, "I, Milo R. Tuttle, of Clinton, Iowa, do hereby make and constitute my wife, Jennie Tuttle, the sole owner in her own right (without regard to my next of kin) of all our property, whether real or personal, or wherever situated, that we may be possessed of; and I hereby invest her with full powers and rights to receive, receipt for, sell, dispose of, and give title to as valid as if done by both of us in my lifetime"—is not a deed. Murphy v. Gabbert, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536, which holds that an instrument reciting that "the intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to come immediately into effect, but not till then,"—is not a valid deed. Hunt v. Hunt, 26 Ky. L. Rep. 973, 68 L. R. A. 180, 82 S. W. 998, which holds that an instrument containing words of present grant and covenants of warranty is a valid deed, although it provides that it "is not to take effect until the death of" the grantors.

It is distinguished in Kelly v. Parker, 181 Ill. 49, 54 N. E. 615, which holds that a deed containing words of grant *in presenti* is not rendered testamentary because of reservations, trusts, and conditions respecting the use of the property during the grantor's life; and in Hitchcock v. Simpkins, 99 Mich. 198, 58 N. W. 47, in which it was held that a deed which provided that the grantor was to remain in full possession and control during his life, that the grantee should pay the grantor an annuity; and states that, "at the death of the said party of the first part, the title shall be, and is hereby declared to be, in said party of the second part,"—passed a present title to the remainder.

Another authority cited in the McGARRIGLE CASE is Leaver v. Gauss, 62 Iowa, 314,

17 N. W. 522, which holds that an instrument purporting to convey real estate, in the usual form, and reciting an agreement "that the grantee shall have no interest in said premises as long as the grantors, or either of them, shall live," conveys no present estate, but is testamentary in character.

This case is cited in the following: Cates v. Cates, 135 Ind. 277, 34 N. E. 957, which holds that a deed reciting that the grantor "hereby expressly excepts and reserves from this grant all the estate in said lands, and the use and occupation, rents and proceeds, thereof unto himself during his natural life," conveys a present interest. Kelley v. Shimer, 152 Ind. 290, 53 N. E. 233, which holds a conveyance reciting that "this deed is to take effect and be in full force on and after the death of this grantor," is a deed, and not a testamentary disposition of property. Phillips v. Thomas Lumber Co. 94 Ky. 445, 42 Am. St. Rep. 367, 22 S. W. 652, which holds that a conveyance stating: "This land is deeded to Vioey E. Phillips during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to John Phillips, son of William Phillips, deceased, and his heirs forever. This deed is not to take effect until the death of Jesse Phillips, and Jesse Phillips is to have and keep full possession of said farm during his life, and to have all proceeds of said farm until his death; and, if said John should get in debt, or anything that would sell the land, then at the time of sale it is to go to his children,"—is to be regarded as a deed taking effect at once.

Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677, which holds that a deed containing a condition that the grantors shall hold the deed in their possession until their death passes no present interest.

It is distinguished in Saunders v. Saunders, 115 Iowa, 275, 88 N. W. 329, which holds

the interest to be limited as a remainder, either vested or contingent, must commence or pass out of the grantor in the same instrument and at the time of the creation of the particular estate, and not afterwards. 4 Kent, Com. 13th ed. 248; 20 Am. & Eng. Enc. Law, p. 834.

It is necessary for an effective deed that it contain what are termed operative words. 5 Am. & Eng. Enc. Law, p. 438; Cadell v. Allen, 99 N. C. 542, 6 S. E. 399; Brown v. Manter, 21 N. H. 528, 53 Am. Dec. 223; 4 Washb. Real Prop. 4th ed. 379; Irwin v. Powell, 188 Ill. 107, 58 N. E. 941; Hummelman v. Mounts, 87 Ind. 178.

It is distinguished in Saunders v. Saunders, 115 Iowa, 275, 88 N. W. 329, which holds

the interest to be limited as a remainder, either vested or contingent, must commence or pass out of the grantor in the same instrument and at the time of the creation of the particular estate, and not afterwards.

Henshaw, J., delivered the opinion of the court:

This action was to quiet title to 42 acres of land in the county of Sonoma. Cordelia Jones during her lifetime conveyed an estate in the land in question to the plaintiff, who was her nephew. Subsequently she died, and in the probate of her estate this land was distributed to Catherine McGarrigle, the mother of this plaintiff, subject to a life estate in plaintiff. Thereafter Catherine McGarrigle conveyed her fee to plaintiff, who instituted this action. Defendant claims by the deed above referred to from Cordelia Jones to the plaintiff, and the construction of that instrument is determinative of this case. It is in language as follows:

"This indenture, made this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, between Cordelia Jones of Sonoma county,

a conveyance subject, however, to the occupancy and possession of said real estate for and during the natural life of the grantor; "the intention being that this deed shall not be in force or take effect until after the death of the grantor herein,"—conveys a present interest; and in *Spencer v. Robbins*, 106 Ind. 584, 5 N. E. 726, which holds that an instrument purporting to convey land to named persons "as tenants in common, in the following proportions, to wit: To be equally divided between them at my decease, and after the payment of all my funeral and burial expenses by them fully settled; and they are to pay all taxes and other expenses of repairs and improvements on the same during my natural life, and then the title to vest in them absolutely,"—is a valid deed.

Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177, cited in the MCGARRIGLE CASE, holds that an agreement that, "after the death of said Henry Rickett, of the first party, the right and title of" the land in question "shall vest in the said John Hazleton, of the second party," is of a testamentary nature.

It is also cited in *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567, which holds that a deed, though accompanied by an agreement by the grantees not to sell any part of the granted premises during the lifetime of the grantor without his written consent; and that all of such property should be under his control and direction so long as he should live, with right to sell and convey as though no deed had been given; and that the grantees should sign all deeds for such property when so requested by the grantor,—conveys a present estate; and in *Bevins v. Phillips*, 6 Kan. App. 324, 51 Pac. 59, which holds that a deed containing the words: "Condition of this deed is such as to said party of the second part that this land shall not be encumbered in any way, or this deed shall be void. The party of the first part

state of California, the party of the first part, and Thomas McGarrigle of the same place, the party of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of the sum of love and affection and one dollar money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey and confirm unto the said party of the second part, during his lifetime, all that certain lot, piece or parcel of land situate, lying and being in the township of Santa Rosa, county of Sonoma, state of California, and bounded and particularly described as follows, to wit: [Here follows description.]

"It is the purpose of the party of the first part by this deed, that after the death of

is to hold said property his lifetime,"—conveys a present estate.

Another case cited in the MCGARRIGLE CASE, *Sperber v. Balster*, 66 Ga. 317, holds that an instrument having the general form of a deed, and stating, "said deed of gift to be of full effect at my death," is of a testamentary character.

This case is also cited in *Barnes v. Stephens*, 107 Ga. 441, 33 S. E. 399, which holds that a paper purporting to convey title to land, declaring that the grantee shall have and hold such lands after the maker's death, together with certain personal property, after payment of grantor's debts and burial expenses; and declaring that all his other property shall be divided among other named persons designated as "heirs"—is testamentary, and conveys no present title; and in *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378, which holds a conveyance containing a clause: "To have and to hold the above-described premises to the said Bryant P. Wynn of the second part, his heirs and assigns, to be his at my death and the death of my wife,"—is a deed, and not a will.

Donald v. Nesbit, 89 Ga. 290, 15 S. E. 367, cited in the MCGARRIGLE CASE, holds that a conveyance providing that "in no event is this deed to go into effect until after my death" is testamentary in character.

Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411, also cited, holds that a conveyance providing: "This deed is to take effect and be in full force from and after my death,"—passes no present estate.

Cunningham v. Davis, 62 Miss. 306, also cited, holds that an instrument, in form a deed, but containing a provision: "And that this deed do not take effect until after my death;" coupled with the direction that the grantee should pay all the grantor's debts, and have only the remainder of his property,—is testamentary in character.

the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco, state of California."

It is upon the italicized portion of this conveyance that appellant relies; but we are of opinion that the trial court correctly construed this clause as containing no operative words of grant, and as failing to convey any present interest in the property. It will be noted that the appellant is nowhere mentioned as a grantee in the deed, and that the language of the clause itself is but an expression of the grantor's purpose in the future disposition of the property. It left in her a reversion after the life estate to Thomas McGarrigle, which required some future conveyance, or some testamentary disposition, to effectuate its transfer to the orphan asylum. But not only was there a failure of operative words to convey to the asylum, but no present interest can be said to pass under the language which was employed. It is fundamental that, while possession or enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest. This was not done by the instrument in question. The express purpose was—giving to it its fullest effect—that the land should become the property of the orphan asylum after the death of McGarrigle, but should not become its property before. Such attempted dispositions have been uniformly held to be inoperative in deeds. *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Leaver v. Gauss*, 62 Iowa, 214, 17 N. W. 522; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Sperber v. Balster*, 66 Ga. 317; *Pinkham v. Pinkham*, 55 Neb. 729, 70 N. W. 411; *Cunningham v. Davis*, 62 Miss. 366; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367.

The judgment and order appealed from are therefore affirmed.

We concur: **McFarland, J., Lorigan, J.**

Petition for rehearing denied January 6, 1905.

VIRGINIA SUPREME COURT OF APPEALS.

A. A. ROBERSON et al., Appts.,

v.

JOHN M. WAMPLER, Guardian, etc., of Susan J. Roberson.

(.... Va.)

1. Deed to heir—construction.

A grant to the "heirs" of a living person will be construed as having meant children, and upheld, if such plainly appears to have been the intention of the grantor.
1 L.R.A. (N.S.)

2. Judgment—matter not in issue.

It is not error to fail to provide, in a final decree, for a matter which has not been put in issue, and for the settlement of which the necessary parties are not before the court.

(September 14, 1905.)

A PPEAL by intervening petitioners from a decree of the Circuit Court for Wise County in plaintiff's favor in a suit brought to enjoin the cutting of timber on land alleged to belong to plaintiffs' ward. Affirmed.

The facts are stated in the opinion.

Messrs. **Ayers & Fulton** for appellants. Messrs. **Bond & Bruce**, for appellee:

The court will ascertain from the instrument itself, and from all the surrounding circumstances, the true intent of the grantor; and will construe it, if possible, so as to make that intent effective.

Devlin, Deeds, § 837; 2 Minor, Inst. 1050; *Carrington v. Goddin*, 13 Gratt. 587; 17 Am. & Eng. Enc. Law, 2d ed. p. 17; *Post v. Weil*, 115 N. Y. 361, 5 L. R. A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; *Cravens v. White*, 73 Tex. 577, 15 Am. St. Rep. 803, 11 S. W. 543; *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984; *Bartholomew v. Muzzy*, 61 Conn. 387, 29 Am. St. Rep. 206, 23 Atl. 604; *Heath v. Hewitt*, 127 N. Y. 168, 13 L. R. A. 46, 24 Am. St. Rep. 438, 27 N. E. 959; *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659; *Holeman v. Fort*, 3 Strobb. Eq. 66, 51 Am. Dec. 665; *Darbishon v. Beaumont*, 3 Bro. P. C. 60; *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575; *Buford v. North Roanoke Land & Improv. Co.* 90 Va. 418, 18 S. E. 914.

Buchanan, J., delivered the opinion of the court:

The principal question involved in this case is whether the word "heirs," as used in the deed under which the parties to this controversy claim, was employed in its technical sense, or as meaning "children." The language of that deed, omitting the description of the land conveyed, is as follows:

"This deed made this April 25th, 1902, between James Roberson and Nancy, his wife, of the County of Wise and State of Virginia, of the first part, and John B. F. Roberson heirs, of the County of Letcher and State of Ky., of the second part.

"Witnesseth: That for and in consideration of the natural love and affection they have for their sd. son and especially for his heirs and for the further consideration of the performance of the agreement herfb to be written on their part, doth grant, bargain and sell unto the heirs of

the sd. John B. F. Roberson, a certain tract or parcel of land, lying and being in the County aforesaid on the waters of Pound River.

"To have and to hold the said heirs of John B. F. Roberson forever, and it is also agreed and becomes a part of this contract that the said heirs of John B. F. Roberson shall take it is also agreed the said heirs of John B. F. Roberson is furnish timber to keep up the line fence so far as it binds on the other heirs of James Roberson care of or cause to be taken care of said James Roberson and Nancy, his wife for and dur-

ing their natural lives by furnishing them with food and raiment, washing and bedding such as will be fit and becoming to persons of this age and as the customs of the country, and for the performance of the said service the said grantors doth hereby retain a lien on the said premises, and the said James Roberson and Nancy, his wife, for themselves and their heirs doth covenant with the said heirs of John B. F. Roberson that they will warrant generally the premises hereby conveyed."

At the time of the execution of the deed John B. F. Roberson was living.

Case Note.—Some other authorities, not cited by the court in the case of *ROBERSON v. WAMPLER*, and which construed the word "heirs," in a deed, to mean "children," are as follows:

In *Tinder v. Tinder*, 131 Ind. 386, 30 N. E. 1077, the deed to a living grantee and "heirs" by her husband was construed as vesting a present estate in the grantee and her children. The court said that the word "heirs" may often be taken as descriptive of a class who shall take directly from the grantor.

Also, in *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122, the court construed a deed to a grantee "and her minor heirs" as using the term "heirs" as synonymous with "children." In this case the conveyance showed the grantee to be living, and, consequently, the possibility of the use of the word "heirs" in its technical sense would be excluded. *Wood v. Taylor*, 9 Misc. 640, 30 N. Y. Supp. 433, is to the same effect.

In *Wikle v. McGraw*, 91 Ala. 631, 8 So. 341, a conveyance to a grantee and her bodily heirs was held to be a deed to the grantee and her children.

In *Tharp v. Yarbrough*, 79 Ga. 382, 11 Am. St. Rep. 439, 4 S. E. 915, it was held that the word "heirs" used in a deed, the consideration of which was love and affection, from the grantor to the heirs of the grantee, there being three children of the grantee living when the deed was executed, passed the title to such three children. *Lee v. Tucker*, 56 Ga. 9, lays down the same rule.

In *Brasington v. Hanson*, 149 Pa. 289, 24 Atl. 344, it was held that children were included within the meaning of the word "heirs" in a deed to the grantee and her heirs, naming them, when the persons so designated were the grantee's children.

In *Read v. Fite*, 8 Humph. 328, the court held that a deed of land to a trustee for the benefit of joint heirs—"as well the present as any future heirs"—of a husband and wife, was made for the benefit of the children of the husband and wife, and includes future as well as present children. *Grimes v. Orand*, 2 Heisk. 298, is to the same effect.

In *Tucker v. Tucker*, 78 Ky. 503, the court held that, in a deed of real estate to a certain grantee and to the heirs of a certain other person, the grantor intended to use the word "heirs" as synonymous with "children." (N.S.)

dren;" and it had the same effect as if the children of such person were named in the conveyance.

In *Findley v. Hill*, 133 Ala. 229, 32 So. 497, the court held that a deed conveying real property to a designated person in trust for the use of the latter's son for life, and, at his death, "for the use and benefit of the heirs of . . . [the son] at the time of his death, and their heirs and assigns forever. But, in case he shall leave no heir or heirs living at the time of his death, then, in that case, the same real and personal estate shall go to the heirs at law of the . . . [grantor] living at the time of the death of . . . [the son],"—intended to use the word "heirs" in the first limitation as children of the son living at his death.

The word "children," in its primary and natural sense, is a word of purchase, and the words "heirs" and "heirs of the body" are, in their primary and natural sense, words of limitation, and not of purchase. *Schoonmaker v. Sheely*, 3 Denio, 490, *Re Sanders*, 4 Paige, 293.

13 *Cyclopedia of Law and Procedure*, p. 660, states that the word "heirs" may be construed as meaning children when an intention to that effect is clearly shown by the instrument.

Devlin on Deeds, § 864, states that if, by the deed, a trust is created for the benefit of the present as well as the future heirs of a person, the word "heirs" will be taken to mean children, as there can be no heirs of a person until after his death.

1 *Kerr on Real Property*, §§ 334, 335, says: The word "heirs" must be deemed, ordinarily, a word of limitation, and not a word of purchase, as the equivalent of "children;" and will be construed to limit or define the estate intended to be conveyed. The words "heirs of the body," in a deed, are words of limitation, and not of purchase. It has been held that the words "heirs now living," where used in a deed, are words of limitation or purchase, as will best accord with the manifest intention of him who employs them. When the word "heirs" is used in reference to a living person as the ancestor, it means in the popular sense children who are heirs apparent. *Jones on Real Property in Conveyancing*, § 231, lays down the same general doctrine.

It is a well-settled rule of construction that technical words are presumed to be used technically, unless the contrary appears upon the face of the instrument, and that words of a definite legal signification are to be understood as used in their definite legal sense. *Nye v. Lovitt*, 92 Va. 710, 713, 714, 24 S. E. 345, and authorities cited; *Waring v. Waring*, 96 Va. 641, 32 S. E. 150; *Brett v. Donaghe*, 101 Va. 786, 788, 45 S. E. 324. But, where other expressions are used in conjunction with such technical words, which plainly indicate what the intention was, and that such intention was not in accordance with the technical signification, the intention will control the legal operation of the words. 2 Minor, Inst. 1st ed. 1114, 1115; 1 Jarman, Wills, Bigelow's ed. 61, and note; *Wootton v. Redd*, 12 Gratt. 196, and note to Michie's ed. citing cases; *Tebbs v. Duval*, 17 Gratt. 349.

The word "heirs" is a technical word having a definite legal signification, and, when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import, and, in this sense, it designates the person or persons appointed by law to succeed to the real estate in cases of intestacy. But where, from the language of the instrument and the circumstances surrounding its execution, it appears that the maker, in using the word "heirs," meant "children," it will be so construed. This it is conceded is so as to wills; but it is insisted that a different rule prevails as to deeds, and cases are cited to sustain the contention that a deed made to the "heirs" of a living person is void, although words are used in conjunction therewith which show that the word was not used in its technical sense, but as meaning children. *Hall v. Leonard*, 1 Pick. 27; *Hileman v. Bouslaugh*, 13 Pa. 344, 53 Am. Dec. 478; *Morris v. Stephens*, 46 Pa. 200; *Winslow v. Winslow*, 52 Ind. 8.

Whatever may have been the rule of decision in the earlier cases of the states of Massachusetts, Pennsylvania, and Indiana, the later decisions seem to have modified the rule. The weight of authority and the better reason is in favor of the rule that in deeds, as well as in wills, the intention of the maker of the instrument, as gathered from all its parts, must prevail.

In *Heath v. Hewitt*, 127 N. Y. 166, 13 L. R. A. 46, 24 Am. St. Rep. 438, 27 N. E. 959, where, by statute, the courts are required to give effect to the intention of the maker in construing deeds as well as wills, it was held that where, from the language of the deed and the circumstances surrounding its execution, it appears that the grantor, in using the word "heirs," meant "children," it will be so construed, and effect 1 L.R.A. (N.S.)

thus given to the instrument, notwithstanding the general rule that a conveyance to the heirs of a living person is void for uncertainty. In this respect the court declared there was no difference between wills and deeds. *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122. See 13 Cyc. Law & Proc. p. 660, note 87, citing cases.

No decision of this court has been cited by counsel, nor have we found one in our investigation, in which the precise question involved in this case was raised and decided. But the rule of construction in this state, independent of statute, is that in deeds, as well as in wills, the intention of the parties must prevail, unless that intention is contrary to law.

In the early case of *Hawkins v. Berkley*, 1 Wash. (Va.) 204, 206, it was said that "agreements are always to be construed according to the evident intent of the parties, appearing from the deed itself, without a rigid adherence to the letter." And this reasonable and just rule has ever since been recognized as the correct rule for interpreting written instruments. 2 Minor, Inst. 1st ed. 1113-1116; *Stace v. Bumgardner*, 89 Va. 420, 16 S. E. 252; *Temple v. Wright*, 94 Va. 338, 340, 26 S. E. 844; *Lindsey v. Eckels*, 99 Va. 668, 671, 40 S. E. 23; *White v. Sayers*, 101 Va. 821, 828, 45 S. E. 747.

In the case of *Stace v. Bumgardner*, 89 Va. 420, 16 S. E. 252, it was said by Judge Lewis, in delivering the opinion of the court, where it was insisted that a different rule applied in the construction of wills from that which prevails as to deeds and other contracts, that "there is, however, no material difference in principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. No technical language is necessary to create a trust either by deed or will; and in both classes of cases the object of the judicial expositor is the same, namely, to discover the intention which is to be gathered in every case from the general purpose and scope of the instrument in the light of surrounding circumstances."

Applying the foregoing rules of construction to the deed under consideration, it is reasonably certain that the word "heirs" was not used technically, but as synonymous with "children," a sense in which it is frequently used in common language, especially by unlettered people, as the scrivener in this case evidently was.

It appears from the record that on the same day the deed under consideration was made the grantor executed two other conveyances, and a few days afterward another, by which he partitioned and conveyed his real estate to three of his children and

the heirs of his other child, in consideration of natural love and affection, with a requirement that the grantees in the deed should support and maintain the grantor and his wife during their natural lives. A consideration of natural love and affection for the grantees in the deed implies that they were living persons for whom he cherished affection, and not persons unknown, or perhaps not in being, as the grantees might be if the word "heirs" was used in its technical sense. *Fountain County Coal & Min. Co. v. Beckleheimer*, 102 Ind. 82, 52 Am. Rep. 645, 1 N. E. 202. Again, the provision in the deeds that the grantees should care for, support, and maintain the grantor and wife, or cause that to be done, necessarily implies that they were living persons, since the deeds took effect upon their delivery, and the duty to support and maintain at once commenced.

The grantees in the deed in question are described as being "of the county of Letcher and state of Kentucky," where John B. F. Roberson resided, again indicating that the word "heirs" was used in the sense of "children," and not in its technical sense, since the grantor could not know who would be the possible heirs of John B. F. Roberson.

The deed further provides that the grantees shall "furnish timber and keep up the line fence so far as it binds on the other heirs of James Roberson," the grantor. There can be no question that the grantor used the word "heirs" in this connection in the sense of "children," for he himself was then living and had no heirs.

In the other deeds made on the same day to his daughters, the grantor makes use of the same expression again, unmistakably indicating that the word was not used in its technical sense.

Construing the deed as a whole, we are satisfied that the manifest intention of the grantor was to convey the property to John B. F. Roberson's children, and not to his heirs in the technical sense of that word, and that the circuit court did not err in so holding.

The appellants assign as error the action of the circuit court in failing to provide, in its final decree, that the person to whom the tract of land in controversy belonged should contribute his proportion of the maintenance and support of the grantors in said deed.

This assignment of error is, we think, without merit. The pleadings in the case do not properly put that question in issue. Unless the appellants had done more for the support and maintenance of the grantor and his wife than their conveyances required them to do, they had no right to implead the appellee's ward for a failure to

comply with the terms of the conveyance to her as to such support and maintenance. Again, the necessary parties were not before the court. The grantor in the deed was dead, and neither his personal representative nor his widow, the principal parties interested in that controversy, was a party to the suit.

The decree appealed from must be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

CLITHEROE D. JAMES, Appt.,

v.

BURTON PAYNE GRAY, Trustee, etc., of
James & Abbott, Bankrupts.

(65 C. C. A. 385, 131 Fed. 401.)

1. Courts—Federal and state—application of general law.

The Federal courts will apply the general rule that a loan by a wife to her husband from her separate estate creates an equity in her favor, notwithstanding decisions of the local state court to the contrary.

2. Husband and wife—loan by wife—presumptions.

A loan by a married woman to a firm of which her husband is a member, in the absence of any evidence as to its source further than that the loan was made, will be presumed to have come from her separate estate, where the statute provides that a woman's property shall, upon her marriage, remain her separate estate, and that she may receive property in the same manner as if she were sole.

3. Same—statutory separate estate—protection in equity.

Equity treats personal estate vested in a married woman in accordance with statutory provisions permitting her to receive and hold such estate for all substantial purposes the same as an estate vested for separate uses according to equity rules, and will pro-

Case Note.—On the question whether or not the Federal courts, in a bankruptcy case, will be bound by the local decisions in determining the equitable rights of a wife on a contract which is not valid in law, that she has made with her husband, or a firm of which he is a member, or whether the Federal courts, in equity, will apply the equitable rules of their own jurisdiction on the subject, if these are contrary to the local law, the final decision must obviously rest with the Supreme Court of the United States. Except for the local decisions to the contrary, it would unquestionably be held in a Federal court that on such a contract, though void at law, the wife's equity would be protected. Post-nuptial contracts between husband and wife, though not valid at law, and though not made with the intervention of a trustee, are sustainable in

tect it substantially to the same extent and in the same manner as it would the latter.

4. Same—statutory regulation of contracts.

A statute permitting a married woman to make contracts, except with her husband, the same as though sole, which does not relate to her separate estate, does not affect the equity rule governing contracts affecting separate estates.

5. Bankruptcy—claims against husband's estate.

Under a bankruptcy act allowing the presentation of equitable claims against bankrupt estates, the Federal courts will allow the presentation of a claim by a married

woman for money loaned out of her statutory separate estate to a firm of which her husband was a partner, in bankruptcy proceedings against it, although the decisions of the state in which the bankruptcy was declared have denied the validity of such claims.

(Aldrich, District Judge, dissents.)

(July 6, 1904.)

A PPEAL by claimant from a decree of the District Court of the United States for the District of Massachusetts dismissing a

equity in the Federal courts, as well as in some, and probably in most, states where the question may arise. Such a contract is upheld in *Kesner v. Trigg*, 98 U. S. 50, 25 L. ed. 83, where the contract sustained in equity did not appear to have been made with the intervention of any trustee. This doctrine is not denied by the dissenting judge in *JAMES v. GRAY*, but is, at least for the purposes of the case, admitted. But the ground of his dissent is stated as follows: "I cannot concur in the idea that the bankruptcy act was intended to create substantive rights to married women beyond those existing under the law of the state in which the married woman resides." That the contract involved was not authorized by the Massachusetts statute is clearly stated; that the Massachusetts decisions cited in the majority opinion deny that such a contract can be enforced in equity is also clearly stated. The question then is, Can a claim on such an invalid contract by a married woman be enforced in equity in a bankruptcy case when the local law, as established by the state courts, denied that any equity was created by the transaction?

A precedent in favor of the equity of the wife against the estate of her bankrupt husband for a loan advanced to him is found in *Re Blandin*, 1 Low. Dec. 543, Fed. Cas. No. 1,527. A similar decision was rendered in *Re Bigelow*, 3 Ben. 198, Fed. Cas. No. 1,398. The *Blandin* Case was cited with approval in *Fleitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276, 13 Sup. Ct. Rep. 495, on the question of the provability of such a claim under a bankrupt law. In the *Fleitas* Case the question was whether a debt of the husband to the wife for her paraphernal property was extinguished by his discharge in bankruptcy; thus indirectly involving the question of the provability of such a claim in a bankruptcy case. But the court said in that case: "The law of Louisiana as to the rights of married women, which must have a controlling influence on the decision of this case, differs widely from the common law;" and it was after a review of the statutes and decisions of Louisiana that the court declared that the husband's liability to the wife for her paraphernal property, under the law of Louisiana, was provable as a debt against him under the bankrupt law. Therefore in that case there was no question

of conflict between the local law and the Federal rule in equity.

The *Blandin* Case was rejected as an authority by the district court of Massachusetts in *Re Talbot*, 110 Fed. 924, on the ground that Judge Lowell, in deciding the *Blandin* Case, proceeded on the assumption that the wife's claim was enforceable in a Massachusetts court of equity. As to the general doctrine of protecting a wife's equity in her separate property as a creditor of her husband, he says: "I do not understand that it has ever been decided in this commonwealth that these doctrines do not fully apply in equity to separate property held under the statute." But in the *Talbot* Case the court held that the premises upon which Judge Lowell based his decision in *Re Blandin* were no longer sound, because since that decision the Massachusetts courts had decided that the liability could not be enforced in equity, any more than at law, because enforcement was contrary to the public policy of the commonwealth. The *Talbot* Case was cited with approval by the same judge who rendered it, in *Re Nickerson*, 116 Fed. 1003, but he distinguished it and sustained the claim of the wife in the bankruptcy case by subrogation which did not arise from any contract with her husband, but from an equitable right against her mother.

The right of a wife to present an equitable claim against her husband's bankrupt estate was upheld, also, in *Re Jones*, 6 Biss. 68, Fed. Cas. No. 7,444, and *Clark v. Hezekiah*, 24 Fed. 663. But no question was raised in these cases as to any conflict of this doctrine with the local law. That equitable debts are provable on the same footing as legal debts in bankruptcy cases was expressly stated in *Re Boston & F. Iron Works*, 20 Fed. 783, and *Re Buckhause*, 2 Low. Dec. 331, Fed. Cas. No. 2,086; and this does not seem to be denied in any case. But whether this rule is to be applied in respect to an equitable claim which is not recognized by the local law of the jurisdiction in which the parties reside is the only matter in question, since the circuit court of appeals in the present case is not unanimous. The question may be deemed somewhat uncertain until the Supreme Court of the United States shall pass upon it.

claim presented against a bankrupt estate. Reversed.

The facts are stated in the opinions.

Argued before Colt and Putnam, Circuit Judges, and Aldrich, District Judge.

Messrs. Joseph H. Beale, Jr., and Henry M. Hutchings, for appellant:

In other jurisdictions a wife may prove in bankruptcy against her husband, and *a fortiori* against her husband's firm, for money lent.

Ex parte Wells, 2 Mont. D. & DeG. 504; *Feitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276, 13 Sup. Ct. Rep. 495; *Re Bigelow*, 3 Ben. 198, Fed. Cas. No. 1,398; *Re Jones*, 6 Biss. 68, Fed. Cas. No. 7,444; *Re Blandin*, 1 Low. Dec. 543, Fed. Cas. No. 1,527.

This is the general doctrine of law. Questions of general law should be settled by the Federal courts according to the general understanding of the common law, and not according to local peculiarities.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Man-ship v. New South Bldg. & L. Asso.* 110 Fed. 845; *United States Sav. & Loan Co. v. Harris*, 113 Fed. 27; *Edwards v. Davenport*, 4 McCrary, 34.20 Fed. 756; *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565; *Re Blandin*, *supra*.

Messrs. Morse & Friedman, for appellee:

A married woman may not prove a debt against her husband's estate in bankruptcy.

Re Talbot, 110 Fed. 924; *Re Nickerson*, 116 Fed. 1006.

The provability in bankruptcy of a claim must depend upon the validity of the claim in the state where it arose.

Re Talbot, *supra*; *Re Novak*, 101 Fed. 800; *Re Neiman*, 6 Am. Bankr. Rep. 329.

In Massachusetts a married woman cannot enter into a contract with her husband; nor can she sue him.

Keil v. Egleston, 140 Mass. 202, 4 N. E. 573; *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521; *Ingham v. White*, 4 Allen, 412; *Bassett v. Bassett*, 112 Mass. 99; *Lord v. Parker*, 3 Allen, 120.

Neither can she contract with, or sue, others jointly with him.

Plumer v. Lord, 7 Allen, 481; *Edwards v. Stevens*, 3 Allen, 315; *Fowle v. Torrey*, 135 Mass. 87; *National Granite Bank v. Tyndale*, 176 Mass. 547, 51 L. R. A. 447, 57 N. E. 1022; *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589.

Putnam, Circuit Judge, delivered the opinion of the court:

This is a case of a bankrupt partnership. Proof of a claim of \$20,469.46 for money loaned the partnership was offered by the wife of one of the bankrupt partners, and 1 L.R.A. (N.S.)

rejected by the district court on the strength of *Re Talbot*, 110 Fed. 924. *Re Talbot* rested on *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521, and *National Granite Bank v. Tyndale*, 176 Mass. 547, 51 L. R. A. 447, 57 N. E. 1022. The district court also made reference to *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589.

All the transactions were in Massachusetts, and all the parties are residents of that state. The common and statutory laws of Massachusetts relating to this loan are, as we will see, in harmony with the common-law text writers and authorities; so that, so far as they are concerned, the claim could not be allowed in either the Federal or state courts, because, on the ground of the unity of the persons of the husband and wife, no contract could ever exist. Therefore, if we had no separate estate as known to the chancery courts, and no statutory separate estate, the decision of the district court would necessarily be affirmed.

The case involves the statutes which were re-enacted in Mass. Rev. Laws 1902, chap. 153, §§ 1, 2, as follows:

"Sec. 1. The real and personal property of a woman shall, upon her marriage, remain her separate property, and a married woman may receive, receipt for, hold, manage, and dispose of property, real and personal, in the same manner as if she were sole. But no conveyance by a married woman of real property shall, except as provided in § 36, extinguish or impair her husband's tenancy by the curtesy by statute or his rights to curtesy which existed at the time this chapter takes effect in such property, unless he joins in the conveyance or otherwise releases his said rights.

"Sec. 2. A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, except that she shall not be authorized hereby to make contracts with her husband."

It will be observed that, unlike the statutes of many states, this legislation does not enlarge the common law so far as contracts between husband and wife are concerned. If any relief is found, it must be on equitable principles, treating the property vested in the wife under the statute as a separate estate in equity, or analogous thereto. The existing statutes in bankruptcy make no special provision in reference to claims of this character; but that full equitable principles are accepted by the courts in bankruptcy was determined by us in *Batchelder & L. Co. v. Whitmore*, 58 C. C. A. 517, 122 Fed. 355, and in *Re Chase*, 59 C. C. A. 629, 124 Fed. 753. There can be no question that equitable claims, as, for instance, claims arising out of a breach of trust in the technical sense of the word

"trust," are provable under act July 1, 1898, chap. 541, § 63 (30 Stat. at L. 562, 563, U. S. Comp. Stat. 1901, p. 3447). They are to be regarded either as "unliquidated claims" or as claims founded "upon a contract, express or implied," because every trust involves such a contract. There never has been any question on this score in the United States, and in England the rule is the same. Williams, Bankruptcy Practice, 7th ed. 1898, at page 120, says: "A breach of trust, although it would afford a good ground for an action of tort for unliquidated damages, is always, even without express enactment, held to create a debt in equity."

The learned author makes this observation as part of his description of debts provable in bankruptcy. At pages 36 and 37 the learned author, speaking of the words describing provable debts in the act of 1869, "due at law and in equity," says: "These words do not appear in the present act, but it would not seem that the law has been changed by the omission of them."

In *Ex parte Wells*, 2 Mont. D. & De G. 504, the value of a legacy of stock, bequeathed to the wife's separate use, but transferred to the name of her husband, who sold it out and became bankrupt, was held provable. In *Ex parte Green*, 2 Deacon & C. 113, it was decided that the income of an estate settled in trust for the wife might be used by the husband with her consent without creating a debt; yet the whole theory of the case was that, if the principal had been so used, it would create a debt provable in bankruptcy. These decisions are in all respects analogous, as they arise with reference to a claim of a married woman against her husband in connection with her separate estate.

It must be conceded that the decisions of the supreme judicial court of Massachusetts, which have been referred to by the learned judge of the district court, would, if they controlled this court, compel us to sustain his decree. *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589, was a bill in equity, brought by a wife against a partnership of which her husband was a member, for relief with reference to a loan made to the partnership from her separate estate. The court held that relief could not be granted, even in equity, stating, at page 391, 158 Mass., page 500, 35 Am. St. Rep., page 591, 33 N. E., that the note was void as between the original parties, having been given to a wife by a partnership of which her husband was a member, and, with a citation of prior decisions of the same court, adds that equity does not relieve in such a case. The reason for this decision appears in *Woodward v. Spurr*, 141 Mass. 283, 286, 6 N. E. 521, where it was held that, with

reference to the rights of a wife having a separate estate, against her husband, with regard to that estate, relief, even in equity, will not be granted on an alleged debt strictly contractual, nor unless there are some elements of spoliation on the part of the husband, or elements raising a trust on his part, either express, implied, or resulting, or something analogous thereto.

We should also refer to the expressions of the then Chief Justice Gray, earlier than any decisions already referred to, found in *Atlantic Nat. Bank v. Tavenor*, 130 Mass. 407. This was in 1881, subsequent to the enactment of any statute the substance of which is found in the sections which we have cited from chapter 153 of the Revised Laws, which could possibly affect the case now before us. We shall have occasion to turn again to this case; but, for the present, we notice only the fact, stated at page 409, that, while it had not then been determined in Massachusetts whether a loan by a wife to her husband from her separate property creates an equity in her favor, "it has generally, if not unanimously, been decided in the affirmative by other courts." That such is the general rule which the Federal courts will apply in equity, notwithstanding any local decisions, cannot be questioned. It is so stated by all the text writers to whom we look for the general rules of the equity law. The latest English work, and a very satisfactory one, *Eversley's Law of the Domestic Relations*, 2d ed. 1896, giving the law as it was before the modern legislation in England, says, at page 291: "But in equity a married woman was permitted to contract with her husband in respect of her separate estate, and sue him with regard to it." Again, at page 297, the author says: "A husband formerly, at common law, could not make a valid loan to his wife, both because it was in the nature of a contract, and whatever property might have passed by delivery reverted to him in virtue of his marital right. But in equity the husband was enabled to sue his wife in respect to her separate estate. The husband can make a valid loan to his wife of property, whether specific chattels or other things. . . . In equity the capacity of a wife who had separate estate to make a valid loan to her husband was clearly recognized, and she might have sued her husband, or proved against his estate after death, like any other creditor."

The same rule, so far as concerns loans by the wife to her husband from her separate estate, was authoritatively held by Lord Westbury in *Woodward v. Woodward*, 3 De G. J. & S. 671, 674. We will observe that any suggestion that there can be no transactions between husband and wife enforce-

able in equity, except through the medium of a trustee or some other third person, finds no support in the authorities, and was positively ignored in *Woodward v. Woodward*, where the loan was a direct one.

The same rules were stated in *Wallingsford v. Allen*, 10 Pet. 583, 593, 9 L. ed. 542, 546. The opinion rendered by Mr. Justice Wayne says: "Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution, before it will confirm them. But it does sustain them, when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife. . . . In *More v. Ellis*, Bunb. 205, it was determined that articles of agreement between husband and wife are binding in equity without the intervention of a trustee."

More v. Ellis was decided in 1726. It was affirmed by the House of Lords, as appears at page 207, and has apparently been ever since regarded as authoritative. These expressions in *Wallingsford v. Allen*, in connection with the other decisions of the Supreme Court to which we will hereafter refer, like the English authorities which we have cited, require that we should disregard the limitations established in Massachusetts, so far as they bear upon any considerations dealt with in courts of equity with reference to the case before us. Therefore it is an established proposition that the claim offered in proof must be allowed, if it came from the separate estate of the wife in any sense in which the chancery courts can accept that expression.

We are left, then, to determine this condition. The case does not expressly show from what estate the funds were advanced by the proponent of the claim offered for proof, in that it does not expressly appear whether they came from her separate estate in any sense which the rules of equity or the statutes recognize. The record stands on the certificate of the referee, which states as follows: "Upon hearing the defense offered, I find as a fact that the money had been advanced by Mrs. James to the firm as set forth in the account."

Thereupon he allowed the claim, which proceeding was reversed by the district court on a point of law only. Thus the presumption is that the funds so loaned came from such an estate as Mrs. James could control in her own right. If it also appeared that the loans were made from an estate vested to her separate use according to the chancery rules, we would have occasion to go no further. There is no statement in the record expressly or impliedly assuming such an equitable separate estate, and therefore for 1 L.R.A. (N.S.)

us to accept its existence from what appears before us involves too violent a presumption. Taking the record together, the reasonable construction of it is that the loan was made from an estate vesting in Mrs. James in accordance with chapter 153 of the Revised Laws.

As, therefore, in order to sustain the proof of debt, we must proceed under the rules of the chancery courts, it is necessary for us to determine that those courts hold, or would hold, that an estate of personal property vested in a married woman in accordance with the statutory provision which we have cited would be regarded by them as, for all substantial purposes, the same as an estate vested for separate uses according to the equity rules, and be protected substantially to the same extent and in like manner. On the reason of the thing there can be no distinction. The underlying purpose of the legislature to secure the interests of married women could not otherwise be made effective. The case at bar is a striking illustration that, unless equity thus regards the statutory estate, the anxiety of the legislature in behalf of married women would fail, in most significant cases, of accomplishing a practical result. Of course, this observation would not apply to legislation which expressly authorized contracts between husband and wife and common-law suits between them.

Section 2 of chapter 153 neither aids this case nor tends otherwise. It vests in married women the right to make contracts independently of any question of holding separate estates. It contains a limitation forbidding her to make contracts with her husband; but as this, also, has no relation to a "separate estate" or "separate property," it is to be regarded only as a limitation on the general authority to make contracts, and therefore is an exception in favor of the common law only, and does not at all concern the chancery rules. This provision existed at the time of the decision in *Atlantic Nat. Bank v. Tavener*, 130 Mass. 407, already cited. The question there was with reference to a loan from a married woman to her husband, without any intimation that the loan was from an estate vested for her separate use under the general rules in equity. In this respect the record stands precisely as it does at bar, and the presumption is that the loan was made from property vested in her in accordance with the Massachusetts statutes. Yet the opinion discusses, as we have already said, the extent of the rules in equity with reference to transactions concerning an estate vested to the separate use of a married woman, without making any distinction of the kind we are considering. This discussion would

have been superfluous, unless the court assumed that, in equity, property held in accordance with the statute was to be regarded the same as an estate in express trust to the separate use of the wife.

Various other decisions tend to show that the supreme judicial court of Massachusetts makes no distinction with reference to the equity rules under discussion, as limited by it, between a statutory estate and an estate vested by a deed of trust, or otherwise, for the sole use of a married woman. Among others is *Willard v. Eastham*, 15 Gray, 328, 335, 79 Am. Dec. 366. Throughout this opinion, which held that, as the law then stood, the statutory separate estate of a married woman could not be charged for a debt contracted by her, unless it in some way related to that estate, the discussion takes up and applies, especially at page 335, without discrimination, the rules recognized by the equity courts. The same is the fact with reference to *Lombard v. Morse*, 155 Mass. 136, 140, 14 L. R. A. 273, 29 N. E. 205. *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266, 53 N. E. 398, is a marked case in this particular, wherein it was held that a bill in equity may be had by a wife against her husband to recover her separate property obtained from her by his fraud and coercion. An examination of the record in the clerk's office discloses that the proceeding originated out of real estate in Boston of which the wife was seised in fee in her sole right. The opinion, at page 215, Am. St. Rep. page 267, N. E. page 398, after referring to the fact that, according to the statutes of Massachusetts, the wife could not maintain an action at law against her husband, adds that, unless the bill could be maintained, she would be without a remedy, and that that of itself would be a sufficient reason for a decree in her favor. It continues that the statutes do not forbid suits between husband and wife, but simply provide that they shall not be construed to authorize them; and it adds: "It would seem, therefore, that equitable remedies may be availed of as between husband and wife, in cases where they apply."

These authorities establish that, in the view of the supreme judicial court, the statutory estate is to be construed, for all the purposes we have in hand, the same as an estate vested under a trust deed.

Our observations in reference to the decisions of the supreme judicial court of Massachusetts, if we correctly understand them, aid the result which we have reached, because it is of assistance if that court has assumed that the statutes of that state are to be construed as vesting estates subject to equitable rules. Yet, even if we were mistaken in that respect, the result could not

change our conclusion. It would not bar the Federal courts from applying their own equitable rules according to their own methods of procedure. Examining what has been determined by those courts, the result seems to be clear. In *Ankeney v. Hannon*, 147 U. S. 118, 128, 37 L. ed. 105, 107, 13 Sup. Ct. Rep. 206, *et seq.*, the court considered, discussed, and settled, on the rules of the chancery, questions with reference to an estate vested in the wife under state statutes which, in substance, so far as any present issues are concerned, were the same as those of Massachusetts; and this it did in a manner which impliedly holds that there is no distinction, so far as those rules are concerned, of the class which we are discussing. Indeed, on this point and on the entire case, *Sykes v. Chadwick*, 18 Wall. 141, 148, 21 L. ed. 824, 826, seems to be most persuasive in favor of the proponent of the proof of debt before us. It is true that, in this case, which came from the supreme court of the District of Columbia, there was a reference to a statute of the District regulating the rights of property of married women; and, both in the syllabus and in some citations, it seems to have been thought that the decision rested on the local statutes, and not on the general rules of equity. An examination of the facts and of the opinion, however, shows that the reverse of this is necessarily true, except to the limited extent otherwise which we will hereafter state. The transaction began with an inchoate right of dower, which existed only at common law, or by statute affirming or modifying the common law. The wife joined with her husband in a sale of the property, releasing her inchoate right, and obtaining in exchange therefor a promissory note signed by her husband and the purchaser. According to the strict rules of the common law, the note was joint, and void; but, under a statute of the District of Columbia, the only statute relied on by the counsel, it became a several obligation, so that a suit against the promisor other than the husband was successfully maintained by the wife, according to the judgment both of the supreme court of the District and the Supreme Court of the United States. The portion of the opinion with which we have to do is at page 148, 18 Wall., page 826, 21 L. ed. This refers to a statute of the District, which, so far as we are concerned, is substantially, if not in literal terms, the same as § 1 of chapter 153 of the Revised Laws of Massachusetts. It states that, by force thereof, the plaintiff acquired the capacity at law to receive property to her separate use. This expression, "to her separate use," was borrowed by the court from the chancery, because the phraseology of the statute is like that of the

Massachusetts act, "separate property." The opinion proceeds: "Having this capacity, she did receive and acquire, for a good and valid consideration moving from herself, the promissory note in question. This note, then, being her separate property, not acquired by gift or conveyance from her husband in the sense in which the statute uses those terms, she is entitled to the benefit of the statute in reference to the exclusive possession and enjoyment of the note, and to the exclusive right of suing upon it. As to it, she is relieved from the incapacity which the common law imposed upon her, and is as if she were unmarried. The technical reasons, therefore, which at the common law rendered void a note or other obligation made by the husband to the wife, no longer exist in this case; and, if there are still any such reasons which would compel the plaintiff, in enforcing the note as against her husband, to seek the aid of a court of equity, there are none to prevent her from suing the defendant upon it in a court of law." At page 146, 18 Wall., page 826, 21 L. ed., the opinion elaborates what is said at page 148, 18 Wall., page 826, 21 L. ed., in reference to the necessity of the aid of a court of equity if the plaintiff had sought to proceed against her husband. It goes into the whole question of the rules of chancery which we have been discussing; and at page 147, 18 Wall., page 826, 21 L. ed., it says: "We may therefore regard the transaction under consideration as valid and binding in equity, both on the defendant and the husband of the plaintiff."

Therefore, although the suit was brought under a statute of the District which allowed a severance, and so was at common law, yet the transaction was regarded by the court as binding in equity as between the wife and the husband, and this without the interposition of a trustee, or other third person, and though dealing with what was the estate of the wife at common law and under the statute. The trend of the opinion supports the conclusion that, on questions like this before us, there is no distinction under the chancery rules arising out of the formal nature of the wife's separate estate, with reference to whether it vested at common law, or by statute, or in equity.

The result of the authorities is summed up in Pomeroy's Equity Jurisprudence, 2d ed. 1882. In §§ 79 and 80, the author points out the fact that the late married women's acts of various states have, most of them, superseded the necessity of applying the chancery rules. Legislation of this kind he describes as the first class. Then he adds, in § 79, as follows: "By the second class, which prevails in most of the states, the

wife's capacity is limited to agreements made with reference to her property. These contracts are wholly equitable in their nature and obligation, and can only be enforced by an equitable action against the property itself, and not against the wife personally." In § 80 he observes: "In all the other states where the wife's contracts are not yet made legal, the equitable jurisdiction is to a certain extent enlarged. It is no longer confined in its operation to her separate equitable estate held in trust for her by an express or implied trustee. It reaches to and operates upon all her property of which she holds the full legal title and interest. While the wife's power to make contracts which shall be a charge upon her property is not increased, the property thus affected, and which can be reached by a court of equity, is all which the wife holds in her own name and right by a legal title."

He repeats, and somewhat elaborates, to the same effect in § 1099. Therefore the authorities are in harmony with the natural, underlying principles which suggest no reason why the chancery courts should not protect an estate vested in, or for the benefit of, the wife, equally, whether at the common law, or by statute, or under a deed of trust for her separate use.

The case may be summarized as follows: While the Federal courts are required by the statutes creating them to accept, as rules of decision in trials at common law, the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise provide, their proceedings in equity suits, involving equitable rights, cannot be impaired by the local rules of the different states in which they sit. The principles of equity as applied by them are the same everywhere in the United States. Of course, there may necessarily exist exceptional circumstances, as, for example, in Louisiana, where there never has been any law of uses and trusts as in England, so there can be no such thing as an estate limited to the separate use of the wife. There the whole topic of the rights and obligations of the wife is a part of the Code or statutory law of the state. So, also, if any state, say Massachusetts, had peculiar legislation relating to estates vested to the separate use of the wife, that legislation might have to be regarded by the Federal courts in equity as well as at law. Such exceptional cases ordinarily fall within those chancery rules which relate to giving special remedies for rights existing only at common law or under a statute. The general rule which we state is well laid down in Curtis's Jurisdiction of the United States Courts (1880) 13, 14, and strikingly illustrated in *Russell v. Southard*, 12 How. 139,

147, 13 L. ed. 927, 930; *Neves v. Scott*, 13 How. 268, 271, 14 L. ed. 140, 142; *Babcock v. Wyman*, 19 How. 289, 299, 300, 301, 15 L. ed. 644, 648, 649; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. ed. 256, 257; and *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 137, 138, 30 L. ed. 569, 572, 573, 7 Sup. Ct. Rep. 430. Even in Massachusetts it appears, as we have already shown, that the topic which we are discussing is recognized as one concerning a right in equity limited or regulated in accordance with rules peculiar to that state. We refer to this as merely illustrating our proposition. It could not control it, because, under the decisions of the Supreme Court, it remains for the Federal courts, not only to occupy the field of equitable rights according to their own rules, but also to determine what are the boundaries of that field.

The first question to be determined in the case at bar is whether an equitable right is involved. We find that the real issue presented is whether, under the Federal bankruptcy statutes, which permit the allowance of equitable claims, a loan by a wife to her husband from property secured to her by the Massachusetts statutes creates an equity in her favor. This is a question of general equity. The Massachusetts courts hold that the general principles of equity jurisprudence are to be applied to the statutory separate estates of married women, the same as to an estate vested in trust for her separate use under the general rules of law. The only difference between the Massachusetts courts and courts elsewhere, with respect to the particular question now under consideration, is that the former hold to a limited rule; so that all courts agree that the general topic relates to an equitable right, and the only distinction is that the local treatment of it is peculiar. In cases where parties seek in equity only a concurrent remedy to enforce a legal right, the right is ordinarily determined by the common law of the state where the litigation is pending; but, as we have seen, this proceeding asserts an equitable right, so that we are not bound by the local rule.

As the record comes to us, we are justified in holding that it authorizes us to make a final disposition of the case. There is nothing to suggest that the findings of the referee, or the assumptions which we have made, are not in conformity with the substantial facts.

The decree of the District Court is reversed; the case is remanded to that court, with directions to allow the proof offered by the appellant, Clitheroe D. James, as a valid proof of an unsecured claim against the partnership estate, and against the several estates of the individual partners, so far as 1 L.R.A. (N.S.)

such several estates are subject to the jurisdiction of the District Court in bankruptcy, subject to the rules for marshaling between partnership and individual estates; and the appellant recovers her costs of appeal.

Aldrich, District Judge, dissenting:

I cannot agree with the conclusion reached in the majority opinion. I do not understand that the rule which contemplates that equity jurisdiction, practice, and procedure in the Federal courts, based upon the English chancery system, shall be uniform throughout the United States, goes so far as to create a legal or equitable status in respect to the property rights of married women within a given state different from that which exists under the local laws thereof. I do not understand that Federal equity accords to married women within a state power to contract or a property status distinctly different and beyond that which exists in equity as administered by the state courts under its own statutory equity and common-law system.

The Federal government never committed itself altogether to the idea of an adoption bodily of English chancery rights, or of the English limitations upon equitable rights, or to the idea of adopting bodily the prospective expansion and growth of the English chancery doctrines, to the end that the same should be imposed upon a state contrary to its own idea of domestic relations and property rights. No state is bound to adopt the measures of supposed equitable reform inaugurated in another jurisdiction. The legal and equitable status of the property rights of married women in a given state is not regulated by general law, or by general principles of equity. It rests upon local statutes and local law. It was the English doctrine as to scope of jurisdiction and the English system of practice and procedure that was adopted, and the adoption related to the situation as it then existed; and any subsequent enlargement or limitation of the English system by statute or otherwise must be excluded when we are considering what was actually adopted at the inauguration of our government. For a discussion of this question, I will refer to *Fontain v. Ravenel*, 17 How. 369, 394, 395, 15 L. ed. 80, 90, 91, and *Alger v. Anderson*, 92 Fed. 696. As said by Chief Justice Taney in *Meade v. Beale*, Taney, 339, 361, Fed. Cas. No. 9,371: "So, too, as relates to the jurisdiction of the circuit court sitting as a court of chancery. It is undoubtedly true, as contended for in the argument of the complainant, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English

chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy, and not the right; and it does not follow that every right given by the English law, and which, at the time the Constitution was adopted, might have been enforced in the court of chancery, can also be enforced in a court of the United States. The right must be given by the law of the state, or of the United States. It is the form of remedy for which the Constitution provides; and, if a complainant has no right, the circuit court, sitting as a court of chancery, has nothing to remedy in any form of proceeding.

"In the case before the court, the question is: Is the bequest which the complainants claim a valid one by the laws of Maryland? It is a question which, in its nature, necessarily depends upon the laws of the respective states. Some of the states sanction devises of this description: some do not; and undoubtedly it depends upon every state to determine for itself to whom, and in what form, and by what instrument any property within its borders may pass by devise or otherwise."

The present enlarged rights of married women in England, both at law and in equity, principally resulted from removal by statutory enactment of disabilities which the old common law imposed upon the wife by reason of the marital relations. The same is true in respect to the rights and liabilities of married women in the various states. The rights of married women, varying largely in the different states, have resulted from legislation extending the rights of the wife upon such grounds of public policy as each state has seen fit to adopt. It has never been understood that the property rights and liabilities of married women in a given state were regulated by the law of England or by the law of any other state.

It is conceded by the majority opinion that the claim of the wife in the case at bar would have no standing, either at law or in equity, in the state courts of Massachusetts. Indeed, § 1 of the Massachusetts statute, referred to in the majority opinion, expressly declares that the wife shall not be authorized thereby to make contracts with her husband, thus statutorily declaring it to be the policy of the state that contracts between husband and wife shall not be recognized and upheld in that jurisdiction. Moreover, in *Woodward v. Spurr*, 141 Mass. 283, 287, 6 N. E. 521, which was an equity proceeding involving a local insolvency law, which provided for the proof of equitable

liabilities against insolvent estates, and in which the state statute in question was under consideration, it was expressly said: "When contracts are themselves not authorized, validity cannot be imparted to them by affording a remedy for the breach of them through the medium of a court of equity;" thus expressly and emphatically repudiating the idea of an enforceable equitable status founded upon considerations of trust in a case like this in the courts of Massachusetts.

Fleitas v. Richardson, 147 U. S. 550, 555, 37 L. ed. 276, 278, 13 Sup. Ct. Rep. 495, was an equity proceeding involving the claim of a wife against her husband, who had been discharged in bankruptcy; and not only was the law of the state with respect to the right and the local idea of trust relations recognized, but the right and the provability of the claim were made distinctly to rest upon the state law of Louisiana.

While I do not question, for the purposes of this case, that a claim of the character of the one in question is now enforceable in equity in England and in nearly all of the states of the Union, and at law, perhaps, in some of the states, I cannot concur in the idea that the bankruptcy act was intended to create substantive rights to married women beyond those existing under the law of the state in which the married woman resides.

The proceeding here is to adjust the rights between local creditors in respect to a bankrupt estate in the state of their residence. There is no diverse citizenship, and therefore could be no regulation of the rights in question by the Federal courts unless under the bankruptcy law. Therefore, if the view of my brethren is sound, under the bankruptcy law, with no diverse citizenship, the wife has a property right of the value of \$20,000, while, if the bankruptcy law were to be repealed, she would have no right enforceable at law or in equity either in the state or Federal courts. Giving a status to the claim of a married woman against the estate of her husband in bankruptcy different from that which exists under the local law impairs the substantive rights of the other creditors as they exist under the laws of the state, and is therefore inequitable as to them. It would be inequitable and unwarrantable in the state courts, because against the policy and contrary to the law of the state, and therefore not founded upon a legal or equitable right or remedy enforceable in that jurisdiction, and inequitable in the Federal courts because, in the absence of diverse citizenship, the Federal courts, in the exercise of general equity power independent of bankruptcy, would have no jurisdiction, equitable or otherwise, to establish and maintain the right.

It is difficult for me to adopt the view that the bankruptcy law was intended to create a property or contract right as between local creditors, either in a legal or an equitable sense, beyond that which obtains according to the rules of property existing under the laws of the state. If the conclusion of the majority is sound, there exist in Massachusetts two rules of property in respect to married women,—one rule, distinctly and deliberately expressed, established by its statutes, construed by the highest court of the state, regulating the rights of married women, and another and a very different rule of property, administered in the same jurisdiction by the Federal courts,—a condition, in my opinion, never contemplated under our system of Federal and state governments, in respect to parties residing in the same state and whose property rights are based upon local law.

English and American decisions in other jurisdictions, as to claims of married women enforceable in equity, have no bearing, as it seems to me, upon a situation involving a Massachusetts statute, Massachusetts decisions, a Massachusetts estate, and Massachusetts creditors only. The property rights of married women in Massachusetts are established upon grounds of public policy, upon which the state is entitled to stand. It has been repeatedly decided by the highest court of the state that a claim of this character, even under insolvency conditions, has no legal standing, either at law or in equity, as against the other creditors. Such decisions are based upon the rules of common law and equity as modified and enlarged by the statutes of Massachusetts. As there expressed by its highest court, the rights of married women are based upon "the rule of the common law which has been declared and recognized by the legislature." *National Granite Bank v. Tyndale*, 176 Mass. 547, 550, 51 L. R. A. 447, 57 N. E. 1022; *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589; *Woodward v. Spurr*, 141 Mass. 283, 6 N. E. 521; *Fowle v. Torrey*, 135 Mass. 87.

When our government was established, and the common law of England, so far as not inconsistent with our institutions, was adopted by the governments of the various states; and when the English chancery system was adopted by the Federal government, and for a long time thereafter,—a claim of a married woman like the one in question had no standing in that country at law, or in equity, it is believed, in a suit by the wife against the husband or his estate upon a naked loan relieved from relations and considerations of trust; but, however that may be, it is clear, even if otherwise, now, that for many years the claim of a

married woman had no standing there either at law, or in equity as administered in bankruptcy proceedings, where the claim of the wife was strictly contractual, and where creditor interests were involved, as is the case here. *Robson, Bankruptcy*, 6th ed. 475, and cases cited; *Re Beale*, L. R. 4 Ch. Div. 249. According to *Taney*, as has been already said, in order to have an equitable remedy, there must be a right based upon Federal or state law; and, as said by Lord Eldon, in *Ex parte Dewdney*, 15 Ves. Jr. 479, 498, in discussing the English doctrine as to equitable claims in bankruptcy: "Upon the whole, my opinion as to the general point is that in the consideration of this statute a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors who could, by legal action or equitable suit, have compelled payment; and that the objection upon the statute [statute of limitations] is competent to the creditors . . . regarding the claim of each creditor as a suit depending."

Indeed, § 23a of the bankrupt law (Act July 1, 1898, chap. 541, 30 Stat. at L. 552, 553, U. S. Comp. Stat. 1901, p. 3431), conferring law and equity jurisdiction upon the circuit courts in bankruptcy matters, adopts the idea expressed by Lord Eldon, that the right, as between the parties, should be regulated according to law and equity in the same manner and to the same extent as though bankruptcy proceedings had not been instituted; thus making the right or the claim depend upon its original status of enforceability or nonenforceability at law or in equity under general equity powers, independent of the bankruptcy law; and under this standard there was no right enforceable under the state law, and no equity jurisdiction or right cognizable in the Federal courts, in the absence, as is the case here, of diverse citizenship. The question in this case is, therefore, a very plain and simple one. Was the claim, independent of the bankrupt law, based upon a right enforceable in the state under its laws, or in the Federal courts under their general equity powers? And surely this question must be solved in the negative.

It thus results in the case at hand that we have a situation where the claim of the wife was not recognized by the local statutes of Massachusetts and not enforceable in its courts, and where there is no equity jurisdiction in the Federal courts in the absence of diverse citizenship, and therefore no equitable right enforceable in such courts under their general equity powers independent of the bankruptcy law. And the consequence is that the majority opinion

departs from and goes contrary to the idea expressed by Lord Eldon, that creditors have a right to object to an equitable claim, not cognizable and not enforceable either at law or in equity, and accords to a creditor wife a right and a status not recognized by the state law, a right and a status not enforceable in the Federal courts of equity under their general equity powers, and one with which they could have nothing to do, independent of the bankruptcy law and bankruptcy proceedings.

Under our distribution of governmental functions between the Federal and state governments, and especially in view of the recognition by the Federal government of the power of the state (under certain limited and expressly defined constitutional restrictions not material here) to establish and regulate rules of property within its jurisdiction, it results clearly and necessarily that the legal and equitable status of property rights of married women in a given state is regulated by local law; that is to say, by the old common law modified and enlarged by such judicial innovations and such legal and equitable statutory reforms as it has seen fit to adopt, and by such, if any, of the modern ideas and expanded rules of common law and equity adopted in other jurisdictions as the legislature and the courts of the state in question have seen fit to recognize and declare.

While a state may not, by statutory enactment or otherwise, place any restrictions upon Federal equity practice and procedure, which is uniform throughout the United States, or impede or impair its jurisdiction, which is likewise uniform, it may regulate property rights within its jurisdiction; and the laws of the state regulating such rights are regarded by Federal courts as rules of decision in respect to property rights so regulated by the local law. And, as said by Woods, Circuit Judge, in *Mitchell v. Lippincott*, 2 Woods, 467, Fed. Cas. No. 9,865, which was an equity proceeding: "If the rule is ever to be applied to any case, it seems to me the construction of the 'married women's law' is a proper case for its application."

The Supreme Court, in affirming the decision of Judge Woods, 94 U. S. 767, 770, 24 L. ed. 315-317, in referring to the state law, and the state decisions, said: "This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state as if we were sitting there as a local court, and this case were before us as such a tribunal." Again, referring to the local statute: "Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on

speculation, the statute intervenes and fixes the character of the estate."

Mr. Justice Curtis, in *Neves v. Scott*, 13 How. 268, 271, 14 L. ed. 140, 142, while holding that the Supreme Court, upon general questions of equity, would not be bound by the decisions of the supreme court of Georgia, in the absence of a statute, a custom, or a local law, in effect recognized the idea of the right of a state to regulate legal and equitable property rights by local statutory law.

While the leading aspect of the principle that the Federal courts regard as rules of decision the decisions of state courts has reference to the construction of statutes and decisions affecting titles to real property, the rule is by no means limited to such subjects; for it includes as well the exposition of the local common law of a state by its highest courts, like preferences between creditors, as in *Parker v. Phetteplace*, 2 Cliff. 70, Fed. Cas. No. 10,746, like questions of possession of personal property, as in *Allen v. Massey*, 17 Wall. 351, 21 L. ed. 542, like questions relating to executions, as in *United States v. Morrison*, 4 Pet. 124, 7 L. ed. 804, the construction of wills, as in *Smith v. Shriver*, 3 Wall. Jr. 219, Fed. Cas. No. 13,108, the equitable rights of married women, as in *Mitchell v. Lippincott*, *supra*, the validity of a mortgage not truly describing the debt intended to be secured, as in *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413, the power of a corporation to issue bonds, as in *Thomas v. Scotland County*, 3 Dill. 7, Fed. Cas. No. 13,909, as to the time when a corporation was formed, as in *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102, and in respect to many other subjects relating to property rights within a state. See also 1 Bates, Fed. Eq. Proc. §§ 6-10; Bump, Fed. Proc. pp. 416-420.

Nothing could be more disturbing or hurtful to a community than the existence within its domain of two sets of law or two measures of equity respecting property rights; and this would be especially so with respect to a system which undertakes to regulate the social, domestic, and property status between the sexes, and the rights of a married woman as between her husband and creditors, who, in reliance upon the local law regulating the rights of property, deal with him in the ordinary course of business within the bounds of the state which creates and maintains its own local system of law and jurisprudence.

I cannot conceive, aside from diverse citizenship or a Federal statute expressly creating a right, that the Federal courts are, or ought to be, charged with any responsibility in the adjustment of property rights, equitable or otherwise, within a state between

its citizens. The idea that such a right or responsibility exists contravenes a fundamental theory as to the distribution of power between the Federal and state governments. It is a strained, startling, and subversive construction that carries a bankrupt law, intended only to distribute the assets of a bankrupt estate between local creditors, according to the right or equity as existing independent of the bankrupt law, to the point of creating a substantive, enforceable, Federal right, which shall override the positive law and the public policy of a state with respect to the legal and equitable status of married women in property situations, domestic affairs, and business conditions relating to property rights within a state.

It must be always borne in mind, of course, that the issue here is not one alone between the married woman and her husband, but involves as well the equitable rights of creditors. This element distinguishes this case from equitable proceedings to protect the separate estate of the wife as against the husband.

The Massachusetts statute and the Massachusetts cases have established a local rule of property which the Federal courts are bound to recognize and enforce. It is said in *Walker v. Walker* (*Walker v. Beal*), 9 Wall. 743, 754, 19 L. ed. 814, 818: "The circuit courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different states, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens."

And in *Ewing v. St. Louis*, 5 Wall. 413, 419, 18 L. ed. 657, 659, which was an equity proceeding, it is said: "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

I agree with the reasoning of Judge Lowell in *Re Talbot*, 110 Fed. 924, which he adopted as the ground for disallowing the claim in question.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BIG SIX DEVELOPMENT COMPANY,
Appt.,
v.

S. DUFFIELD MITCHELL.

(138 Fed. 279.)

1. Injunction—restraining operation of mine.

Injunction will lie to restrain a lessee
1 L.R.A. (N.S.)

from continuing to mine ores on leased property after a forfeiture of the lease for breach of conditions as to manner of performing the work, although the title is disputed, and no action has been instituted at law; since a continuation of the alleged wrongful acts will tend to destroy the property.

2. Equity—cancellation of lease.

Having acquired jurisdiction to prevent a destruction of mining property by wrongful methods of operating the mine under a lease, equity may retain the case, and cancel the lease as a cloud on title.

3. Same.

Although equity will not enforce a forfeiture, it may remove a lease as a cloud on title after it has been declared forfeited, and the aid of the court is sought to prevent a threatened continuous trespass upon the property, which will tend to its destruction.

4. Lease—forfeiture—waiver.

Receipt of rent under a mining lease does not waive a forfeiture of it for continuous failure to work it in a workmanlike manner, as required by the terms of the lease.

5. Equity—remedy at law—forcible entry and detainer.

An action for forcible entry and detainer to recover possession of property leased, for mining purposes is not an adequate remedy, so as to defeat the jurisdiction of equity, where the mining operations are being carried on in such a way as to remove the supports of the surface and cause it to subside.

(Hook, Circuit J., dissents.)

(April 22, 1905.)

A PPEAL by defendant from a decree of the Circuit Court of the United States for the Western District of Missouri in favor of complainant in a suit to cancel a lease as a cloud on title. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Hook, Circuit Judges, and Riner, District Judge.

Mr. Frank Hagerman, with Messrs. John W. McAntire, Haywood Scott, Samuel McReynolds, and John W. Halliburton, for appellant:

Complainant's bill will not be entertained by a court of equity, as he has an adequate remedy at law.

Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975; Killian v. Ebbinghaus, 110 U. S. 568, 28 L. ed. 247, 4 Sup. St. Rep. 232; Fussell v. Gregg, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631; Church of Christ v. Reorganized Church of Jesus Christ of L. D. S. 17 C. C. A. 389, 36 U. S. App. 110, 70 Fed. 179; Smyth v. New Orleans Canal & Bkg. Co.

141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. Rep. 113; Scott v. Neely, 140 U. S. 106, 35 L. ed. 358; 11 Sup. Ct. Rep. 712; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. Rep. 691; Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

Equity never, under any circumstances, lends its aid to enforce a forfeiture.

Horsburg v. Baker, 1 Pet. 237, 7 L. ed. 127; Marshall v. Vicksburg, 15 Wall, 149, 21 L. ed. 121; Livingston v. Tompkins, 4 Johns, Ch. 415, 8 Am. Dec. 598; 2 Story, Eq. § 1319; Farmers' v. M. Nat. Bank v. Dearing, 91 U. S. 33, 23 L. ed. 199; Jones v.

New York Guaranty & Indemnity Co. 101 U. S. 628, 25 L. ed. 1035; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. ed. 955; Minah Consol. Min. Co. v. Briscoe, 47 Fed. 276; Michigan Pipe Co. v. Fremont Ditch, Pipe Line, & Reservoir Co. 49 C. C. A. 324, 111 Fed. 284; Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630; Colgan v. Forest Oil Co. 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119; Young v. Forest Oil Co. 194 Pa. 243, 45 Atl. 121; Ammons v. South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Erskine v. Forest Oil Co. 80 Fed. 583; Blodgett v. Lanyon Zinc Co. 58 C. C. A. 79, 120 Fed. 893; White, Mines & Mining Remedies, § 127; McKnight v. Kreutz, 51 Pa. 232; Core v. New York Petroleum Co.

Case Note.—A valuable addition to the discussion found in the above case is afforded by the opinion of Judge Phillips in the lower court, the material portions of which are as follows:

In modern equity jurisprudence in the Federal courts it has become a crystalized rule that "it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy, 3 Pet. 216, 7 L. ed. 657; Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 58 C. C. A. 311, 121 Fed. 973. In the constantly developing complications growing out of new conditions and situations in our complex commercial and business affairs, the courts, in the very necessities of the occasions as they arise, must extend the protective, preservative hand of equity to meet the extraordinary demands of justice in the particular instance. The growth of mining industries of the country furnishes a striking illustration of the flexibility of equitable principles adaptable to the exigencies of the peculiar character and situation of such property. The owner of a tract of land chiefly valuable for its mineral deposits might have his property ruined if he were driven to the ordinary action at law for evicting the wrongdoer, burrowing beneath the comparatively worthless surface and extracting the ore. At the end of a tedious lawsuit, he might find the under-surface despoiled of its riches, and his judgment for damages might be against an insolvent wrongdoer. In such instance a court of equity, on proper showing in the bill, would not hesitate to lay its restraining hand on the despoiler *pendente lite*, and at the end place the rightful owner in the peaceable and full possession of the property. It should make no difference that the wrongdoer has been admitted into the ground under a license contract to mine, if, after he enter, he so prosecute his explora-

tions and excavations in disregard of the reversionary rights and interests of the owner of the fee as to threaten irreparable injury thereto,—especially when such licensee is insolvent.

It inheres in the powers of courts of equity, in the case of mines and collieries, to entertain bills in the nature of bills *quia timet* and bills of peace, and to remove, as a cloud on the title, recorded leases, where the mining property is exposed to irreparable injury, as where the lessee exceeds the limits imposed by the lease,—especially where he is insolvent, and a continuation of his course and methods of mining in violation of the contract threatens great damage. Story, Eq. Jur. §§ 860, 922; Pom. Eq. Jur. § 1398, and notes; Bispham, Eq. § 575; West Point Iron Co. v. Reymert, 45 N. Y. 703. In Allegany Oil Co. v. Bradford Oil Co. 21 Hun, 26, 32, it is held that, where the condition absolutely avoids the license in case of breach, the estate lapses without any entry or notice; citing Smith's Leading Cases, vol. 1, 8th ed. p. 109, notes to Dumpsor's Case. So a court of equity in that case granted relief by injunction, annulled the lease, and restrained the defendants from boring for oil thereon. In Pendill v. Union Min. Co. 64 Mich. 172, 31 N. W. 100, upon failure of the lessee to pay rent, and while he had ceased to operate the mine, the lessor took possession under a provision of the lease for re-entry in case of nonperformance, and filed a bill to remove the cloud of the forfeited lease. The court decreed an injunction, notwithstanding the lessee had expended large sums of money in mining operations, and paid the landowner large royalties, and the lessee's machinery and tools were in the ground at the time of the forfeiture, just as is claimed in the case at bar. In Oolagah Coal Co. v. McCaleb, 15 C. C. A. 270, 32 U. S. App. 330, 68 Fed. 87, the rights of the parties depended upon the legality of the license grant to each. The defendant being insolvent, Judge Thayer overruled the demurrer to the bill praying for an injunction to restrain the defendants from further mining coal and from obstructing the plaintiff in so doing, al-

52 W. Va. 276, 43 S. E. 128; *Henne v. South Penn Oil Co.* 52 W. Va. 192, 43 S. E. 147; *Bowser v. Colby*, 1 Hare, 109; *Hoch v. Bass*, 133 Pa. 328, 19 Atl. 360; *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538; *Lynch v. Versailles Fuel Gas Co.* 165 Pa. 518, 30 Atl. 984; *Re Brain*, L. R. 18 Eq. 389; *Peachy v. Somerset*, 1 Strange, 447; *Messersmith v. Messersmith*, 22 Mo. 369; *Bispham, Eq.* § 181, p. 238; *McCormick v. Rossi*, 70 Cal. 474, 15 Pac. 35; *Cross v. McClenahan*, 54 Md. 21; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83; *Morse v. O'Reilly*, 4 Clark (Pa.) 75, Fed. Cas. No. 9,858; *Keller v. Lewis*, 53 Cal. 113; *Beecher v. Beecher*, 43 Conn. 556; *McKim v. Mason*, 2 Md. Ch. 510; *White v. Port Huron & M. R. Co.* 13 Mich. 356; *Vermont Copper Min. Co. v.*

Ormsby, 47 Vt. 709; *Clark v. Drake*, 3 Chand. (Wis.) 253, 3 Pinney (Wis.) 228; *Lowe v. Hyde*, 39 Wis. 345.

It will not lend its aid to defeat an estate for breach of condition subsequent.

Warner v. Bennett, 31 Conn. 468; *Douglas v. Union Mut. L. Ins. Co.* 127 Ill. 101, 20 N. E. 51; *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151; *Michigan State Bank v. Hammond*, 1 Dougl. (Mich.) 527; *Smith v. Jewett*, 40 N. H. 530; *Livingston v. Tompkins*, 4 Johns. Ch. 415, 8 Am. Dec. 598; *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363; *Bispham, Eq.* § 181; *Tiedeman, Eq. Jur.* § 37.

It is essential in a bill to quiet title that plaintiff aver possession.

Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Boston &*

though the respective rights of the parties had not been determined in an action at law. So, in *Preteca v. Maxwell Land Grant Co. supra*, and *Dimick v. Shaw*, 36 C. C. A. 347, 94 Fed. 266, injunctions were sustained restraining mining operations, although the question of title between the parties had not been adjudicated at law. In *Kentucky River Nav. Co. v. Com.* 12 Bush, 8, the court sustained a bill in equity in behalf of the state to determine and forfeit the navigation company's right under a lease from the state, on the ground of its failure to keep in repair the works and improvements along the river, where the company was insolvent. *Mr. Justice Field*, in *Erhardt v. Boaro*, 113 U. S. 539, 28 L. ed. 1117, 5 Sup. Ct. Rep. 566, said: "It is now a common practice in cases, where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title." And it may be added, under the recognized practice in equity, that, where the court becomes possessed of the cause in equity, it will maintain jurisdiction to the end; determining the legal rights of the parties to the property by putting the rightful owner in peaceable possession. In *Mehaffey's Appeal*, 4 Pennyp. 502, the authorities are fully discussed, holding that a forfeited lease may be regarded as a paper, although *functus officio*, and is subject to cancellation by a court of equity. This should be so, for the reason that the lease in question runs for ten years from the 1st day of May, 1898. It was duly acknowledged and recorded in the recorder's office of Jasper county, Missouri, where the land is located; and as long as it remains uncanceled of record it constitutes a cloud on complainant's title. "In a case like this, equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true, as 1 L.R.A. (N.S.)

general statement, that equity abhors a forfeiture; but this is when it works loss that is contrary to equity, not when it works equity and protects the landowner against the indifference and laches of the lessee and prevents a great mischief." *Brown v. Vandergrift*, 80 Pa. 142; *Munroe v. Armstrong*, 96 Pa. 307. So, *Mr. Justice Miller*, on the circuit in this court, in the case of *Kansas City Elevator Co. v. Union P. R. Co.* 3 McCrary, 463, 17 Fed. 200, said "that the right of re-entry and forfeiture, in regard to the terms of the lease, is a right which the courts at common law dealt with very rigidly and strictly, while a court of equity very often sets aside and restores the parties to their former position, and refuses compensation for any damage done. There is, however, a different mode of proceeding to declare the lease forfeited. When either party—lessor or lessee—claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask to have that lease set aside, canceled, and annulled. In that case the court in equity sits, holding the scales of justice evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to terminate the agreement, or that he shall account by compensation and by payment of damages. And the court will declare the agreement at an end, and set aside and annulled, and will make such orders as seem proper and right."

Foremost among the matters of special defense excepted to is that of waiver or estoppel, predicated of the allegation that, after the complainant was advised of the alleged grounds of forfeiture, and after formal declaration of forfeiture, he accepted rentals from the defendant. It may be conceded to the defendant that, as a general rule, the acceptance of the payment of rent constituted a waiver of antecedent forfeiture; but the rule is as firmly established that where the obligation of the defendant to do, or to forbear doing, certain acts is a continuing obligation, which the tenant persists in disregarding, it is a con-

M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Northern P. R. Co. v. Amacker*, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 537; *Gordan v. Jackson*, 72 Fed. 88; *Gombert v. Lyon*, 80 Fed. 305; *Erskine v. Forest Oil Co.* 80 Fed. 583; *Davidson v. Calkins*, 92 Fed. 232; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Blalock v. Equitable Life Assur. Soc.* 21 C. C. A. 208, 41 U. S. App. 761, 75 Fed. 43; *Orton v. Smith*, 18 How. 265, 15 L. ed. 394; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129; *Mc-*

Guire v. Pensacola City Co. 44 C. C. A. 670, 105 Fed. 677.

Waiver of forfeiture occurs by an acceptance of rent which became due after a breach committed by the tenant.

Taylor, Land. & T. § 497; *Jackson ex dem. Lewis v. Schutz*, 18 Johns. 174, 9 Am. Dec. 195; *Jackson ex dem. Church v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *Jones v. Roberts*, 3 Hen. & M. 436; *Keeler v. Davis*, 5 Duer, 507; *Croft v. Lumley*, El. Bl. & El. 1069; *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Marsh v. Curteys*; *Cro. Eliz.* pt. 2, p. 528; *Harvey v. Oswald*, *Cro. Eliz.* pt. 2, p. 553; *Goodright ex dem. Walter v. Davids*, 2 Cowp. 804; *Boggs v. Black*, 1 Binn. 333; *Clarke v. Cummings*, 5 Barb. 339; 1 *Smith, Lead. Cas.* 83; *Roe ex dem. Gregson*

continuing cause of forfeiture, which "the landlord will not be precluded from taking advantage of by receiving rent which accrued after the breach was originally committed." Much less does it constitute a waiver where the landlord simply stands by, with knowledge of the breaches of the lease, where they are continuing from day to day. *Bleecker v. Smith*, 13 Wend. 531; *Taylor, Land. & T.* § 500; *Conger v. Duryee*, 24 Hun, 617; *Douglas v. Herms*, 53 Minn. 209, 64 N. W. 1112; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446; *Ainley v. Balsden*, 14 U. C. Q. B. 535; *Farwell v. Easton*, 63 Mo. 446; *Mulligan v. Hollingsworth*, 99 Fed. 220, 221. In *Alexander v. Hodges*, 41 Mich. 691, 694, 3 N. W. 187, 188, *Campbell, Ch. J.*, said: "The desire of the landlord to avoid coming to extremities if the lessee would mend his ways cannot be regarded as a waiver, but was laudable and calculated to further the interests of both. Where there is such a continuous obligation, there is nothing to prevent the exercise of forbearance until it ceases to be desirable." The requirements imposed by the lease at bar were continuing obligations, and were violated up to the hour of the application for a temporary injunction herein, if the complainant's testimony is to prevail.

Other matters of special defense set up in the amended answer were substantially pleaded in the original answer, exceptions to which were sustained by the court. Their repetition in the amended answer adds no virtue to the error, nor force to the matter. They are statements to the effect that the defendant's subtenants, in their manner of working the mine, pursued the course approved by other mine operators in that locality, and that they worked the mines as they deemed most advantageous for the lessor, and as best they could under the circumstances of the local situation, and the like. Such special matters constitute no defense. The requirements of the contract, as its terms have received settled construction by courts of recognized authority, must control.

For instance, the gravamen of the complaint is that the defendant's sublessees

were mining in such manner as to permanently injure the surface superstructure of the premises, and do irreparable injury to the mineral deposits. The law is oppositely expressed by the court in *Robertson v. Youghiogheny River Coal Co.* 172 Pa. 566, 33 Atl. 706. There the defendant sought to prove that it was regarded as good mining to take out the coal in the manner pursued: that it was skillfully done, in respect of the depth of the surface and the condition of the rock over the coal; that the surface over this particular deposit was light, and the rock was rotten or broken, so that it would be impossible to take the coal without doing some injury to the surface; that the coal was mined according to approved methods of mining practised throughout that region, as approved by experienced mining engineers; and that the coal under such light surface could not be mined by any known method without doing some injury to the surface. This evidence was excluded. The court said: "The owner of the coal, though he has a right to take it out, must support the surface above. . . . This is a duty devolving upon the owner of the coal, who takes it out by virtue of the relations between the two parties; and therefore, if the coal is taken out, and the surface is injured in any way by reason of taking the coal out, the defendants are bound to make that injury good. . . . It does not make any difference whether the mining is done in the ordinary and usual way of mining coal, or whether there is negligence in the mining of the coal. It is an absolute right that the plaintiffs have to have their surface supported, and if that support is interfered with, intentionally, negligently, or otherwise, the plaintiffs are entitled to recover." So, *Shearman & Redfield on Negligence*, 5th ed. § 716, state the general rule to be that "where, as is often the case, the title to the surface of the land is in one person, and the title to the minerals underneath the surface is in another, together with the right to excavate for and remove them. . . . Unless there is some peculiar law or contract affecting the rights of the parties the miner is in such case

v. Harrison, 2 T. R. 425; Arrsby v. Woodward, 6 Barn. & C. 519; 2 Platt, Leases, 468; Taylor, Land. & T. § 497, 498; Coon v. Brickett, 2 N. H. 163; Jackson ex dem. Blanchard v. Allen, 3 Cow. 220; Gombor v. Hackett, 6 Wis. 323, 70 Am. Dec. 467; Bleecker v. Smith, 13 Wend. 530; Goodright ex dem. Charter v. Cordwent, 6 T. R. 219; Camp v. Scott, 47 Conn. 370; Carroll v. Charter Oak Ins. Co. 1 Abb. App. Dec. 320; Clark v. Jones, 1 Denio, 516, 43 Am. Dec. 706; Rogers v. Snow, 118 Mass. 118; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Guild v. Richards, 16 Gray, 309; Chapman v. Harney, 100 Mass. 353; 2 Kerr, Real Prop. §

1282; White, Mines & Mining Remedies, § 256.

Messrs. S. Duffield Mitchell and Thomas Dolan, for appellee:

In controversies respecting mines and mineral land a court of equity will take jurisdiction of a bill: (a) To quiet title; (b) to cancel a forfeited lease as a cloud upon title; and (c) to enjoin defendant from asserting rights thereunder, and settle the rights of the parties.

17 Enc. Pl. & Pr. pp. 278, 279; Story, Eq. Jur. § 860; Pom. Eq. Jur. § 1398; Biapham, Eq. § 575; West Point Iron Co. v. Reymert, 45 N. Y. 703; Allegany Oil Co. v. Bradford

absolutely bound to leave sufficient support to the surface to prevent it, while in a natural state, from falling in." Indeed, in the absence of a special contract limiting the right, it is the well-settled rule in such mining contracts that "the owner of the surface is entitled to absolute support, not as an easement of right depending on a supposed grant, but as a proprietary right at common law. . . . The right of a surface owner has been likened to that of an owner of an upper story of a house, who holds his tenement with an implied right to support from the owner of the lower story. . . . If the owner of land grant a lease of minerals beneath the surface, with power to work and get them, in the most general terms, still the lessee must leave a reasonable support to the surface; and so, conversely, when the minerals are demised and the surface is retained by the lessor, there arises a prima facie inference at common law, upon such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support." Snyder, Mines & Mining, § 1020. "The word 'surface,' as used in the books, means not simply the geometrical superficies, without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the line." § 1030. The rule is thus stated in Wood on Nuisances, § 192: "The person owning the minerals is bound, at his peril, not to cause a subsidence of the surface, even though he cannot work his mines at all without doing so, and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of any subsidence thereof. A custom, as between the owner of the surface and the owner of the mines, entitling the owner of the mines to cause a subsidence of the surface if necessary to the working of the mines, will not be operative to shield the mine owner from liability; and such a custom has been held bad and wholly void." This rule is recognized and enforced in Brown v. Torrence, 88 Pa. 186. In Humphries v. Brogden, 12 Q. B. 739, it was held that, notwithstanding the jury found that the defendant had worked faithfully according to the custom of the country, but without leaving sufficient pil-

lars of support, the plaintiff was entitled to judgment. After discussing the question, the court asserted the rule to be that, in the absence of any express reservation, the owner of the surface is entitled to protection, without any reference to the nature of the strata of mineral deposits or the difficulty of propping the surface, or the comparative value of the surface and the mineral. In Randolph v. Halden, 44 Iowa, 327, the defendant sought to show a custom among miners, when the coal is exhausted, to remove the supporting pillars. The court ruled that such custom was wholly inadmissible, for the reason that "it is made manifest if the pillars are removed the mine will not be and cannot be left in a working condition at the expiration of the lease; and it is also manifest that the removal of the pillars of coal will cause depressions on the surface of the ground." The supreme court of Ohio, where there is much coal mining pursued, recognizes this doctrine to its fullest extent. In Burgner v. Humphrey, 41 Ohio St. 340, after reviewing the authorities, the court said: "This obligation to protect the superincumbent soil exists, whether there is a conveyance of the surface, reserving the minerals, or a grant of the minerals without a conveyance of the surface. In either case the presumption arises that the owner of the minerals is not, by removing them wholly or in part, to injure the owner of the soil above. . . . The right which the surface has to support is a part of the freehold, and not an easement. It is a right independent of the nature of the strata, and the mine owner can only work so far as is consistent with this right, and is liable if he violates it. The highest care and skill in the working of the mine is no defense whatever, if injury results to the surface from a removal of the subjacent strata." See also Randolph v. Halden, *supra*; Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109; Erickson v. Michigan Land & Iron Co. 50 Mich. 604, 16 N. W. 161; Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; New Jersey Zinc Co. v. New Jersey Franklinite Co. 13 N. J. Eq. 322, 341.

Oil Co. 21 Hun. 26; Oolagah Coal Co. v. McCaleb, 15 C. C. A. 270, 32 U. S. App. 330, 68 Fed. 87; Pendill v. Kenton Min. Co. 64 Mich. 172, 31 N. W. 100; Preteca v. Maxwell Land Grant Co. 1 C. C. A. 607, 4 U. S. App. 328, 50 Fed. 674; Dimick v. Shaw, 36 C. C. A. 347, 94 Fed. 266; Kentucky River Nav. Co. v. Com. 13 Bush. 435; Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565; Anderson v. Harvey, 10 Gratt. 386.

Riner, District Judge, delivered the opinion of the court:

This was a bill in equity, brought by S. Duffield Mitchell, a citizen of the state of Pennsylvania, against the Big Six Development Company, a corporation organized under the laws of the state of Missouri, to cancel a lease as a cloud upon plaintiff's title to certain lands, to establish his right of possession therein, and to enjoin the lessee from mining ore in the leased premises. The lease was dated May 31, 1898, and, by its terms, was to run ten years from date. It provided that the parties of the second part should commence the work of sinking shafts within ten days after the date of the lease: "And shall keep and have on said tract of land, sufficient pumps and machinery to drain the same of water, so as to permit efficient mining thereof, and shall properly operate the same, and shall increase the capacity thereof from time to time as same becomes necessary."

"The said parties of the second part, their successors and assigns, shall mine said land in a good, thorough, and workmanlike manner, shall keep all shafts and drifts well and securely timbered and supported, and shall not remove such timbers and supports so as to endanger the ground or to permit the same to cave or fall in. Mining shall be carried on in good faith continuously, and shall not be suspended at any time except on written permission of the party of the first part. All lead and zinc ores shall be cleaned and prepared for market on said land, and no rough or crush stuff shall be removed therefrom to be cleaned; nor shall minerals or crush stuff from other land be brought or cleaned on said land without the written permission of the said party of the first part."

"The said parties of the second part, their successors and assigns, shall keep in a book a correct account of all lead and zinc ores mined, the kinds and weights thereof, to whom sold, and the price received therefor, which book shall be open to the inspection of the party of the first part at all reasonable times."

"The said parties of the second part, their successors and assigns, shall pay to the party of the first part, at the Bank of Jop-

lin, Missouri, on Monday of each and every week, as rent and royalty, twelve (12) per cent of the market value of all ores mined and sold during the preceding week, and shall furnish at the time of said payment a written statement of all ores sold, to whom sold, and the price received therefor."

"The parties of the second part, their successors and assigns, shall have the right to erect all necessary buildings and machinery on said land for the purpose of mining and draining, crushing and cleaning ores thereon, and to remove the same at the expiration or forfeiture of this lease, except timbering and other materials necessary to support the ground, which timbering and improvements immediately on their being placed in the ground shall become the property of the party of the first part. All uses of the ground not inconsistent with thorough and proper mining, as herein required, are hereby reserved to the party of the first part."

"Any failure at any time on the part of the parties of the second part, their successors and assigns, to comply with and perform in good faith the requirements of this lease shall end and determine the same, and said party of the first part, his heirs and assigns, may declare an ouster and forfeiture of said lease, and may re-enter and hold said demised premises without recourse to law in as full and complete a manner as if this lease had never been made. Nor shall the failure of the party of the first part, his heirs or assigns, to enter upon and take possession of said premises on account of the failure of the parties of the second part to keep and perform the conditions and agreements herein contained, be construed to be a waiver of the rights of the party of the first part to declare an ouster and re-enter and forfeit said demised premises for any other and subsequent breach of the requirements of this lease."

The bill alleges that the plaintiff was the owner in fee simple and in possession of a tract of land situate in Jasper county, Missouri, and described as the north half of the northeast quarter, and the southeast quarter of the northeast quarter, of section 4, township 27, range 32, containing 120 acres, more or less; that on the 31st of May, 1898, plaintiff executed and delivered a mining lease upon the southeast quarter of the northeast quarter of section 4, containing 40 acres, the same being a part of the 120 acres above described; that, by deed of assignment duly executed and acknowledged by the parties of the second part to the lease, they conveyed all of their interest and title therein to defendant; that defendant subdivided the tract of land into mining lots, and subleased the same to

miners and mining companies, who have been conducting mining operations thereon; that the defendant, by its mining rules and regulations, declared and posted according to law, imposed upon its several sublessees the duties and obligations imposed upon it by the lease with reference to sinking and driving shafts, timbering, supporting the surface of the land, preventing the surface from caving or falling in, pumping and draining water, cleaning and preparing for market all ores produced from the mine; that defendant performed none of these acts, nor did it own any machinery, pumps, or buildings located on the land; that the defendant kept an account of all lead and zinc ores mined, the kind and weight thereof, to whom the same was sold, and paid to the plaintiff the royalty due thereon, as provided by the terms of the lease. It is then alleged in the bill that "defendant corporation, its sublessees and licensees, have failed to comply with and perform the conditions and requirements of said lease, in this: That it and they have failed and refused to keep the deeper drifts in said land drained of water, to permit efficient mining thereof, and have failed to mine said ground in a workmanlike manner; and have removed and caused to be removed a pillar or pillars in said ground, which, in mining said ground, had been left to support the surface and prevent the same from caving or falling in, and have failed to properly timber and secure the drifts of said ground from caving, and have failed to timber certain shafts securely and properly; by reason of which failure the ground has subsided, caved, and fallen in, to the great detriment and damage of said land. That, by reason of its failure to comply with the requirements and conditions of said lease, the defendant has forfeited the same, and the said lease, by its terms, has ended and determined; and the plaintiff, electing to enforce said forfeiture as against defendant, on account of said failure to comply with the conditions and requirements of said lease, did on the 7th day of July, 1903, declare said lease forfeited, and made re-entry on said described land, declared an ouster of the defendants therefrom, and posted upon said land a notice of forfeiture, . . . and duly served same on defendant on said 7th day of July, 1903, by delivering a true copy thereof to J. W. Allen, president of defendant. That, notwithstanding the re-entry by plaintiff on said land by the terms of said lease, at his election, to re-enter and oust defendant from said land for forfeiture of said lease by reason of failure to comply with its conditions and requirements, defendant, its officers and agents, refused to surrender said lease, and claim 1 L.R.A. (N.S.)

and assert rights thereunder adverse to plaintiff, and threaten to continue to claim and assert said rights to the said land of plaintiff, and threaten to continue to mine or cause said land to be mined, and to take the ores, rock, and earth therefrom, to the irreparable damage of plaintiff."

It is then alleged that the defendant corporation was organized solely and only to take over and hold the title to the plaintiff's lands; that it has no other property or assets than the lease; that at the organization the defendant corporation received nothing but the lease as property, in full payment for its entire capital stock; that the defendant divides its royalty, earnings, or profits derived under said lease on plaintiff's land among its stockholders, when received; that the defendant is insolvent; and that plaintiff's remedy at law would be inadequate. The plaintiff then alleges that the lease creates a cloud upon his title to the land in controversy, and prays that the court may decree that the defendant has no interest in or title to the lease; that the title of the plaintiff to the land in controversy is unaffected by the lease or any claim of the defendant; that the lease be declared to be no longer in force and effect in favor of the defendant, and that it may be canceled, annulled, and surrendered into the possession of the plaintiff; and that the defendant, its officers, servants, and agents, be enjoined from asserting any claim under the lease, and from continuing in possession of the land in controversy. To this bill the defendant demurred, and the demurrer was overruled. It then filed an answer, the testimony was taken, and the case came on for final hearing, resulting in a decree declaring the lease a cloud upon plaintiff's title, establishing his right of possession in the property, and enjoining the lessee from mining ores in the leased premises.

It was insisted by appellant that a court of equity had no jurisdiction, upon the pleadings and evidence, to grant the relief given by the court in this case. And at the argument it was said that this bill should not be maintained: (1) Because a bill for an injunction can only be maintained, where the title is disputed, after a trial at law, or after an action at law has been commenced; (2) because a cloud upon the title cannot be removed unless the complainant is in possession; and (3) because it seeks to enforce a forfeiture.

The trespass here complained of, as disclosed by the record, is not an ordinary case of trespass upon lands, of temporary duration, but, as we think the evidence shows, was a continuous trespass, which threatened to destroy the character of the property as a mine, and would render the plaintiff's

interest therein valueless. Threatened and continuous injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined, because, as has been said, such acts "alter the character of the property, and also tend to destroy it, and occasion irreparable loss and damage." *Courthope v. Mapplesden*, 10 Ves. Jr. 290; *Scully v. Rose*, 61 Md. 408; *Erhardt v. Boaro*, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Hammond v. Winchester*, 82 Ala. 470, 2 So. 892; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367. In such cases the threatened injuries are to the *res*, and diminish the value of the property itself; and an injunction will be granted to prevent the continuing waste or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law. *Story, Eq. Jur.* § 860; *Union P. R. Co. v. Kansas City Elevator Co.* 3 McCrary, 463, 17 Fed. 200; *Cowper v. Baker*, 17 Ves. Jr. 128; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Snyder v. Hopkins*, 31 Kan. 559, 3 Pac. 367; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.* 82 N. Y. 486; *Oolagah Coal Co. v. McCaleb*, 15 C. C. A. 270, 32 U. S. App. 330, 68 Fed. 87; *High, Inj.* 736; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Peck v. Ayers & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 273; *Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co.* 61 C. C. A. 359, 126 Fed. 623.

If the only relief sought by the bill in this case was to remove the cloud upon plaintiff's title, it may well be doubted whether the bill could be sustained. *Orton v. Smith*, 18 How. 263, 15 L. ed. 393; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129. But the bill goes further, and seeks to enjoin the defendant from committing waste and destroying the property as a mining property. In such a case jurisdiction in equity attaches, even where the plaintiff is not in possession. And, having obtained jurisdiction for that purpose, the court may, for the purpose of preventing a multiplicity of suits, retain it for further relief, and may remove a cloud upon the title, quiet the title, and determine the right of possession.

In the Elevator Case above cited, Mr. Justice Miller said: "When either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity, on general principles, and ask to have that lease set aside, canceled, and annulled. In that case the court of equity sits, holding the scales of justice 1 L.R.A.(N.S.)

evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to terminate the agreement. . . . And the court will declare the agreement at an end, and set aside and annulled, and will make such orders as seem proper and right."

We think, both upon reason and authority, that in a case such as this, where the injury is to the *res* (that is to say, where irreparable mischief is being done or threatened, going to the very substance of the estate), a court of equity has jurisdiction, not only for the purpose of restraining waste or threatened trespass, but, having acquired jurisdiction for that purpose, it may also proceed to settle the question of title and to remove the cloud; and this was the view taken by the circuit court.

While the bill in this case is not carefully drawn, yet we think sufficient is presented by the record to invoke the jurisdiction.

It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But, as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuous trespass. We think the bill may well be maintained upon this ground. *Metropolitan Land Co. v. Manning*, 98 Mo. App. 248, 71 S. W. 696. While the right of a lessor to determine, without recourse to the courts, a lease of real estate, as forfeited, and re-enter upon the premises, is limited to the most technical terms and conditions upon which the right is to be exercised, yet we think there can be no doubt but what the right exists in a case where the terms of a contract and the acts complained of justify such a course. He must, it is true, be able to point out specifically some clear act in violation of the terms of the lease, which will authorize the forfeiture. The circuit court found that the plaintiff had made a sufficient showing in this regard, and, from our examination of the record, we are not prepared to say that the conclusion reached was erroneous.

It is also urged that after the notice of forfeiture, and on the 5th day of October, 1903, the plaintiff received and accepted the rents or royalties due under the lease, and that this act upon his part constituted a waiver of the forfeiture. The ground of forfeiture, as we understand the record, was the continued failure of the defendant to mine in a workmanlike manner, and to support the ground so that it would not cave, and the defendant's violation of these cove-

nants of the lease continued up to the time the temporary injunction was issued. We think the receipt of the rent or royalty was not a waiver of the forfeiture. A waiver rests upon an estoppel, and there was no estoppel here: (1) Because a continuing breach of the covenants of a lease is not waived by receipt of rent. *Farwell v. Easton*, 63 Mo. 446; *Taylor, Land. & T.* 500; and (2) because the receipt of rent after the institution of a suit to recover the property is not a waiver. 18 Am. & Eng. Enc. Law, p. 387; *Cleve v. Mazzoni*, 19 Ky. L. Rep. 2001, 45 S. W. 88.

It is also insisted that the bill cannot be maintained because there was a complete remedy at law by an action for forcible entry and detainer. Our examination of the record leads us to the conclusion that this contention cannot be sustained. Such an action would not have prevented the extraction of the ore and removal of the earth, so that continuous cavings would have occurred, during the time spent in the various courts in reviewing the trial for forcible entry and detainer by successive appeals until a final decision was reached. On the other hand, we think it is a case where there would be no adequate remedy at law, because the law, as stated by the Supreme Court, in regard to the jurisdiction in suits in equity of courts of the United States, in view of the statute which declares that there shall be no remedy in equity where there is a plain, adequate, and complete remedy at law, is that the remedy at law must be as efficient to the ends of justice and its complete and prompt administration as the remedy in equity; and we think the record clearly shows in this case all of the injuries that could be inflicted upon the property might well be inflicted before such a proceeding could have effect.

We have carefully examined the evidence set out in the record, and, while it is somewhat conflicting, we think it is entirely sufficient to sustain the findings of the circuit court. Applying the rule so well stated by Judge Sanborn, of this court, in the case of *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 82, that "the legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts," we think it does not so clearly appear that the defendant was not violating the terms of the lease, in failing to properly support the surface of the ground and to properly conduct its mining operations, that the finding of the lower

court should be reversed. The evidence, we think, not only permitted, but compelled, the conclusion reached by the circuit court, that the mining operations were carried on in disregard of the covenant in the lease that the land should be so supported that there would be no caving. Indeed, the evidence is strong that these mining operations were conducted in the most careless manner, and with a view to extracting the largest amount of ore with the least expense, in utter disregard of plaintiff's rights. In other words, if the defendant had been permitted to proceed with the work in the manner in which it was being done at the time the injunction issued, it would necessarily have resulted in great injury, if not in total destruction of the property as a mining property.

Upon the whole record, the conclusion reached is that the decree of the Circuit Court must be affirmed.

Hook, Circuit Judge, dissenting:

One effect of the decision is that, whenever a court of equity may issue an injunction in aid of a cause of action that is purely legal, it may for that reason also draw to itself cognizance of the entire controversy. I think that this is an inadmissible enlargement of equitable jurisdiction. *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630. A lessor who claims that his lessees in possession have forfeited the lease by breach of condition subsequent has an adequate and efficient remedy at law by notice and action for wrongful detention. But if there is fear that, before the remedy can be made effectual, the leased property will be materially damaged by the lessees, he may apply to a court of equity to restrain the threatened damage pending his proceedings in the court of law; and thus may the rights of the lessor be fully secured, consistently with the preservation by the courts of their respective spheres of jurisdiction.

Again, this was a suit in equity to enforce a forfeiture. *Kellar v. Craig*, *supra*. It will not do to say that its purpose was to restrain trespass after a forfeiture had occurred through the acts of the lessees and the notice to quit. This would seem to be reasoning in a circle. The real issue in the case was whether in fact there was a forfeiture,—whether the notice to quit amounted to anything. If the acts had not been committed, the lessees would have been entitled to remain in possession notwithstanding the notice. The case is not that of a trespass by a stranger to the title.

Nor can the suit be maintained as one to quiet title, the defendant being in actual possession. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188

U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4.

Petition for writ of certiorari denied by Supreme Court of United States October 16, 1905.

ILLINOIS SUPREME COURT.

Re PETITION OF MARION MULFORD for Leave to Administer the Estate of Harriet M. Richards, Deceased.

(217 Ill. 242.)

1. Executor—right to act as.

The right to act as executor is not a privilege or immunity within the protection of the Federal Constitution.

2. Same—nonresidents.

Nonresidents may be denied permission to act as executors of local estates.

3. Domicil—change of.

One's character as a nonresident is not changed by coming into the state for the purpose of administering upon an estate, with the intention of remaining there as long as his duties may require, if he retains his domicil in another state.

(October 24, 1905.)

Subject Note.—Right of nonresidents to act as executors or administrators.

I. Scope, 341.

II. Nonresidents as executors.

a. Eligibility for appointment.

1. Rule independent of statutes, 341.

2. Rule under statutes, 342.

b. Nonresidence after appointment.

1. Continued nonresidence, 343.

2. Change of residence, 344.

III. Nonresidents as administrators.

a. Eligibility.

1. Rule independent of statutes, 346.

2. Rule under statutes, 347.

b. Change of residence after appointment, 350.

IV. Résumé, 351.

I. Scope.

Ancillary administration constitutes such a distinct branch of the law relative to executors and administrators that cases involving that subject are not here considered,—the few exceptions being cases in which it is apparent that the fact that the administration was not the original one did not in any way control the decision.

Other questions excluded from the discussion are those which relate respectively to the right to attack collaterally the appointment of a nonresident as executor or administrator (L.R.A. (N.S.))

APPPEAL by petitioner from an order of the Probate Court of Will County denying him letters testamentary upon the estate of Harriet M. Richards, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. John T. White and Morrill Sprague, for appellant:

There can be no denial to citizens of other states of any of the rights and privileges which are accorded to the citizens of the state enacting the law.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Roby v. Smith*, 131 Ind. 342, 15 L. R. A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093; *Shirk v. La Fayette*, 52 Fed. 857.

All persons capable of making wills, and some others besides, are capable of being made executors, except such as are expressly forbidden by law.

11 Am. & Eng. Enc. Law, 2d ed. p. 751.

Whom the testator will trust, so will the law.

Senior v. Ackerman, 2 Redf. 302.

istrator, and the eligibility of a foreign corporation for such a trust. See the note to *Bolton v. Schriever*, 18 L. R. A. 242, on "Collateral impeachment of findings as to jurisdictional facts on which administration of a decedent's estate is based;" also the note to *Cone Export & Commission Co. v. Poole*, 24 L. R. A. 289, on "Recognition or exclusion of foreign corporations."

For obvious reasons the question "What constitutes nonresidence?" is not considered.

The right of a resident appointee or nominee of a nonresident to letters of administration is manifestly not within the scope of the note as indicated by its title.

II. Nonresidents as executors.

a. Eligibility for appointment.

1. Rule independent of statutes.

At common law a nonresident may be an executor. *Fulgham v. Fulgham*, 119 Ala. 403, 24 So. 851; *Cutler v. Howard*, 9 Wis. 309.

Residence in another state creates no insuperable objection to the appointment of an executrix. *Hammond v. Wood*, 15 R. I. 566, 10 Atl. 623.

Additional support for this view is found in the practice at common law, when a nonresident was named as executor, to appoint a temporary administrator to take charge of the estate until the executor should come

Nonresidence in the state where the will is admitted to probate is not a disqualification of the person named therein as executor.

11 Am. & Eng. Enc. Law, 2d ed. p. 753, 5.

A man can have a residence in Illinois for a part of the year and in another state for the remainder of the year; and this, even though his domicil is continuously in the latter state.

Frost v. Brisbin, 19 Wend. 11, 32 Am. Dec. 423; Tazewell County v. Davenport, 40 Ill. 197; Hayes v. Hayes, 74 Ill. 312; Keller v. Carr, 40 Minn. 428, 42 N. W. 292.

In statutory connections there is a distinction between "actual residence" and "legal residence."

21 Am. & Eng. Enc. Law, p. 125; Lawson v. Adlard, 46 Minn. 243, 48 N. W. 1010;

into the state to qualify. Examples of cases recognizing this practice are—Slater v. May, 2 Ld. Raym. 1071, 1 Salk. 42; Taynton v. Hannay, 3 Bos. & P. 26; Ex parte Galluchat, 1 Hill, Eq. 148; Griffith v. Frazier, 8 Cranch, 9, 3 L. ed. 471.

And the right of a nonresident to qualify as executor is recognized in Taylor's Goods, 61 L. J. Prob. N. S. 93 [1892] P. 90, where, upon a showing of urgent necessity, administration with the will annexed was granted under 20 & 21 Vict. chap. 77, § 73, to the partner of one of the executors, who was requested by the will to act for him in event of his absence, such administration to continue until one or the other of the executors, both of whom were nonresidents, should come in and take a grant of probate.

But the permanent removal of an executor from the state without having qualified puts it out of his power to act, and is equivalent to a renunciation of his executorship. Chanet v. Villeponteaux, 3 M'Cord, L. 29.

Independently of statute, a nonresident, even though an alien, may be named and appointed executor. BREEN v. KEHOE.

But nonresidence was thought, in Carthey v. Webb, 6 N. C. (2 Murph.) 268, to disqualify an alien enemy from acting as executor, though his character as an alien enemy would not alone affect his eligibility.

In refusing to sustain the probate court in making nonresidence a ground for removing from their trust the persons to whom ancillary letters testamentary had been issued, the court, in Wilev v. Brainerd, 11 Vt. 107, said that a nonresident ought not to be appointed executor except in particular cases, where there is a sufficient and apparent reason for the contrary course.

2. Rule under statutes.

Nonresidence is a statutory disqualification for executors in some states. Whitaker v. Wright, 35 Ark. 511; Holladay v. Holladay, 16 Or. 147, 19 Pac. 81.

A similar statute once existed in Alabama; 1 L.R.A. (N.S.)

Hanson v. Graham, 82 Cal. 631, 7 L. R. A. 127, 23 Pac. 56; Long v. Ryan, 30 Gratt. 720.

Messrs. Knox & Akin, for appellees:

Statutes making discriminations between residents and nonresidents, and not between citizens, are valid.

Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 215, 2 L. R. A. 636, 19 N. E. 625; Lemmon v. Peopple, 20 N. Y. 562; Cummings v. Wingo, 31 S. C. 427, 10 S. E. 107; Duryea v. Muse, 117 Wis. 399, 94 N. W. 365; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785.

The right to inherit and the right to devise are purely statutory, and their exercise is subject to such restrictions and limitations as the legislature may impose.

Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321.

If a state may deny the privilege alto-

but since its repeal nonresidence is not a disqualification. Fulgham v. Fulgham, 119 Ala. 403, 24 So. 851.

The same is probably true in Montana since the enactment of Mont. Code Civ. Proc. 1895, § 2401, which, in reciting the disqualifications of persons as executors, omits the provision of an earlier statute, excluding an applicant "who is absent from or resides out of the state," although the court, in Re Connor, 16 Mont. 465, 41 Pac. 271, expressly reserved its opinion as to the effect of the new statute.

The omission of nonresidents from the statutory enumeration of persons disqualified to serve as executors authorizes the appointment of nonresidents to act as executors. Hecht v. Carey (Wyo.) 78 Pac. 705; Rice v. Tilton (Wyo.) 80 Pac. 828.

A nonresident may be appointed executor where nonresidents are not mentioned in the statute declaring what persons are ineligible for that trust, although there is a further statutory provision that "where a person absent from the state. . . is named executor, if there is another executor who accepts the trust and qualifies, the latter may have letters testamentary and administer the estate until the return of the absentee, . . . who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted, but the court may, in its discretion, revoke them on the return of the absent executor," since the words "a person absent from the state" mean a person who is out of the state, and has made no application for letters. Re Brown, 80 Cal. 381, 22 Pac. 233.

A statute providing that for nonresidence the court "may" remove an executor will not be construed absolutely to forbid the appointment of a nonresident, but makes such nonresidence ground for the exercise of discretion in appointment. BREEN v. KEHOE. See also *infra*, H. b. 1,—Cutler v. Howard, 9 Wis. 309. And see *infra*, III. a, 2,—Child v. Gratiot, 41 Ill. 357; Re Neubert,

gether, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.

Mager v. Grima, 8 How. 493, 12 L. ed. 1170.

The exclusion of nonresidents from the office of executor or administrator is essential to the due and proper administration of the estates of decedents.

Child v. Gratiot, 41 Ill. 357.

Executors and administrators are public officers.

Wharton, Conf. L. § 552; *Woerner*, Am. Law of Administration, § 172; *Child v. Gratiot*, 41 Ill. 357; *O'Brien's Estate*, 63 Iowa, 622, 19 N. W. 797.

A man's legal residence is not changed when he leaves it for a temporary and transient object, meaning to return when that object is attained.

58 S. C. 469, 36 S. E. 908; *Re Ulhorn*, 12 Ohio C. C. 765; *Sarkie's Appeal*, 2 Pa. St. 157; *Sargent's Estate*, 62 Wis. 130, 22 N. W. 131; *Chicago, B. & Q. R. Co. v. Gould*, 64 Iowa, 343, 20 N. W. 464.

In Georgia the executor must be not only a resident, but a citizen of the United States. *Carnochan v. Abrahams*, T. U. P. Charlt. (Ga.) 197; *Walker v. Torrance*, 12 Ga. 604.

But in New York both alienage and non-residence must exist in order to disqualify. *McGregor v. McGregor*, 1 Keyes, 133, 3 Abb. App. Dec. 92.

If objection is made, under N. Y. Code Civ. Proc. §§ 2636, 2638, to the appointment of a nonresident as executor, he may, by the express provisions of the latter section, entitle himself to letters testamentary upon giving bond, provided he is a citizen of the United States. *Demarest's Estate*, 1 N. Y. Civ. Proc. Rep. 302; *Vernon's Estate*, 1 N. Y. Civ. Proc. Rep. 304, note; *Re Magoun*, 41 Misc. 352, 84 N. Y. Supp. 940.

In the absence of any such objection a nonresident may qualify as executor without giving bond. *Demarest's Estate*, 1 N. Y. Civ. Proc. Rep. 302; *Vernon's Estate*, 1 N. Y. Civ. Proc. Rep. 304, note.

If a nonresident named as executor has an office within the state for the regular transaction of business in person, and the will provides that he may act without giving security, he is entitled, by the express provisions of N. Y. Code Civ. Proc. § 2638, to receive letters even over objection, without giving security. *Vernon's Estate*, 1 N. Y. Civ. Proc. Rep. 304, note.

Nonresident officers of a foreign corporation personally engaged from day to day in transaction of its business in its New York office have an office in the state for the regular transaction of business in person within the meaning of N. Y. Code Civ. Proc. § 2638, permitting nonresidents so situated to act as executors, even against objection, without giving bond if the will contains express provision that they may act without 1 L.R.A. (N.S.)

Cadwalader v. Howell, 18 N. J. L. 138; *State ex rel. Daubmann v. Camden*, 39 N. J. L. 50; *Hayward v. Board of Review*, 189 Ill. 234, 59 N. E. 601; *Hayes v. Hayes*, 74 Ill. 314; *Dale v. Irwin*, 78 Ill. 181; *Smith v. People*, 44 Ill. 16; *Wilkins v. Marshall*, 80 Ill. 74; *Johnson v. People*, 94 Ill. 512.

Boggs, J., delivered the opinion of the court:

Harriet M. Richards, a resident of the county of Will, in this state, while temporarily absent from her home, departed this life on the 26th day of April, 1904, at Palacios, Matagorda county, Texas. She left a will bearing date March 15, 1890, in which she nominated as executor Marion Mulford, the appellant. The will was presented to the probate court of Will county and duly admitted to probate. It was made known

giving security. *Re Sterling*, 9 N. Y. Civ. Proc. Rep. 448, 4 Dem. 492.

The Pennsylvania statute prohibits the granting of letters testamentary to a nonresident only when security is not given. *Jones's Appeal*, 10 W. N. C. 249. See also *infra*, III. a, 2,—*Re Bullock*, 28 Pittsb. L. J. N. S. 252.

By statute in Louisiana whenever the testamentary executor shall be present in the state, but be domiciled out of it, letters shall be granted to him only on such security as is required of dative testamentary executors. This statute is applicable even to a case where there were other executors residing in the state, who duly qualified and received their letters. *McDonogh's Succession*, 7 La. Ann. 472.

Where the testamentary executor was absent and his address unknown at the opening of the succession, it was the duty of the court in Louisiana to appoint a dative testamentary executor; and where the latter has fully administered and has been discharged, the court will not order a new administration upon appearance and demand of the testamentary executor. *Nicholson's Succession*, 5 La. Ann. 358. See also *infra*, III. a, 2,—*Sharpe's Appeal*, 87 Pa. 163.

b. Nonresidence after appointment.

1. Continued nonresidence.

Where nonresidence is not a bar to qualifying as executor, statutory provisions for the removal of an executor or the revocation of his letters where "he has permanently removed from the state" or "has removed or is about to remove from the state" do not warrant such action for the mere continued nonresidence of one who was a nonresident when the letters were issued. *Hecht v. Carey* (Wyo.) 78 Pac. 705; *Re Sterling*, 9 N. Y. Civ. Proc. Rep. 448, 4 Dem. 492.

If such a statute covers cases of nonresidence which existed at the time of the grant of letters, this result follows, said the court,

to the probate court that said Marion Mulford, was a resident of the state of Ohio, and the court, on motion of certain legatees and distributees under the will, refused to grant letters testamentary to him, for the reason that he was a nonresident of this state. This record presents for decision the correctness of the action of the court in refusing to authorize the appellant, Mulford, to act as executor of said will.

The final proviso of § 18 of chapter 3, entitled "Administration" (4 Starr & C. Anno. Stat. Supp. 1902, p. 32), as amended by the act of 1897 (Acts 1897, p. 1), provides that "no nonresident shall be appointed or act as executor." But it is urged that this statutory provision is in conflict with § 2 of article 4 of the Constitution of the United

States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and is also in conflict with § 2 of article 2 of the Constitution of the state of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law." The right to be appointed and act as an executor is not a "privilege" or "immunity," the denial whereof is prohibited by the Federal Constitution. The disposition which shall be made of property after the death of the former owner is to be determined by the lawmaking body of the state. No one has a natural right to take as heir of another, nor has any person the natural right to direct the devolution of his property after

in *Sterling's Estate*, 9 N. Y. Civ. Proc. Rep. 448, 4 Dem. 492, viz.: "That though, in the absence of objection, a nonresident executor has an absolute right to letters even without giving a bond, and though he has that right, even in the face of objection, upon furnishing such bond, the letters must, as soon as granted, be taken away if any person interested in the estate demands it. An interpretation which involves such absurd consequences should certainly be avoided if the language to be interpreted is capable of some other sensible construction. For the foregoing reasons I hold that when letters have been issued to a nonresident executor they cannot be revoked merely because of his continued nonresidence, nor can any bond be for that cause required of him."

But such nonresident executor must come into the state within a reasonable time, personally submit himself to the jurisdiction of the court, and personally conduct the business of the estate. *Re Brown*, 80 Cal. 381, 22 Pac. 233; *Re Kelley*, 122 Cal. 379, 55 Pac. 136; *Hecht v. Carey* (Wyo.) 78 Pac. 705.

The reason for removing an executor who "has permanently removed from the state" within the meaning of Cal. Code Civ. Proc. § 1436, applies equally to a nonresident executor who comes into the state to receive his appointment and file his inventory and then permanently withdraws from the state and remains away. *Re Kelley*, 122 Cal. 379, 55 Pac. 136. "We do not wish to be understood as destroying by construction the right of the testator to name a nonresident as his executor," said the court in this case, "but we do say that the statute should be so construed as to give ground of removal of a nonresident executor when he fails to come to this state and personally conduct the business of the estate at such times and as frequently as the interests of the estate and of those concerned in its settlement may require."

The common-law right to name a nonresident as executor is not to be swept away by giving a mandatory construction to a statutory provision: that the court "may" remove an executor who shall reside out of the state, but such provision is to be construed as giving discretionary power of removal when the distance between the place of residence of the executor and the court where the business is to be transacted is so great as to render it inconvenient and impracticable for him to act. *Cutler v. Howard*, 9 Wis. 309.

In *Ewing v. Ewing*, 38 Ind. 390, letters testamentary were issued in Indiana to a resident of that state and to a resident of Ohio. The former resigned and the latter removed to Chicago for greater convenience in the discharge of the duties of the trust. On petition of one of the legatees it was held to be the duty of the court of common pleas to appoint a resident administrator to take the place of the resigned executor. Such action was held to be demanded by the Indiana statutes which in effect provide that if a resident executor or administrator ceases from any cause to be such, it is the duty of the clerk or court to appoint an administrator, resident in the county where the estate is to be administered, with the will annexed, *de bonis non*. But the court expressly refrained from deciding whether this would remove the nonresident executor, or deprive him of any of the powers conferred, or relieve him from any of the duties imposed on him by law or by the will as executor or trustee.

2. Change of residence.

An executor who, after having duly qualified, absents himself from the state, was said in *Griffith v. Frazier*, 8 Cranch, 9, 3 L. ed. 471, to be still capable of performing, and bound to perform, all the duties of an executor.

So, in holding that a duly qualified executor cannot release himself from his liability to account for funds received by paying them over to his coexecutor and removing from the state, the court said, in *Edmonds v. Crenshaw*, 14 Pet. 166, 10 L. ed. 402, that such removal did not render him incapable of discharging his duties as executor.

It has been held that the removal of an executor from the state does not qualify or furnish ground for revoking his letters,

he shall have died. The right to devise or bequeath property by will or to take by inheritance exists only because conferred by law. *Evans v. Price*, 118 Ill. 593, 8 N. E. 854; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; *Kochersperger v. Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321. The legislature may change the course of descent or of the devolution of property by will, and the enactment will operate at once as to all estates not already passed by the death of the owner. *Kochersperger v. Drake*, *supra*. The state, acting in its sovereign capacity, by appropriate legislation regulates and controls the devolution of property after the death of an owner. Our statute in respect of these matters authorizes the owners of property

to provide by will for the ownership thereof after they shall have died, and regulates and controls the manner in which such will shall be executed and authenticated, and provides that they be duly proven in the court given jurisdiction of such matters, and admitted to probate, and that the same, when so duly admitted to probate, shall be carried into execution by the person named therein as executor or executrix, provided such person shall possess the qualifications which the same statute has fixed and declared to be essential to the legal right to discharge such duty. The judicial procedure thus established to regulate and control the devolution of property by will is the exercise of governmental power and duty by the state, and executors acting by force

even under a statute prohibiting an appointment to that office,—especially where other statutes *in pari materia* plainly infer the continuing capacity and qualification of the executor to hold and exercise his office in the state, notwithstanding his residence beyond the limits of the state. *Walker v. Torrance*, 12 Ga. 604.

But in most jurisdictions the permanent removal from the state of an executor who has duly qualified either operates as a disqualification for the further exercise of his duties, or furnishes ground for revoking his letters, or removing him from his trust.

Independent of any statutory provisions, the removal of an executor from the state without making settlement was ground in Alabama for removal from office. *Harris v. Dillard*, 31 Ala. 191.

And authority to remove from office on that ground is expressly conferred by statute: *Ibid.*; *Crawford v. Tyson*, 46 Ala. 299.

The removal of an executor from the state does not, in Arkansas, of itself vacate his letters so as to prevent the subsequent allowance by the probate court, on notice, of a claim against the estate. *Haynes v. Semmes*, 39 Ark. 399.

But such removal operates in that state as a disqualification further to maintain a suit on behalf of the estate, and such suit cannot be further prosecuted until an administrator *cum testamento annexo* is appointed. *Whitaker v. Wright*, 35 Ark. 511.

A vacancy is, by the express provisions of the Iowa statutes, caused by the removal of an executor from the state. *O'Brien's Estate*, 63 Iowa, 622, 19 N. W. 797.

Permanent removal from the state after appointment is ground for removing an executor from his office; and such removal cannot be prevented by giving the power of attorney contemplated by the Louisiana statutes in case of temporary absence from the state. *Yerkes v. Broom*, 10 La. Ann. 94.

The removal of an executrix from the state without giving a power of attorney, duly recorded, as required by law, to anyone to represent her, is a sufficient ground for removing her from office. *Winn's Succession*, 27 La. Ann. 687.

1 L.R.A. (N.S.)

The departure of an executrix from the state, though coupled with failure to have such power of attorney duly recorded, did not have the effect *ipso facto* to deprive her of her office. It requires some action of the court appointing her to declare the office to be vacant. *Coussy v. Vivant*, 12 La. Ann. 44.

A duly qualified executor, by refusing to take the oath of allegiance to the United States, and by going beyond the jurisdiction of the proper authorities, became *functus officio*, and lost all right to control or administer the property any further, and all claims to commissions except on sums received or recovered by him prior to his abandonment of the trust. *Vogel's Succession*, 20 La. Ann. 81.

The court, by treating the remaining executor as the sole testamentary representative of the deceased after the coexecutor had removed from the state, in effect discharged the one who became disqualified by nonresidence. *Vosler v. Brock*, 84 Mo. 574. See also *infra*. III. b.—State ex rel. *Rucker v. Rucker*, 59 Mo. 17.

Removal of an executor from the state necessitates the revocation of the letters testamentary by reason of the express provisions of N. Y. Code Civ. Proc. §§ 2685, 2687, where a nonresident executor would not be entitled to letters without giving bond. *Sohn's Estate*, 1 N. Y. Civ. Proc. Rep. 373. This evidently refers to the provision of N. Y. Code Civ. Proc. § 2638, permitting a nonresident to qualify as executor without giving bond, even when objected to on that ground, if he has an office within the state for the regular transaction of business in person, and the will provides that he may act without giving security. See *supra*, II. a. 2.—*Vernon's Estate*, 1 N. Y. Civ. Proc. Rep. 304, note; *Re Sterling*, 9 N. Y. Civ. Proc. Rep. 448, 4 Dem. 492.

Temporary nonresidence of executors on account of the ill health of certain members of the family is not removal from the state within the meaning of N. Y. Code Civ. Proc. §§ 2685, 2687, requiring revocation of letters testamentary in case of removal from the state. *Re McKnight*, 80 App. Div. 284, 80 N.

of such procedure exercise functions that are official in character. The position is denominated an "office" in §§ 31 and 36 of the administration act. 1 Starr & C. Anno. Stat. 1896, chap. 3, pp. 283, 284.

The nomination of an executor by the testator in his will does not confer power and authority on the person so nominated to act as executor until he has been found "legally competent" so to act by the branch of the judicial department of the state in which has been vested jurisdiction and power to so determine, save that the statute has granted temporary authority to the person so named as executor to act, to a circumscribed and limited extent, before the probate of the will. But this limited power is possessed in virtue of the statute con-

ferring the same on the person named as executor. An executor receives formal letters testamentary, which constitute his commission as an officer. Before such letters may issue he must take the oath of office prescribed by the statute, and must execute a bond to the people of the state of Illinois, conditioned for the faithful performance of the duties of his office, unless the will shall direct that no bond be required; and even in the event of such direction in the will, the court may, for certain specified reasons, require the bond to be given. The estate is committed to the executor to be administered under the direction and supervision of the court, acting in pursuance of the general statutory enactments relating to the administration

Y. Supp. 251. Affirmed without opinion in 179 N. Y. 522, 71 N. E. 1134.

And residence with her relatives outside the state since her appointment did not require the removal of an executrix who was the sole beneficiary, where she denied any intent to become a nonresident. *Re Magoun*, 41 Misc. 352, 84 N. Y. Supp. 940. The court, however, granted privilege to renew the application upon the original papers and upon notice if, at the expiration of the statutory year and a few weeks of grace, her accounts should not be rendered and settled.

Where an executrix has left the jurisdiction more than a year, and taken up a residence in another state, it is within the discretion of the orphan's court in Pennsylvania, without regard to other circumstances, to say whether she shall be removed from the trust or retained on giving security. *James's Estate*, 10 Pa. Co. Ct. 220.

The removal of an executor who has left the state is discretionary with the court. *Re Grotz*, 1 Northampton Co. Rep. 96, cited in *Brightly's* (Pa.) Digest, vol. 4, col. 6049.

By statute in South Carolina the change of domicile of an executor to a place beyond the limits of the state requires revocation of his letters. *Re Neubert*, 58 S. C. 469, 36 S. E. 908. In an earlier case in that state, where an executor permanently left the state after fully accounting for his management of the estate, he was discharged at his request and a receiver was appointed. *Ex parte Galluchat*, 1 Hill, Eq. 148.

It may reasonably be inferred from the decision in *Humes v. Cox*, 1 Pinney (Wis.) 551, reversing an order appointing an administrator *de bonis non* with the will annexed when the executor had removed from the state because the latter had not first been required to come into the state and settle his accounts, that removal, accompanied by failure to return and settle the accounts, would be ground for removal from his office. And see *supra*, II. a, 1,—*Cutler v. Howard*, 9 Wis. 309.

The special and temporary administration provided for in England by 38 Geo. III. chap. 87, in case the executor, after qualifying,

goes abroad, was granted in *Warburton v. Hill*, 5 Sim. 532, where the surviving executor had absconded and was beyond the jurisdiction; and in *Jenkins's Goods*, 49 L. J. Prob. N. S. 30, 41 L. T. N. S. 736, where the executor, after proving the will, left England permanently for Japan.

III. Nonresidents as administrators.

a. Eligibility.

1. Rule independent of statutes.

In the absence of any controlling statute a nonresident is not ineligible for appointment as administrator. *Chicago, B. & Q. R. Co. v. Gould*, 64 Iowa, 343, 20 N. W. 464; *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484; *Fulgham v. Fulgham*, 119 Ala. 403, 24 So. 851; *Smith v. Munroe*, 23 N. C. (1 Ired. L.) 345; *Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880; *Smith v. Young*, 5 Gill, 197; *Crawell v. Littlefield*, 2 Rich. L. 17; *Jones v. Jones*, 12 Rich. L. 623 (but see *infra*, III. a, 2,—*Re Neubert*, 58 S. C. 469, 36 S. E. 908); *Ex parte Barker*, 2 Leigh, 719; *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580; *Leeson's Goods*, 1 Swabey & T. 463.

The common-law right of a nonresident to qualify as administrator is also recognized in *Barton's Goods* [1898] P. 11, where, upon the death of an administrator, letters of administration *de bonis non* were granted to the attorney of a nonresident next of kin until the latter should come into the country, and herself apply for a grant of administration.

Even alien nonresidents were not disqualified under the common law to act as administrators. *Caroon's Case*, Cro. Car. 8.

But in *Carthey v. Webb*, 6 N. C. (2 Murph.) 268, the court said that although even an alien enemy might rightfully act as administrator if resident within the state, yet, if a nonresident, he was certainly disqualified.

Even where residence does not appear to be an absolute qualification a court may, and generally should, refuse to appoint a nonresident as the personal representative of a

of estates. Power resides at all times in the court to control and direct the executor, and to revoke his authority to act for any statutory disqualification. His compensation is fixed by public law. He is required to report to the court at stated intervals, and it is essential to the preservation of the rights of widows and children, creditors, legatees, and devisees, and to the proper administration of the estate in compliance with the law, that the court shall have power at all times to compel his personal attendance before the court. An executor is a public officer. Wharton, *Conf. Laws*, § 552; Woerner, *Am. Law of Administration*, § 172.

The "privileges and immunities" which are protected by the constitutional inhibi-

tion concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings, and secure happiness and safety, etc., and do not include within their meaning the right to hold office. *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 51 N. E. 785. The state may decline to confer official power on residents of other states without depriving such nonresidents of any "privilege" or "immunity" protected by the Constitution of the general government, or of "liberty" or "property" within the meaning of those words as used in our state Constitution. A nonresident can have no property right in the fees provided by law to be paid as compensation for the performance of the duties of an office created by or existing by virtue

person domiciled in the state at the time of his death. *Radford v. Radford*, 5 Dana, 156.

In reversing an order removing from their trust because of nonresidence the persons to whom ancillary letters testamentary had been issued, the court, in *Wiley v. Brainerd*, 11 Vt. 107, took occasion to say that administrators should not be appointed unless they reside in the state, except in particular cases where there is a sufficient and apparent reason for the contrary course.

While nonresidence does not amount to a disability, yet the courts, in the exercise of a sound discretion, will not appoint a nonresident distributee administrator so long as any other distributees competent to act and willing to assume the trust is within the jurisdiction. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

The court said in *Ex parte Barker*, 2 Leigh, 719, that it might be indiscreet and improper to give administration to a nonresident if there were local creditors and the distributees lived in the state.

2. Rule under statutes.

Statutes forbidding the appointment of nonresidents to act as administrators exist in a number of jurisdictions. *Whittaker v. Wright*, 35 Ark. 511; *Re Cotter*, 54 Cal. 215; *Re Beech*, 63 Cal. 458; *Re Stevenson*, 72 Cal. 164, 13 Pac. 404; *Re Muersing*, 103 Cal. 587, 37 Pac. 520; *Re Donovan*, 104 Cal. 623, 38 Pac. 456; *Re Weed*, 120 Cal. 634, 53 Pac. 30; *Re Kelley*, 122 Cal. 379, 55 Pac. 136; *Re Gordon*, 142 Cal. 125, 75 Pac. 672; *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225, 69 N. E. 909; *Chouteau v. Burlando*, 20 Mo. 482; *Re Stewart*, 18 Mont. 597, 46 Pac. 806; *State ex rel. Lancaster v. Woody*, 20 Mont. 413, 51 Pac. 975; *Re Watson (Mont.)* 78 Pac. 702; *Holladay v. Holladay*, 16 Or. 147, 19 Pac. 81; *Hecht v. Carey (Wyo.)* 78 Pac. 705; *Rice v. Tilton (Wyo.)* 80 Pac. 828.

By statute in Georgia none but citizens of the United States residing in the state are qualified to be administrators. *Headman v. Rose*, 63 Ga. 458; *Walker v. Torrance*, 12 Ga. 604; *Carnochan v. Abrahams*, T. U. P. Charit. (Ga.) 197. 1 L.R.A. (N.S.)

The single exception which the Georgia statutes make to this rule is contained in Ga. Civ. Code, § 3366, which authorizes a citizen of another state, who has a given interest in the estate of a deceased citizen of Georgia, to act as administrator under specified conditions. *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134.

Letters of administration, by the express provision of N. Y. Code Civ. Proc. § 2661, cannot be granted to a person not a citizen of the United States, unless he is a resident of the state. *Re Ferrigan*, 92 App. Div. 376, 87 N. Y. Supp. 16; *Sutton v. Public Administrator*, 4 Dem. 33.

The plain inference and obvious meaning of this statute is that a nonresident may serve as administrator if he is a citizen of the United States. *Libbey v. Mason*, 112 N. Y. 525, 2 L. R. A. 795, 20 N. E. 355; *Re Williams*, 44 Hun. 67, Affirmed without opinion in 111 N. Y. 680, 19 N. E. 284.

Nonresidents are not by implication excluded from acting as administrators by N. Y. Code Civ. Proc. § 2663, providing that, upon application for letters of administration, every resident shall be cited, and the surrogate, in his discretion, may issue a citation to nonresidents. *Re Williams*, 44 Hun. 67, Affirmed without opinion in 111 N. Y. 680, 19 N. E. 284; *Libbey v. Mason*, 112 N. Y. 525, 2 L. R. A. 795, 20 N. E. 355.

A statutory provision that, when it is unnecessary to cite any person, a decree granting letters of administration to the petitioner may be made upon the presentation of the petition, does not, by implication, though coupled with a provision giving surrogates discretion to omit citation to nonresidents, whatever their priority of right, disqualify nonresidents from appointment as administrators; and where, although not cited, the nonresident appears before the issue of letters, and presents his claim, and stands upon his right, the surrogate may not deny it. *Libbey v. Mason*, 112 N. Y. 525, 2 L. R. A. 795, 20 N. E. 355.

Nonresidence, therefore, does not bar the right of a claimant to letters of administration in New York, provided he is otherwise by law entitled thereto. *Re Page*, 107

of the statutes of this state. "Liberty," as the term is used in the constitutional provision, includes freedom from servitude and unlawful restraint, the right to pursue any ordinary calling, trade, or employment, and acquire property, etc., thereby, but does not include any supposed right of a nonresident to receive an appointment to a position created by the general laws of the state for the purpose of carrying into effect legislation affecting the state and its people.

The power to control property of a deceased person, to the end that it shall be applied to the payment of the just debts of the decedent, for the protection of those who were peculiarly dependent upon him, and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the state has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No nonresident enjoys the "privilege or immunity" to participate as an officer in the administration of the affairs of the state, nor has he any right of "liberty or property" in the fees or emolu-

ments of any such office or public position. The petitioner, Marion Mulford, testified that he was seventy-one years old and had a wife and two daughters, with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died; that he lived with his family on homestead property owned by himself and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate, and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will; and that he still retained that fixed purpose, whatever time might be required therefor. Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home, and removing to another place, without a present intention of returning. 24 Am. & Eng. Enc. Law, 2d ed. p. 697. "A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitance, does not constitute residence." *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117.

The court did not err in refusing to issue letters testamentary to the appellant.

Judgment affirmed.

N. Y. 266, 14 N. E. 193; *Re Williams*, 44 Hun, 67; Affirmed without opinion in 111 N. Y. 680, 19 N. E. 284; *Libbey v. Mason*, 112 N. Y. 525, 2 L. R. A. 795, 20 N. E. 355; *Re Tyers*, 41 Misc. 378, 84 N. Y. Supp. 934; *Lus- sen v. Timmerman*, 4 Dem. 250; *Re Selling*, 17 N. Y. S. R. 833, 2 N. Y. Supp. 634.

A nonresident married daughter of the intestate was appointed administratrix in that state in preference to a worthless and irresponsible son residing in the state. *Re Selling*, 17 N. Y. S. R. 833, 2 N. Y. Supp. 634.

Letters of administration issued to a creditor without notice to a nonresident brother of the deceased were revoked upon the application of such nonresident. in *Re Tyers*, 41 Misc. 378, 84 N. Y. Supp. 934, on the theory that the administrator had, by such application, become disqualified to act, within the meaning of N. Y. Code Civ. Proc. § 2685, making subsequent disqualification a ground for revocation.

A different result was reached in a Maryland case where it was held that letters of administration issued to the person next entitled will not be revoked on the subsequent application of a nonresident who, through relationship to the deceased, was first entitled to administer, where the statutes provide that it is unnecessary to give notice to a person entitled to administration, if he is out of the state. *Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880.

Although not contrary to any express statutory prohibition, it is deemed against the policy of the law and the well-presumed intention of the Pennsylvania legislature 1 L.R.A. (N.S.)

from correlative legislation that letters of administration be granted to nonresidents. *McDevitt's Estate*, 9 Pa. Dist. R. 474. See also *infra*, *Sarkie's Appeal*, 2 Pa. St. 157.

Although letters of administration may not be void in Pennsylvania if granted to a nonresident who gives the requisite bond, no nonresident has a right to the administration. *Frick's Appeal*, 114 Pa. 29, 6 Atl. 363.

And nonresidence of the applicant is, at least, a sufficient ground for refusing the grant of letters of administration. *Re Bullock*, 28 Pittsb. L. J. N. S. 252; *Colvin's Estate*, 25 Pittsb. L. J. 101, as cited in *Brightly's (Pa.) Digest*, vol. 3, pt. 1, col. 3824.

The fact that nonresidence, under the Pennsylvania act of March 15, 1832, § 16, does not disqualify executors, does not entitle a nonresident to act as an administrator, although by statute the powers, duties, and liabilities of executors are extended to those to whom letters c. t. a. have already been granted. *Re Bullock*, 28 Pittsb. L. J. N. S. 252.

By statute in New Hampshire a nonresident is not to be appointed administrator unless other circumstances than his relationship render his appointment proper. Under this statute the court, in *Pickering v. Pendexter*, 46 N. H. 69, held that a nonresident widow was properly appointed administratrix as against a resident brother whose interests were adverse to hers and to those of the creditors, where all the rest of the heirs united in requesting her appointment.

Under a statute which permits the court

MICHIGAN SUPREME COURT.

RE ESTATE OF JAMES BREEN, Deceased.

ANNIE BREEN, Plff. in Err.,
v.

J. J. KEHOE et al.

(.... Mich.)

1. Executor—competency of nonresident.

A nonresident alien is not an incompetent executor under a statute which provides that if any executor shall reside out of the state, the court may remove him.

2. Same—effect of indebtedness to estate.

Indebtedness to the estate does not disqualify one from acting as executor.

(November 21, 1905.)

ERROR to the Circuit Court for Chippewa County to review an order affirming an order of the Probate Court appointing executors of the will of James Breen, deceased. Affirmed.

The facts are stated in the opinion.

Mr. John W. Shine, for plaintiff in error:

Removal from the state being ground for revocation of letters of administration, it would seem that nonresidents otherwise qualified should not be appointed.

to grant administration to a stranger if no distributee has applied within a specified time, the court should, under ordinary circumstances, after that time has expired, prefer a resident who is not a distributee to a nonresident who is a distributee. *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

The beneficiary heir is entitled to the administration of a succession in Louisiana in preference to a creditor, though the former be not a resident of the state, in view of La. Civ. Code, art. 1035, providing that, in the choice of administrator, the preference shall be given to the beneficiary heir over every other person, if he be of age and present in the state, as this article does not require a residence in the state, but simply the presence of the party in the state for the purpose of qualifying. *Penney's Succession*, 10 La. Ann. 290.

A foreigner, being the heir of a person who died intestate in France, leaving an estate in Massachusetts, was entitled to administration thereon under Mass. Stat. 1817, chap. 190, § 16, providing that "any person interested" is entitled to letters of administration on an estate within the commonwealth of any person dying intestate outside the state. *Re Piquet*, 5 Pick. 65.

The court, in *Weaver v. Chace*, 5 R. I. 356, thought that there could be no stronger case for the appointment of a nonresident administrator within the discretion given to the court by R. I. Rev. Stat. chap. 156, § 6, than that of a husband entitled, by § 7 of that chapter, to administer on his wife's

Gary, Probate Law, 2d ed. § 267; *Burkheim v. Pinkhussahn*, 58 S. C. 469, 36 S. E. 908; *Re Bullock*, 28 Pittsb. L. J. N. S. 252; *Re Ulhorn*, 12 Ohio C. C. 785; *Child v. Gratiot*, 41 Ill. 357; *Sarkie's Appeal*, 2 Pa. St. 157; *Frick's Appeal*, 114 Pa. 29, 6 Atl. 363; *Sargent's Estate*, 62 Wis. 130, 22 N. W. 131; 1 *Woerner*, Am. Law of Administration, 2d ed. p. 505.

It is against the policy of the law to appoint a debtor executor or administrator.

11 Am. & Eng. Enc. Law, 2d ed. p. 781.

Messrs. Sharpe & Handy, for defendants in error:

Under the common law, any person may be an executor who is capable of making a will.

Berry v. Hamilton, 12 B. Mon. 191, 54 Am. Dec. 515.

An executor appointed by will cannot be rejected by the court, except where the law has specifically so provided.

Smith's Appeal, 61 Conn. 420, 16 L. R. A. 539, 24 Atl. 273; *McGregor v. McGregor*, 3 Abb. App. Dec. 95; 2 Wms. Exrs. & Adms. 5th Am. ed. 198; *Cutler v. Howard*, 9 Wis. 309; *Kidd v. Bates*, 120 Ala. 79, 41 L. R. A. 154, 74 Am. St. Rep. 17, 23 So. 735; *White v. Spaulding*, 50 Mich. 22, 14 N. W. 684; *Berry v. Hamilton*, *supra*.

The right of nonresidents to become executors or administrators is regulated by local

estate in case of her intestacy, and without account.

An administrator is not a public officer within the meaning of Mo. Const. art. 8, § 12, making one year's residence in the state a qualification to election or appointment to "any office in this state." *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113.

Upon the question whether a statute providing for the removal from office of an administrator who has removed from the state since his appointment prevents the appointment of a nonresident to that office, the decisions are squarely in conflict. Sustaining the affirmative of the proposition is *Child v. Gratiot*, 41 Ill. 357, holding that a statutory provision making the removal of an administrator from the state ground for removal from office necessitates a decision that a nonresident cannot be appointed administrator of an estate lying within the state.

So, a statute providing that if an executor or administrator, since the grant of letters testamentary or of administration, shall change his domicile to a place beyond the limits of the state, his letters shall be revoked, has been held necessarily to imply that a grant of letters of administration to one who is a nonresident at the time would not be lawful. *Re Neubert*, 58 S. C. 469, 36 S. E. 908.

And a nonresident is held to be an unsuitable person within the meaning of Ohio Rev. Stat. § 6005, to be appointed administrator in view of § 6017, making removal from the state a ground for removal of an adminis-

legislation. The better policy favors such right provided adequate security is furnished.

Schouler, Exrs. § 32; *Hammond v. Wood*, 15 R. I. 566, 10 Atl. 623; *Sarkie's Appeal*, 2 Pa. St. 157; *McGregor v. McGregor*, 1 Keyes, 133; 1 Wms. Exrs. & Admrs. p. 278.

Hooker, J., delivered the opinion of the court:

James Breen died on July 26, 1904, a resident of Sault Ste. Marie, Michigan, where he had lived from 1902. Previous to that time he had lived in Ontario. He left a large estate in both countries. A will made in Ontario some years before his death named his widow Annie Breen, John J. Kehoe, his solicitor, and David Lynn, a friend, as executors. A codicil made shortly before his death made no change in this regard. Mrs.

trator or executor. *Re Ulhorn*, 12 Ohio C. C. 765.

And in *Sarkie's Appeal*, 2 Pa. St. 157, the court said that among the causes of incompetency of an administrator appears to be nonresidence in the state, as might be inferred from the provision of the act of March 29, 1832, § 27, that when an administrator has removed from the state or ceased to have any known place of residence therein during the period of one year or more, the orphans' court may vacate the letters of administration, and the provision of the act of March 15, 1832, § 27, prohibiting letters testamentary from being granted to any person not being an inhabitant of the state. (A careful reading of the latter statute, however, reveals the fact that it prohibits the granting of letters testamentary to a nonresident only where security is not given. *Jones's Appeal*, 10 W. N. C. 249.)

The contrary view is represented by *Sargent's Estate*, 62 Wis. 130, 22 N. W. 131, holding that nonresidents are not absolutely disqualified to act as administrators, even under a statute authorizing removal for that reason.

And so in *Chicago, B. & Q. R. Co. v. Gould*, 64 Iowa, 343, 20 N. W. 464, we find a decision that the statutory provision that removal from the state creates a vacancy in the office does not prohibit the appointment of a nonresident to the office of administrator. The obvious reason for this enactment, said the court, is found in the fact that the nonresidence of the applicant is an important matter to be considered in issuing letters of administration, and when an administrator removes from the state there ought to occur a vacancy for the reason that his nonresidence was not considered in making his appointment. See also *BREEN v. KEHOE*.

Under such a statute the fact of nonresidence ought to be considered in connection with ability, character for integrity, etc., of an applicant for letters of administration, together with the magnitude and character

Breen petitioned for the probate of the will, and objected to the appointment of Kehoe and Lynn as executors, on the grounds (1) that they were nonresidents and aliens; (2) that Kehoe was indebted to the estate. This indebtedness was amply secured by real-estate mortgage upon property in Ontario. The probate court confirmed the appointment of the three executors, and on appeal to the circuit this order was affirmed. Mrs. Breen has brought the case to this court by writ of error.

The cause was tried at circuit before a jury, and a verdict was directed. No question is raised over the propriety of the trial by jury. The deceased left a widow and several children surviving him, all of whom reside in Michigan. Lynn has filed his refusal to act as executor. The will contains a provision authorizing the acting executor to re-

of the estate, and extent of the personal attention it will probably require. *Foley v. Cudahy Packing Co.* 119 Iowa, 246, 93 N. W. 284.

And even if a nonresident can be appointed an administrator when the statutes provide that a vacancy is caused in his office by his removal from the state, such appointment should not ordinarily be made. *O'Brien's Estate*, 63 Iowa, 622, 19 N. W. 797.

And where the statute makes nonresidence a ground for removal, such nonresidence affords sufficient ground for refusing an appointment as administrator if another suitable person is named for the trust. *Sargent's Estate*. 62 Wis. 130, 22 N. W. 131.

Where nonresidence is a disqualification, letters of administration issued to a competent person will not be revoked on the application of one who, when they were issued, was incompetent because of such nonresidence, but has subsequently come into the state. *Sharpe's Appeal*, 87 Pa. 163.

b. Change of residence after appointment.

An administrator who removes from the state of Tennessee, where he was appointed, and becomes a citizen of another state, may sue in the United States circuit court in Tennessee for the collection of debts due him as such administrator, there being no legislation in Tennessee requiring an administrator not to remove from the state. *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484.

The removal of an administrator from Georgia, where he was appointed, to Alabama, cannot, in the absence of any proof that the common law has been changed by statute in Georgia, be deemed by the Alabama courts to disqualify him for his office, much less absolutely to vacate the office. *Bradley v. Harden*, 73 Ala. 70.

In *McLaurin v. Thompson*, Dud. L. 335, the court, in holding that the grant of a new administration without objection on the part of the administrator, who had removed from

move such other executors, as reside abroad or become incapable to act. Annie Breen filed her bond as executor, letters testamentary were issued to her, and she is administering the estate, which administration is now nearly completed, and the estate in shape to be carried on by her as sole executrix.

Counsel seem to agree that the question in the case is whether it was within the authority and discretion of the probate judge to appoint two nonresident aliens, one of whom was indebted to the estate, to the office of executor. We will therefore consider no other question. Comp. Laws 1897, § 9310, provides: "(9310) Sec. 1. When a will shall have been duly proved and allowed the probate court shall issue letters testamentary thereon, to the person named executor therein, if he is legally competent, and shall accept

the trust, and give bond as required by law." This section appears to leave no discretion in the probate judge. If the person named is legally competent, and will accept and give the bond, he must be appointed. That a nonresident, and even an alien, might be named and appointed executor under the common law is clear. See Smith's Appeal, 61 Conn. 420, 16 L. R. A. 539, 24 Atl. 273; 18 Cyc. Law & Proc. p. 77, and cases cited in note 30; McGregor v. McGregor, 3 Abb. App. Dec. 95; 2 Wms. Exrs. 5th Am. ed. 198; Cutler v. Howard, 9 Wis. 309; Berry v. Hamilton, 54 Am. Dec. 518, note (12 B. Mon. 191). If a nonresident alien is not eligible in Michigan, it must be by reason of Comp. Laws 1897, § 9317, which provides that: "(9317) Sec. 9. If an executor shall reside out of this state, or shall neglect, after due notice given by the judge of probate to render his account

the state, was equivalent to a judgment of revocation, said that it was of the opinion that the removal of an administrator from the state did not, of itself, justify the ordinary in revoking his letters of administration.

Statutes in some states expressly provide for the removal from office of an administrator who has removed from the state. Child v. Gratiot, 41 Ill. 357; Trumble v. Williams, 18 Neb. 144, 24 N. W. 716. And see cases cited in the preceding division of this note.

By statute in Texas an administrator may be removed when he absents himself from the state for three months without the permission of the court. Hall v. Monroe, 27 Tex. 700.

The removal of an administrator from the state without making settlement is, by statute, in Alabama, a sufficient cause for removing him from his office. Crawford v. Tyson, 46 Ala. 299.

A statutory declaration that the term "executor" includes "administrator" when the subject-matter applies to an administrator makes applicable to administrators the provision of Iowa Code, § 2347, that a vacancy is caused by the removal of an executor from the state. O'Brien's Estate, 63 Iowa. 662, 19 N. W. 797.

But such removal does not, in general, *ipso facto* work a revocation of the letters.

A removal from the state does not, in Arkansas, *eo instante* vacate the letters of an administrator. It requires the action of the court for that purpose, on motion. McCreary v. Taylor, 38 Ark. 393.

The removal of an administratrix from the state does not of itself work a revocation of the letters of administration. An order or judgment is necessary. State ex rel. Rucker v. Rucker, 59 Mo. 17.

Letters of administration do not abate by the removal of the administrator from the state. Brown v. Strickland, 28 Ga. 387.

The absence of an administrator from the state, in the military service of the Con-
1 L.R.A. (N.S.)

federacy, even if cause for removal, did not work renunciation or revocation of his authority. Hooper v. Scarborough, 57 Ala. 510.

It was unsuccessfully contended in Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135, that the removal of an administratrix from the state operated *ipso facto* as a revocation of the letters, based on the assumption that the statutes of the state expressly provide that when an administrator becomes a nonresident, the probate court shall revoke his letters.

Orders approving final settlement of an administrator after the removal of his co-administrator from the state and distributing the estate, which ignore her and exclude her from any further participation in the administration, have the effect of a revocation of her letters for such change of residence. State ex rel. Rucker v. Rucker, 59 Mo. 17. See also *supra*, II. b, 2,—Vosler v. Brock, 84 Mo. 574.

IV. Résumé.

In the absence of statute there can be no doubt of the right of a nonresident to qualify either as executor or administrator; but in the United States the question is largely regulated by statute, and such statutes, even when similar, are not always similarly interpreted by the courts. In some states the statutes have changed the common-law rule only so far as to prevent nonresidents from acting as administrators; and the courts, when construing legislation upon this subject, seem more tender of the testator's right to choose whom he will to administer his estate than of the right of a nonresident to be appointed administrator, if otherwise entitled to the appointment.

It should be borne in mind that controlling statutes which have not yet received the attention of the courts, and which would, therefore, not be referred to in this discussion, may, and probably do, exist in other states than those represented by the cases herein cited.
W. W. N.

and settle the estate according to law, or to perform any decree of the court, or shall abscond or become insane, or otherwise incapable or unsuitable to discharge the trust, the probate court may remove such executor." If we construe the word "may" in this section in accordance with the common understanding of the word (see *Comp. Laws 1897*, § 50, subd. 1), it should be said that this section was designed merely to permit removal, not to compel it, and perhaps refusal to appoint one not a resident of the state. It is suggested, however, that the word has acquired a peculiar meaning, appropriate to the purpose of its use, and should be held to mean "shall." To give force to this claim, counsel cite cases where, under similar statutes in relation to administrators, it has been held that the courts may refuse to appoint a nonresident administrator in the first instance. Thus in *Gary Probate Law*, § 267, it is said that, "removal from the state being ground for revocation of letters of administration, it would seem that a nonresident, otherwise entitled, should not [not cannot] be appointed." The authority cited in support of this statement is *Radford v. Radford*, 5 Dana, 156. In that case a woman abandoned her husband and went to another state two years before his death, at which time, and when she applied for letters at his domicile, she still resided there. Under these circumstances, the county court refused to appoint her. What kind of a statute, if any, was in force, does not appear; but it is probable that there was a statute authorizing her rejection, in view of the discussion in the later case of *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 517, which seems to recognize the general features of the common-law rule. We must therefore conclude that she was disqualified by the statute. For such a case, see *Re Uihorn*, 12 Ohio C. C. 766; also, *Sargent's Estate*, 62 Wis. 130, 22 N. W. 131. Mr. Crosswell, a text writer, interprets our statute 9317 as follows: "In Michigan and Vermont no provisions of statute touch the point, except that if executors or administrators reside out of the state, they may be removed from office; from which it would seem that they are incompetent to be originally appointed." *Crosswell, Exrs. & Admrs.* 2d ed. p. 112. Mr. Woerner is more guarded. He contents himself with saying (somewhat inaccurately, perhaps) that "in Maine, Michigan, and Ohio nonresident executors [and those] who fail to account and settle in the probate court when required are to be removed." 1 Am. Law of Administration, p. 505. In *Wiley v. Brainerd*, 11 Vt. 112, revocation of letters testamentary was refused. What the statute was does not appear, but the result would indicate that there was a statute, and 1 L.R.A. (N.S.)

the quotation from *Gary* indicates that it may have been a statute similar to ours. In any event, the case goes no further than to hold that her rejection was within the discretion of the county court, and we should perhaps be disposed to follow the case to that extent in the construction of our statute. It is entirely consistent with the interpretation of the word "may" in accordance with common understanding, and falls short of holding that such an appointment was prohibited. There are cases which hold that where a statute provides that, "if an administrator moves out of the state, his letters shall be revoked," a nonresident cannot be appointed as an administrator, since such an appointment is forbidden by implication. See *Burkhim v. Pinkhussahn*, 58 S. C. 469, 36 S. E. 908. It is so in Illinois, where the statute makes it the duty of the court to remove an administrator who has removed from the state. See *Child v. Gratiot*, 41 Ill. 359. In Pennsylvania the statute prohibits the appointment of a nonresident. See *Sarkie's Appeal*, 2 Pa. St. 157, and *Frick's Appeal*, 114 Pa. 29, 6 Atl. 363.

The foregoing discussion of the authorities satisfies us that our statute was not intended to absolutely disqualify or prohibit the appointment of nonresidents to the office of executor, but to make the nonresidence ground for the exercise of a discretion both in appointment and revocation. There is a wide difference between an administrator and an executor. The latter's appointment must ordinarily be made in accordance with the will of the testator, unless he is ineligible, or a statutory discretion, express or by implication, to refuse it is lodged with the court. See note to *Berry v. Hamilton*, 54 Am. Dec. 518, and other cases hereinbefore cited. For a case closely in point, see *Cutler v. Howard*, 9 Wis. 309.

It is said that *Kehoe's* indebtedness to the estate disqualifies him. The authorities cited are in point upon this question. When the statute has not intervened, indebtedness to the testator does not disqualify. The exact point was decided in *Kidd v. Bates*, 120 Ala. 70, 41 L. R. A. 154, 74 Am. St. Rep. 17, 23 So. 735.

The order of the Circuit Court is affirmed.

MICHIGAN SUPREME COURT.

CHARLES S. WITHEY

v.

PERE MARQUETTE RAILROAD COMPANY, Plff. in Err.

(.... Mich.)

1. Carrier—loss of infant's baggage.

A father may recover upon the carriage

contract for loss of, or injury to, articles of his infant child, packed and carried with his baggage, where he has paid full fare for his transportation, and the infant is below the age at which fare is customarily exacted.

2. Same—woman's baggage—action by husband.

A man has such special interest in the property of his wife, which she had not obtained from him, but which is packed in trunks which he has contracted with a carrier to transport, as to entitle him to maintain an action for their value in case they are lost through breach of the contract.

3. Evidence—opinions of injury.

Parties who have examined clothing injured through another's negligence, and who are familiar with the values of such articles, may state their opinions as to the proportion of damage done by the injury.

4. Same—production of article in court—discretion.

An abuse of discretion in refusing to compel a production in court of articles alleged to have been injured by another's negligence is not shown, where defendant's witnesses have been permitted to examine them, and it is not clear that the jury would have been aided by personal examination of them.

(September 28, 1905.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to recover the value of baggage alleged to have been lost through defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Charles McPherson, with Mr. Frederick W. Stevens, for plaintiff in error:

Articles of merchandise are competent and

Case Note.—The question involved in *WITHEY v. PERE MARQUETTE R. CO.* is whether or not a child traveling with its parent, or other person paying fare, without the child's fare having been paid, is a gratuitous passenger within the rule which makes the carrier of a gratuitous passenger a gratuitous bailee in respect to his baggage, or whether the personal effects of the infant, being the property of the parent with whom the child is traveling, and who has paid his fare, constitute part of the baggage of the parent, for which the company is liable.

Fetter on *Carrier of Passengers*, vol. 2, § 587, gives the following rule as to what constitutes baggage: "Baggage is such personal property of the passenger, delivered to the carrier for transportation, which the passenger takes with him for his personal use or convenience, according to the habits or convenience of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey." Certainly the child's wearing apparel, which the father takes with him, comes within this definition. It is hard to imagine a father who would not be inconvenienced by the absence of such wearing apparel; in fact it is essential to the purpose of the journey which he is taking. This is especially true in view of the fact, as shown in *Elliott on Railroads*, § 2608, that the following articles, essential for the purpose of the particular journey, are considered baggage: Mechanics' tools, books for amusement, opera glasses, telescopes, fire arms, and fishing tackle.

The decision in *Dexter v. Syracuse, B. & N. Y. R. Co.* 42 N. Y. 326, 1 Am. Rep. 527, is probably broad enough to permit the father to recover for the loss of his baggage containing his infant child's wearing apparel, as in that case the court permitted the plaintiff to recover for his lost baggage, including material for two dresses, and other articles, which he had purchased and was taking home to his wife and other members

of the family. In this decision two of the judges dissented as to the cloth for dresses for members of his family, and a majority of the court were of the opinion that he could not recover for a dress which he was taking home to his landlady.

That an infant traveling with its father without a ticket, where the father has paid his fare, is not a gratuitous passenger, is shown by the following cases, where the infant so traveling was permitted to recover for personal injuries:

In *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442, the question was whether the plaintiff, an infant three years and two months of age at the time of the accident, was entitled to recover for injuries received while traveling on defendant's train with its mother, who purchased a ticket for herself, but did not take a ticket for the plaintiff, although the statute entitled the defendant to half fare for children between three and twelve years of age, where the plaintiff's mother acted in good faith, and no questions were asked her as regards the child's age. The decision in this case upheld the liability of the railroad company, and was placed upon the ground that there was one entire contract to carry both mother and child, which operated in favor of each party.

Does not the principle in the above case justify the holding in the *WITHEY CASE*? If, in consideration of the full fare paid by the mother, the railroad company can be said to make a contract to carry the mother and infant child safely, which contract is entire and based upon the consideration paid by the mother, does not the same rule apply to the baggage of both parties? If the carriage of the infant is not gratuitous, but is based upon the consideration paid by the mother for her ticket in the one case, is it not the same where the claim is for lost baggage?

A similar decision was rendered in *Rawlings v. Wabash R. Co.* 97 Mo. App. 515, 71 S. W. 534, where it was held that a child under the age for requiring the payment of

the most satisfactory evidence of their own condition.

National Cash Register Co. v. Blumenthal, 85 Mich. 464, 48 N. W. 622; Stevenson v. Michigan Log Towing Co. 103 Mich. 412, 61 N. W. 536.

The refusal to compel their production constitutes error.

Powers v. Russell, 26 Mich. 179; Hunton v. Hertz & H. Co. 118 Mich. 475, 76 N. W. 1041; Graves v. Battle Creek, 95 Mich. 266, 19 L. R. A. 641, 35 Am. St. Rep. 561, 54 N. W. 757; South Bend v. Turner, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200, 60 N. E. 271; Stevenson v. Michigan Log Towing Co. *supra*; Hudson v. Roos, 76 Mich. 173, 42 N. W. 1099; Amey v. Long, 9 East, 473; Bull v. Loveland, 10 Pick. 9.

fare, and who pays no fare, is a passenger where he goes upon the train and travels with an older brother for whom fare is paid, and is entitled to recover for injuries incurred in being carried by his destination.

In the WITHEY CASE the court cited no direct authority on the question of the liability of a railroad company for the loss of an infant's baggage where it is traveling with an older person, who, while paying his own fare, pays no fare for the infant. The cases cited by the court, which will be reviewed, determine only the parent's title to the infant child's wearing apparel, and the right of such parent to maintain an action for its negligent injury. These authorities are of use in this case for the purpose of showing that the title to the infant's wearing apparel was in its father, but leave open for discussion the question whether, the title being in the father, the infant's wearing apparel constitutes baggage of the father, or merely merchandise which is not protected as baggage. To return to the cases cited by the court: Smith v. Abair, 87 Mich. 62, 49 N. W. 509, involved the sufficiency of the husband's title to the wife's wearing apparel for the purpose of enabling him to maintain replevin for the same; Wheeler v. St. Joseph & W. R. Co. 31 Kan. 640, 3 Pac. 297, involved the question as to whether a deceased infant left an estate, so as to justify the issuance of letters of administration. The court's opinion contains a *dictum* that "it is probably true that the child's clothing belongs to the father, and not to the child." In Burke v. Louisville & N. R. Co. 7 Heisk. 451, 19 Am. Rep. 618, it was held that the title to a minor daughter's wearing apparel was in the parent, and that he could maintain an action for its negligent destruction.

Neither is Prentice v. Decker, 49 Barb. 21, the remaining case cited by the court, directly in point. There the plaintiff's infant daughter had the defendant transfer her baggage from the railroad station to her home, and the father sued to recover for the negligent loss of the baggage. The question of the defendant's liability to someone was 1 L.R.A. (N.S.)

If it is found that there is any better evidence existing than is produced, the very nonproduction of it is presumption that, if produced, it would have detected some falsehood that at present is concealed.

3 Bl. Com. p. 368; 22 Am. & Eng. Enc. Law, 2d ed. p. 1258; Bigelow v. Paton, 4 Mich. 170; Page v. Stephens, 23 Mich. 357; Heath v. Waters, 40 Mich. 457; Cole v. Lake Shore & M. S. R. Co. 81 Mich. 156, 45 N. W. 983; Warren v. Holbrook, 95 Mich. 185, 35 Am. St. Rep. 554, 54 N. W. 712; Hay v. Peterson, 6 Wyo. 419, 34 L. R. A. 581, 45 Pac. 1073.

It is not permissible for witnesses to express opinions as to the amount of the damages which the jury should award.

Sutherland, Damages, § 444; Grand Rap-

not involved, but merely the right of the father to maintain the action; and it was held that, the legal title to the goods being in the father, he could maintain the action. Of course the case is an authority on the proposition that the title to the infant's wardrobe is in the parent who furnished it.

In addition to the above cases involving the right of the father to recover for the lost baggage of his infant child, where it is lost under circumstances creating a liability, the following cases are in point:

In Richardson v. Louisville & N. R. Co. 85 Ala. 559, 2 L. R. A. 716, 5 So. 308, the father was permitted to maintain an action for the loss of the baggage of his wife and infant child, who were traveling together. But the decision was upon the ground that the title to the wife's and child's wearing apparel was in the father. The age of the infant, or whether the infant's fare was paid, does not appear. Apparently the only question involved was as to who could maintain the action.

And in Baltimore Steam Packet Co. v. Smith, 23 Md. 402, 87 Am. Dec. 575, the right of a father to maintain an action for the loss of his own and his infant daughter's baggage while traveling together was sustained. But in this case the daughter was nineteen years of age, and paid her fare; so the only question involved was the sufficiency of the father's title in his daughter's wearing apparel to permit him to maintain the action.

In Curtis v. Delaware, L. & W. R. Co. 74 N. Y. 116, 30 Am. Rep. 271, the father was permitted to recover for the loss of his baggage, including his own wearing apparel and that of his infant child. The age of the infant, or whether his fare was paid, does not appear from the report of the case. If the child was of tender years and his fare unpaid, so as to bring the facts within the decision in WITHEY v. PERE MARQUETTE R. Co., the effect of such facts was not discussed; the defendant railroad company contenting itself with challenging the right of the father, who was not with his family at the time, but had gone on ahead on a different train, to recover for the lost baggage.

ids v. Grand Rapids & I. R. Co. 58 Mich. 641, 26 N. W. 159; *Roberts v. New York Elevated R. Co.* 128 N. Y. 455, 13 L. R. A. 499, 28 N. E. 486; *Zabel v. New State Teleph. Co.* 127 Mich. 405, 86 N. W. 949.

A gift, either before or after marriage, becomes the separate property of the wife. 2 Am. & Eng. Enc. Law, 2d ed. p. 350; *Michigan C. R. Co. v. Coleman*, 28 Mich. 440.

Mere possession of his wife's property does not confer a right of action upon the husband.

Blackwood v. Brown, 32 Mich. 104; *Noble v. Milliken*, 74 Me. 225, 43 Am. Rep. 581.

The defendant was a gratuitous bailee as to the baby, and the transportation as baggage of articles intended solely for its use was a mere incident to that gratuity.

Hutchinson, Carr. § 716; *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499.

Messrs. Crane & Norris, for defendant in error:

The power of the courts to compel the production of evidence is limited to cases where the party calling the witness has a right to use the document, and is confined to private writings.

Delaney v. Philadelphia, 1 Yeates, 403; *Shippen v. Wells*, 2 Yeates, 260; *Re Shephard*, 3 Fed. 12; 2 Tidd, Pr. p. 806.

The wearing apparel of every person or family is exempt by law from execution.

3 Comp. Laws 1897, § 10,322.

Certainly a party to the suit by a *sub-pana duces tecum* could not lay hold of it.

Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000.

The testimony of the plaintiff and his wife as to the damage to their clothing and household goods was admissible.

Continental Ins. Co. v. Horton, 28 Mich. 173; *Seyfarth v. St. Louis & I. M. R. Co.* 52 Mo. 449; *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306; *Tubbs v. Garrison*, 68 Iowa, 44, 25 N. W. 921; *Williamson v. New York. N. H. & H. R. Co.* 24 Jones & S. 508, 4 N. Y. Supp. 834; *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61, 52 N. W. 826; *Erickson v. Drazkowski*, 94 Mich. 551, 54 N. W. 283; *Rademacher v. Greenwich Ins. Co.* 75 Hun, 83, 27 N. Y. Supp. 155; *Thomason v. Capital Ins. Co.* 92 Iowa, 72, 61 N. W. 843; *Mason v. Partrick*, 100 Mich. 577, 59 N. W. 239; *Meyerson v. Hartford F. Ins. Co.* 16 Misc. 286, 38 N. Y. Supp. 112; *Lewis Baillie & Co. v. Western Assur. Co.* 49 La. Ann. 658, 21 So. 736; *Fowler v. Fowler*, 111 Mich. 676, 70 N. W. 336; *Zabel v. New State Teleph. Co.* 127 Mich. 402, 86 N. W. 949.

The wife's wearing apparel, though purchased by herself and with her husband's money, belongs to her husband.

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Hawkins v. Providence & W. R. Co. 119 Mass. 596, 20 Am. Rep. 353; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271; *Graham v. Londonderry*, 3 Atk. 393.

Plaintiff delivered the trunks to the defendant, and the defendant accepted them from the plaintiff, and gave him the checks, which stood in the place of a bill of lading, and thereby undertook to carry them safely for the plaintiff. It does not matter whether the plaintiff, as bailor, was owner or had possession.

Saville v. Tancred, 3 Swanst. 141; *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659; *Joseph v. Knox*, 3 Campb. 320; *Freeman v. Birch*, 1 Nev. & M. 420; *Faulkner v. Brown*, 13 Wend. 63; *Nicolls v. Bastard*, 2 Crompt. M. & R. 659; *Dunlop v. Lambert*, 6 Clark & F. 600; *Goodwyn v. Douglas Cheves*, L. 174; *Mayall v. Boston & M. R. Co.* 19 N. H. 122, 49 Am. Dec. 149; *Moran v. Portland Steam Packet Co.* 35 Me. 55; *Dill v. South Carolina R. Co.* 7 Rich. L. 158, 62 Am. Dec. 407; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *Kellogg v. Sweeney*, 1 Lans. 397, 46 N. Y. 291, 7 Am. Rep. 333; *Casey v. Suter*, 36 Md. 1; *Rogers v. Long Island R. Co.* 1 Thomp. & C. 396; *Curtis v. Delaware, L. & W. R. Co.* *supra*; *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 382; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *American Dist. Teleg. Co. v. Walker*, 72 Md. 454, 20 Am. St. Rep. 479, 20 Atl. 1; *Jacksonville, St. A. & H. River R. Co. v. Mitchell*, 32 Fla. 77, 21 L. R. A. 487, 13 So. 673; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 21 L. R. A. 298, 42 Am. St. Rep. 902, 23 S. W. 70; *Andrews v. Keith*, 168 Mass. 558, 47 N. E. 423.

A bailee is estopped to deny the bailor's title.

Betterley v. Reed, 4 Q. B. 511; *Great Western R. Co. v. McComas*, 33 Ill. 186; *Biddle v. Bond*, 6 Best & S. 225; *Lain v. Gaither*, 72 N. C. 234; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Rogers v. Lambert*, L. R. 24 Q. B. Div. 573; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

The plaintiff was the owner of the clothing of his minor child, and therefore could properly maintain an action for its loss or injury.

Dickinson v. Winchester, 4 Cush. 114, 50 Am. Dec. 760; *Parmelee v. Smith*, 21 Ill. 620; *Prentice v. Decker*, 49 Barb. 21; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618; *Wheeler v. St. Joseph & W. R. Co.* 31 Kan. 640, 3 Pac. 297; *Schouler, Dom. Rel.* 349.

Ostrander, J., delivered the opinion of the court:

On Saturday, December 26, 1903, plaintiff, his wife, and their twenty-one-months-old child were passengers on defendant's road from Monroe, where they had passed Christmas with relatives, to Grand Rapids, their home. As baggage they had on the same train two trunks. These trunks contained various articles of dress and of the toilet; some intended solely for the use of the infant. They contained, also, some articles of jewelry used by and intended for use by the wife, which had been given her by others than her husband, which she took to Monroe with her on her visit, and some gifts made to plaintiff and his wife and to the child at Monroe. Plaintiff purchased at Monroe two full-fare tickets to Grand Rapids, no ticket for the infant, checked the trunks, and received the checks issued for them. At East Paris, near Grand Rapids, the train in question was in collision with an eastbound passenger train. On the following Monday the baggage was delivered at the plaintiff's place of residence, and later at defendant's freight depot, plaintiff's wife picked out from a quantity of goods certain articles which had been in the trunks. As delivered, the trunks, which were broken, contained a portion only of their original contents, and also articles, some of them greasy, not belonging to plaintiff or his wife, coal, and pieces of earth or mud. The contents of the trunk were mussed, and some of them stained and greased and spotted with mud. In January, 1904, a claim, which reads: "I herewith present my claim for damages sustained by Mrs. Withey and myself in your wreck of December 26, amounting to \$386.25,"—with a list of articles and figures, was presented to defendant, and later plaintiff began this suit. The action is *assumpsit*. Liability of defendant is predicated upon the contract of carriage, the nonperformance of the contract by the defendant, and the injury of the baggage. No contention was made in the court below respecting the negligence of the defendant and resulting liability to pay plaintiff the damages he sustained.

The case comes here upon twenty-five assignments of error, which may be grouped, and which counsel for defendant has grouped and discussed, under four propositions. Stating these propositions as they are understood, and in the order in which they will be discussed, they are: (1) That plaintiff was not entitled to recover (as he did) for destruction of and damages to articles intended for the sole use of the infant; (2) that he was not entitled to recover (as he did) for loss of and damages to the articles of jewelry belonging to his wife; (3) that

the court improperly admitted opinion evidence as to the amount or sum of the damage to particular articles; and (4) that the court should have required, upon defendant's application, production of the damaged articles, so far as they could be produced, for exhibition to the jury.

1. It is contended that, because no fare was paid for the infant,—because it was carried free,—the defendant "was a gratuitous bailee as to the baby, and the transportation as baggage of articles intended solely for its use was a mere incident to that gratuity;" and the case of *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499, is relied upon to sustain the contention. In that case the form of action was, as it is here, *assumpsit*. The plaintiff, on a passage from Saginaw to Detroit upon defendant's road, lost as he claimed, his trunk, containing personal effects. It appeared that both plaintiff and his trunk were being carried, not for hire, but gratuitously. It was held that, in the absence of a contract for carriage, damages for loss of the baggage could not be recovered in *assumpsit*. The rule in the case cited does not control the present case. Even if it can be said that the child was carried free, a point which we do not consider, it by no means follows that the articles in question, the child's wearing apparel, were carried free. The clothing of the infant was the property of the father, and was in the trunks of the father, with whom the defendant had made a contract of carriage, both of his person and his baggage. While it is asserted on the part of defendant that it had the right to charge for the carriage of the infant, it is not claimed that under its rules and practice it does charge anything for the carriage of infants of the age of plaintiff's child. Nor do we base our determination at all upon the fact, which appears in the record, that the infant occupied for hire a seat in the parlor car during the trip. What we hold, and what we think the correct rule of law, is that a father paying full fare for himself, traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract for carriage for the loss or injury of articles bought and used for the child, which articles are a part of, and packed and carried with, his baggage, and upon the ground that such articles are the property of the parent, in his possession, and properly a part of his proper baggage. *Prentice v. Decker*, 49 Barb. 21; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618; *Wheeler v. St. Joseph & W. R. Co.* 31 Kan. 640, 3 Pac. 297; *Smith v. Abair*, 87 Mich. 62, 63, 49 N. W. 509.

2. We have before us no question concerning the right of the husband (plaintiff

to recover for injuries to the ordinary wearing apparel of the wife. The contention relates entirely to articles of jewelry, lost or injured, which were not given or furnished by her husband. It is defendant's position that, these being the separate and sole property of the wife, the husband, under the circumstances shown, could not recover for their loss or injury. In his charge the court said to the jury: "Some question has been raised by defendant's counsel to the effect that the articles contained in this trunk which had been previously given to the plaintiff's wife by others, and which were taken by her to Monroe on this trip as a part of her wardrobe, ought not to be included in your consideration. These articles are the cameo pin set in pearls, the silk liberty scarf, the set of gold beads, the emerald wreath set in pearls, and perhaps some other articles. But after some consideration (although not without considerable hesitation) I have concluded, under the circumstances admitted in this case, to submit that question to you in relation to these articles thus enumerated. I feel somewhat certain that the husband had such special property in these articles by reason of his possession that he would be entitled to recover their value, if lost, notwithstanding they were the special property of the wife. I therefore instruct you that . . . these articles, which were the wife's property, . . . and which you believe, under the evidence, were either lost or damaged, shall be taken into consideration by you in fixing the amount of damages sustained by the plaintiff. . . ." Error is assigned upon this portion of the charge, and is also assigned upon the refusal of the court to give defendant's eleventh request to charge, which was: "The plaintiff is not entitled to recover for the loss of, or damage to, any article belonging to his wife which had not been purchased with funds furnished by the plaintiff." Of this request it is said by counsel for plaintiff that "the defendant contends that in no case can any recovery be had, unless the plaintiff establishes an absolute title to the articles, notwithstanding that the plaintiff was the bailor and the defendant was the bailee, and undertook with the plaintiff to carry the trunks safely."

We do not so understand the position of counsel for defendant. No one will contend that in all cases a bailor must show absolute title to the thing bailed in order to maintain an action against the bailee for injury to the subject of the bailment. The question in this case is whether, under the circumstances shown, plaintiff, with respect to the particular chattels, had the interest necessary to enable him to maintain this action. I have been of opinion that upon the facts 1 L.R.A. (N.S.)

and the declaration, which avers a contract between the parties to transport plaintiff's baggage, of which baggage the articles in question are averred to have been a portion, it must be held that the plaintiff cannot recover the value of the particular property of the wife. My brethren who sat in the case are agreed, and there is reason and authority to sustain them, that the verdict and judgment are right, and that the recovery may be and should be sustained upon the ground that the contract to carry plaintiff and his wife and their common baggage was a contract with the plaintiff. *Jacksonville, St. A. & H. River R. Co. v. Mitchell*, 32 Fla. 77, 21 L. R. A. 487, 13 So. 673; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575. Analogous decisions are those in *Blanchard v. Page*, 8 Gray, 281; *Moran v. Portland Steam Packet Co.* 35 Me. 55. See also *Hutchinson on Carriers*, § 724. It is not claimed that the articles in question were not proper baggage for the wife. In a sense, the question presented is one of general commercial law, in view of which I yield my own opinion to that of the majority.

3. It is necessary in considering this proposition, for a better understanding, to make further reference to the record. The plaintiff, his wife, and others were sworn as witnesses for the plaintiff. Each of them had made some examination of the articles about which they gave testimony. Excepting plaintiff's wife, each was permitted over objection to estimate in dollars the amount of the injury described by them, or to state the injury in fractions of the value before injury, as that the damage was one fourth or one half of the original value of the articles, or that for the purpose for which they were purchased they had no value. The witnesses Smith, Schwartz, Remington, and Berry, called by plaintiff, were treated by counsel as expert witnesses, and each gave answers to hypothetical questions. It is evident that whether included in the hypothetical question or not, and it usually was, the answer of each witness as to amount of damage was based in part upon a personal inspection of the injured article.

A witness with twenty-five years' experience in dry goods was asked by plaintiff's counsel:

Q. Assuming that that gown was made late in the fall of 1903 by Miss Remington, cost \$85 when delivered, and was worn the second time, that it had been through a railroad collision, been to the cleaner's, and left after cleaning in the shape it is now, state what in your opinion would be the value of that gown in the present condition for Mrs. Withey's use and wear.

A. The gown having been injured, the purpose for which it was made is absolutely destroyed. A gown which is made for a dressy dress, to be worn as a dress for dress occasions, when it has become soiled or spotted or injured so that it shows, its value for that is lost entirely; and it is not a gown that is adapted for ordinary uses. She did not buy it for a house dress or street dress. Its value is gone. . . . I should not consider it had any money value for the purposes for which it was made. It has lost it by its damage.

Another witness, the dressmaker who made the gown, testified that in her opinion it was damaged one half, or \$42.50. These examples acquaint us fairly with the grounds of the exceptions taken. As to two rather expensive dresses, an opera cloak, and the overcoat of the plaintiff, the injuries complained about were principally to the appearance of the garments, rather than injuries to the fabrics. Each witness had some knowledge, gained from observation, which the jury had not and could not have, except by seeing the injured property, although the witnesses attempted to describe conditions as they saw them.

Counsel for appellant contends that, whatever experience these witnesses may have had in their respective lines, and however competent they may have been to state cost and quality and to describe the injury, it was not competent to state to the jury an opinion of the amount of the damage expressed in dollars. It is a rule of the law of evidence that upon the question of the existence or nonexistence of a fact in issue, whether a main fact or an evidentiary fact, the opinion of witnesses is not admissible. What a witness has seen or heard or felt, he knows, and it is for him to put before the jury the facts as he has perceived them by his senses, and for the jury to form an opinion concerning the fact in proof of which the evidence is offered. But there are exceptions, apparent or real, to the rule which excludes opinion evidence. A real exception is that class of opinion evidence which is called expert evidence. The apparent exceptions are not easily classified. They are sometimes treated as opinions admitted under exceptions to the rule, sometimes as matters of fact. The practical test for receiving or rejecting opinions of lay witnesses seems to be that, when the jury can be put into a position of equal vantage with the witness for drawing them,—when by the mere words and gestures of the witness the data he has observed can be so represented that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion,—he may

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not as a rule give an opinion or estimate Wigmore, Ev. § 1924. It was said by Justice Campbell, in *Evans v. People*, 12 Mich. 27, 34: "Experience has shown that many cases exist in which it is impossible, by any description, however graphic, to explain things so as to enable anyone but the witness himself to see or comprehend them as they would have been seen or comprehended, could the jury have occupied his position of observation. In such cases the witness must give his own impressions and conclusions, or his narrative is useless; adding, however, as full explanations as the nature of the case will admit, so that his capacity and truthfulness may be tested as far as practicable." In this state, testimony concerning the amount of damage, largely matter of opinion, has been held properly received in cases not to be distinguished in principle from the one at bar. *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306; *Enright v. Hartsig*, 46 Mich. 469, 9 N. W. 496. In *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 28 N. W. 159, cited and relied upon by plaintiff in error, the evidence held to have been wrongly admitted was not opinion as to value of premises merely, but opinion or judgment as to compensation to be awarded for taking premises in condemnation proceedings.

The court carefully instructed the jury. He said in part: "Several witnesses have been permitted to testify as to their opinions as to value both before and after the alleged injuries to these articles. But I instruct you that you are to assess the plaintiff's damages according to your own best judgment of the evidence and as to the injury done to them; and the evidence that has been thus received may be followed or not, as you find that it is true or not, under the evidence as to the amount of damages the plaintiff has actually sustained. If you believe from the evidence in the case that the statements and estimates made by any witness are not warranted, you need not follow such statements. If you believe that they are warranted, you may, to the extent that you find they are warranted by the evidence. In other words, the whole question of the amount of damages sustained by the plaintiff is for you to determine, and you alone, from the evidence, and you are not to be governed or concluded by the opinions of anyone else unless you believe such opinions to be well founded and based upon the evidence in the case."

A subpoena requiring in terms that plaintiff and his wife produce in court such of the damaged articles as were in their possession, was taken out on the part of defendant, and with a witness fee and an additional fee was

served upon both the plaintiff and his wife. The record discloses that a considerable amount of the most expensive clothing could have been, without evident inconvenience, so produced, including plaintiff's overcoat, and the opera cloak and two dresses belonging to his wife, the value of which it was claimed had been diminished \$127.50 by stains, marks, and other injuries to the appearance of the garments received in the collision. None of the clothing was produced, and, upon the motion of defendant's counsel to compel its production, counsel for plaintiff announced that it would not be produced. At different times during the trial the following, with other similar, language was used by the court: "At present I think it is a matter in the discretion of the court to require it, and, being a discretionary matter, I do not feel like exercising it against the wish of the party to bring personal chattels into court for exhibition to the jury." "I do not think it is within the province of the court, as I have already said, to compel the production of such evidence." "If the party does not care to produce these articles, but chooses rather to have oral testimony as to their condition received, instead of the articles themselves, I think it is a matter that rests with the party, and not with the court." And in the charge to the jury it was said: "Something has been said about the refusal of the plaintiff to produce before you the articles alleged to have been injured or damaged. I think, perhaps, I ought to say something about that to you in these instructions. I have already said in your presence that to produce the articles or not produce them was a privilege belonging to the plaintiff, and to him alone, concerning which the court under the circumstances had no right to interfere. Yet, if it should appear to you by the evidence that it would be practicable to produce those articles in court, the fact that there was a refusal to produce them is a matter you may consider as bearing upon the credibility of the witnesses." These rulings and this instruction are before us for review. We shall assume that the learned trial judge did not mean to be understood as denying the power of the court to order the production of the garments. *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, 35 Am. St. Rep. 561, 54 N. W. 757. Treating the rulings made as an exercise of judicial discretion, we are not impressed that the discretion was abused. The witnesses for defendant were permitted before the trial inspection of the principal articles of apparel claimed to have been injured, and we do not think it is clear

that the inspection which the jury might have made, if the garments had been produced in court, would have aided them.

Judgment is affirmed.

Petition for rehearing denied November 6, 1905.

KENTUCKY COURT OF APPEALS.

LOUIS LEVY, Appt.,

v.

LOUISVILLE GUNNING SYSTEM.

(.... Ky.)

1. Sign—lease of wall space—revocation.

The right to display a sign on the walls of a building, given in writing for a definite time for a valuable consideration, is not revocable at will.

2. Same—lease to another—effect.

Failure to mention in a lease of a building a right which has been given to a third person to display a sign on its wall does not amount to a revocation of the right.

(November 23, 1905.)

APPEAL by plaintiff from a judgment of the First Division of the Chancery Branch of the Circuit Court for Jefferson County in favor of defendant in a suit to enjoin interference with an advertising sign. Affirmed.

The facts are stated in the opinion.

Messrs. Caruth, Chatterson, & Blitz for appellant.

Mr. Jacob Solinger, for appellee:

The instrument was a lease.

O. J. Gude Co. v. Farley, 28 Misc. 184, 58 N. Y. Supp. 1036; *Reynolds v. Van Beuren*, 155 N. Y. 120, 42 L. R. A. 129, 49 N. E. 263; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; *Van Ohlen v. Van Ohlen*, 56 Ill. 528.

It is not revocable at the will of the lessor.

Jones v. Fowler Drug Co. 27 Ky. L. Rep.

Case Note.—The decision in the above case is not made entirely with reference to the doctrine of executed licenses, or the revocability of mere licenses which have been granted for a consideration, or under which expenses have been incurred. It will be noticed that the court is dealing with a written instrument, and does not admit that it is merely a license, but says it is "in the nature of an easement as well as a license." Nevertheless, the court proceeds to cite authorities on the question of the revocability of licenses for privileges in real property. The right to revoke, at pleasure of the licensor, a parol license from one lot owner to another for the maintenance of a drain, was upheld in *Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497, 27 N. E. 399, and

558, 85 S. W. 721; Pevey v. Skinner, 110 Mass. 129; Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; 18 Am. & Eng. Enc. Law, 2d ed. p. 1144; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Batchelder v. Hibbard, 58 N. H. 269; Risien v. Brown, 73 Tex. 135, 10 S. W. 661; McLeod v. Dial, 63 Ark. 10, 37 S. W. 306; Boone v. Stover, 66 Mo. 430; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Davis v. Townsend, 10 Barb. 333; Willoughby v. Lawrence, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356; Van Ohlen v. Van Ohlen, 56 Ill. 528; Hall v. Boyd, 14 Ga. 1; Morton Brewing Co. v. Morton, 47 N. J. Eq. 158, 20 Atl. 286.

The second lease did not amount to a revocation of the prior privilege.

Dillion v. Crook, 11 Bush, 321; O. J. Gude Co. v. Farley, 28 Misc. 184, 58 N. Y. Supp. 1036.

Settle, J., delivered the opinion of the court:

Heissman is the owner of a business house and lot, known as No. 929 West Broadway, in the city of Louisville. By the following writing she granted to the "2 Jakes Sign Company," for one year from June 20, 1903, with the option of four years in addition, the right to use the west wall of the building for advertising purposes:

The 2 Jakes Sign Co., Louisville, Ky.
Wall Space. June 20th, 1903.

In consideration of four (\$4.00) cash dollars payable in advance, the receipt of which

is hereby acknowledged, I, the undersigned lessor, hereby rents to lessee the entire west wall of my building located at 929 West Broadway St. for advertising purposes from June 20th, 1903, to June 20th, 1904, and for the sum of one dollar additional, the receipt of which is hereby acknowledged, I grant them the option of renewal of said lease for a period of four years at five dollars per annum after June 20th, 1904. In case said space should become obstructed to view by building, this contract shall, at the option of the lessee, become void, and lessor agrees to rebate rent *pro rata* for its unexpired term. M. Heissman, Owner.

W. Market Street.
Heissman, Lessor.

Accepted June 20th, 1903.

2 Jakes Sign Co.,
by A. L. Gribble.

Appellee, the Louisville Gunning System, as the successor of the "2 Jakes Sign Company" in the advertising business, became the assignee of its right to the use of the west wall of the Heissman building for advertising purposes and of the option as to the four additional years granted by the foregoing instrument of writing. Pursuant to this option, appellee, on the 11th of June, 1904, demanded and received of M. Heissman a writing granting to it the right to use for advertising purposes the west wall of her building for one year from June 20, 1904, with the option, for a like considera-

the annotation to that case examines and analyzes the great number of cases on the question of the revocability of a license to maintain a burden on land after expense has been incurred in creating the burden. The weight of authority, as shown by the comparison of the numerous cases on the subject, is that a parol license can never impose an irrevocable burden on land, which would be, in effect, to create an easement or estate; and that can only be done by deed or writing conforming to the statute of frauds; also, that the license cannot become irrevocable on the doctrine of estoppel, because of the absence of any element of fraud, where a person has proceeded to expend his money on the faith of what he knows to be merely a license. The same doctrine is followed in Ewing v. Rhea, 37 Or. 583, 52 L. R. A. 140, 82 Am. St. Rep. 783, 62 Pac. 790, denying that the mere acquiescence in the expenditure of money for an irrigating ditch will estop one who purchased the land with knowledge of the ditch from revoking the license under which it had been constructed. Substantially the same is held in Hicks Bros. v. Swift Creek Mill Co. 133 Ala. 411, 57 L. R. A. 720, 91 Am. St. Rep. 38, 31 So. 947, where a licensor was held to have the right to revoke a parol license for a dam 1 L.R.A. (N.S.)

and ditch, notwithstanding large expenditures had been made under the license.

The distinction between a mere license and a license which is in the nature of an easement is furnished in Chicago & I. Coal R. Co. v. Hall, 135 Ind. 91, 23 L. R. A. 231, 34 N. E. 704, where a license to enter upon land for railroad purposes, with an agreement to pay its value, was held to be irrevocable.

In Goddard on Easements, p. 90, it is said: "A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not."

In LEVY v. LOUISVILLE GUNNING SYSTEM the instrument obviously was intended to create something more than a license. It was a written contract for a consideration, giving a right for a definite time to use the wall of a building for a certain purpose. If the writing was sufficient, under the statute of frauds, to create any interest in real estate, it was in the nature of a lease, since it was for a specified use of a portion of real estate for a definite period. As the court says nothing about the insufficiency of the instrument under the statute of frauds, it may be assumed that it was not defective in that respect.

tion, of continuing such use for the same purpose from year to year, for the four succeeding years. The writing last mentioned is as follows:

The Louisville Gunning System,

Louisville, Ky. June 11, 1904.

In consideration of five (\$5.00) dollars in hand paid, the receipt of which is hereby acknowledged, and in repainting Beechman's sign as it is at present, M. Heissman, the undersigned lessor, having full right and authority in the premises, hereby leases to the Louisville Gunning System (Incorporated), lessee, its successors and assigns, the entire west wall of the building and premises known as 929 West Broadway street, for advertising purposes, from the 20th day of June, 1904, to the 20th day of June, 1905. The lessee is hereby granted the privilege of necessary access through and upon the premises, and shall have the option of continuing this lease for a like consideration from year to year for the four succeeding years. Should the view of said space become in any way obstructed, this lease may, at the option of the lessee, be terminated; and in such case the lessor shall refund *pro rata* the rent for the unexpired term. The lessor warrants the title to said leasehold for the term herein mentioned.

M. Heissman,

Owner, Tenant, Agent,

Address 1744 Broadway. by A. Marcus.
Accepted.

The Louisville Gunning System,

by B. G. Gribble.

At the time this instrument of writing was executed, the building therein mentioned was unoccupied, but on the 16th day of August, 1904, Mrs. Heissman, also in writing, leased the property to Hilmer Ehrman for a term of five years, to be used "as a wholesale and retail liquor house, and living rooms above." In September, 1904, Ehrman sublet the property to appellant, Louis Levy, for the same use. Appellant took possession of the property in September, 1904, and soon after doing so obliterated from the west wall appellee's sign, advertising "Edinger's flour," and on the same space placed his own sign, which appellee in turn destroyed by repainting over it the words "Edinger flour," whereupon appellant again painted his sign over the "Edinger flour" and immediately instituted this action in equity to enjoin appellee from interfering with his sign or further using the wall for advertising purposes.

The answer of appellee contained a general denial in one paragraph, and in another it was alleged that it had leased from the owner of the property, prior to appellant's 1 L.R.A. (N.S.)

and his assignee's lease, the wall in controversy for advertising purposes, for which it paid a valuable consideration. The answer interposed the further defense that appellant and his assignor, at the time of leasing the property of Heissman, had notice of the right of appellee to the use of the west wall for advertising purposes. By an amended answer appellee set out with greater particularity the terms of the writing executed to it by M. Heissman June 11, 1904, filed same as a part of the answer, and averred that, after its execution by Heissman and delivery to appellee, it (appellee) took and retained possession of the wall in controversy, and went to considerable expense, in painting advertisements thereon; that appellee's right to the use of the wall was not revoked or affected by the leasing of the property to appellant's assignor, or the subletting of the same by the latter to appellant. The amended answer also relied on the knowledge on the part of appellant, when he leased the building, of appellee's right to the use of the wall, and of the expense it had incurred in painting advertisements thereon, as an estoppel and bar to the action.

The testimony used upon the trial of the case was, by the consent of the parties, presented in the form of affidavits. The chancellor, finding no merit in appellant's complaint, dissolved the temporary injunction and dismissed his petition. It is appellant's contention that the writing under which appellee asserts right to the use of the wall for advertising purposes is not a lease, but that it merely granted it a license to use the wall; that such a license may be revoked at the will of the licensor; and that it was revoked by the licensor when she leased the property to appellant's assignor and failed to mention in the lease the licensee's right to the use of the wall.

The form of the writing, the use therein of such words as "lease" and "rent," the fact that it is for a definite period and a recited consideration; that it provides for an abatement of rent in case of an obstruction of the wall by other buildings, also for "necessary access through and upon the premises" by appellee, and that "the lessor warrants the title to said leasehold for the term herein mentioned," demonstrate that the writing was intended as a lease. But, whether it be entitled a lease or license, it is not revocable at the will of the lessor. The right it confers is in the nature of an easement as well as a license, and a written contract for an easement in real property, founded upon a consideration and executed by the owner, gives a greater right than a mere revocable license. We do not think the fact that the privilege granted appellee

by this writing was not reserved or mentioned in the writing by which the property was subsequently leased by the owner to appellant's assignor, Ehrman, amounted to a revocation. Upon the other hand, that it was not mentioned in the lease to Ehrman furnishes some evidence that it was not the intention of the lessor to revoke it. In 18 Am. & Eng. Enc. Law, 2d ed. p. 1144, it is said: "The general rule is that if there is a license simply, not coupled with an interest in the land, it may be revoked at any time, even though it is under seal, and, according to some cases, though founded upon a consideration; but the weight of authority is against this latter view." "Licenses are usually divided into executory and executed licenses, a distinction which is of importance as bearing on the right of the licensor to revoke the license. A license may, if executed in proper form, take effect as a grant as to some things and as a mere license as to others." 7 Wait, Act. & Def. 202. "It is not essential that the interest should be in the thing to which the right given relates, or on which it is to be exercised. All that is necessary is that the licensor should have conferred, or that the licensee should possess, some estate or interest which depends on the continuance of the license, and cannot be enjoyed if it is terminated. It is not necessary that it should be an absolute interest." 7 Wait, Act. & Def. 209; *Jarvis v. Satterwhite*, 2 Ky. L. Rep. 436; 3 Kent, Com. 452; *O. J. Gude Co. v. Farley*, 28 Misc. 184, 58 N. Y. Supp. 1036; *Dillon v. Crook*, 11 Bush, 321.

It appears from the record that appellant and his assignor, Ehrman, had notice of the right of appellee to the use of the wall for advertising purposes when they leased the property, and that appellee had gone to expense in placing its advertisements on the wall, so in this view of the matter appellant is not on solid ground for asking equity. *Pevey v. Skinner*, 116 Mass. 129. We think the great weight of authority is to the effect that, under most circumstances, a naked license may be revoked at the pleasure of the licensor, but an executed license for a term and for a consideration cannot be revoked; and the proof fails to show that even an attempt to revoke the license to appellee has been made by the licensor in this case. We do not find that the authorities relied on by counsel for appellant, which declare a mere license may be revoked at any time, hold such an instrument as that relied on by appellee revocable at the will of the licensor.

Regarding the conclusions expressed in the able opinion of the chancellor as sound and just, the judgment is affirmed.
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KENTUCKY COURT OF APPEALS.

NANNIE SOPER, Appt.,

v.

IGO, WALKER, & CHENAULT.

(.... Ky.)

Enticing child—action by mother.

A woman residing with her husband cannot maintain an action for the enticement from home of her minor child.

(November 29, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Madison County in defendants' favor in an action brought to recover damages for the enticement from home of her minor child. Affirmed.

The facts are stated in the opinion.

Mr. Grant E. Lilly for appellant.

Mr. J. A. Sullivan, with Mr. J. Tevis Cobb, for appellees:

Since the father is required to maintain, educate, and support his children, he is entitled to the benefit of their labor.

1 Bl. Com. p. 453; 2 Kent, Com. 193; *Louisville & N. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124; *Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; 21 Am. & Eng. Enc. Law, p. 1040.

The right of action in such cases is not founded on the parental relation, but on the technical relation of master and servant; the recovery being on the theory of the loss of services.

Trimble v. Spiller, 7 T. B. Mon. 394, 18 Am. Dec. 189; 21 Am. & Eng. Enc. Law, p. 1044; *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403.

Case Note.—The parent's right of action for the enticement of a minor is based on the ground of loss of services; and, hence, the action must be maintained by the parent entitled to such services. *Wood, Mast. & S. p. 23*. See also *Kenney v. Baltimore & O. R. Co. ante*, 205.

The rule that, in the absence of peculiar circumstances not involved in *SOPER v. IGO, WALKER, & CHENAULT*, the father is entitled to the services of his minor children, and must maintain actions based on the loss of such services, is well settled.

Schouler on Domestic Relations, § 254, says: "At the common law, a mother has no implied right to the services and earnings of her minor child, not being bound as a father would be for the child's maintenance. Nor have her rights or liabilities in these respects been usually regarded as equivalent to those of a father, even where she is the only surviving parent." And in § 245 the same author says: "The topic of parental custody is one of absorbing importance in England and America, and its principles have re-

Nunn, J., delivered the opinion of the court:

This is an appeal from a judgment of the lower court sustaining a demurrer to the petition of appellant. The petition is as follows: "The plaintiff says that she is a married woman, and her husband, Charles Soper, is now living with her; and they were married in the year 1880. By this marriage they have several children, one of whom is named Thomas Daniel Soper, hereinafter called 'Dan.' On the 2d day of June, 1903, this infant boy, then aged about eighteen years, was induced, persuaded, enticed, helped, aided, and assisted by certain designing persons to leave the home, bed, and board of this plaintiff, all of which was against the knowledge, will, and consent of herself and her husband, and the said Dan did, by reason of the said wrongful acts, leave the home, bed, and board of plaintiff, against her will, knowledge, and consent, and against the knowledge, will, or consent of her husband, by reason of which this plaintiff has lost the society and companionship of said infant, and has suffered much mental distress and pain therefrom. Her said son has been kept by these defendants since said day in June until the present time against their will and consent, and said defendants and each of them knew that the said Dan had been induced, enticed, persuaded, helped, aided, and assisted away from this plaintiff's home without their knowledge, and against the will and consent of herself and her husband, and, knowing this, the said defendants wrongfully kept and harbored said Dan in conjunction with C. H. Chenault, and gave him employment, all of which was against plaintiff's and her husband's will and consent, which wrongful harboring and keeping deprived and now deprives this plaintiff of his society and companionship, and from all of which she has suffered much mental distress and pain, and has expended money to recover the

possession of her said son, in all to the sum of \$5,000, for which she prays judgment, and for all proper relief."

The only question involved on this appeal is whether the mother can maintain an action like this when her husband and the father of her child is alive and resides with her. Ever since the marriage relation existed, the law has recognized the husband as the head of the family and enjoined upon him the duty of maintaining, educating, and protecting his children, and in return for these duties he is entitled to their services; and it has always been the law that, if anyone wrongfully abducts from the father one of his children, he can maintain an action against the wrongdoer for damages, based upon the principle that the father has the right to the services of his child, it matters not whether the child renders such services, and, having such a right upon which to base his action, he is not confined in a recovery to the loss of services alone, but may recover damages for injury to his feelings and the loss of the companionship of his child. We have been unable to find any case where a mother has been permitted to recover where her husband was alive and residing with her. It is true her suffering may be as great or greater than that of her husband in being separated from her child, but the law has never recognized her right to the services of the child as against the right of the husband so long as they are living together. It is contended that they both should be permitted to sue and recover,—the wife for her mental suffering, and the husband for loss of service and also for mental suffering. This appears plausible; but the rule against it has existed for so long that it should not be changed, except by legislative enactment. If this court should sustain appellant's contention, and change the rule, and permit the appellant to recover in this action, it would, in effect, permit not only the mother, but the brothers and sis-

ceived the most ample discussion in the courts of both countries. The fundamental principle of the common law was that the father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture."

Rodgers on Domestic Relations, § 531, in speaking of the right of a parent to recover for injury to a child, says: "The injury must be sued for generally by the father, as he is the natural guardian by law of his infant children; and while he lives, being such, the mother has no right of action in her own behalf for an injury to her infant."

In *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403, where it was held that a widow cannot recover for an injury to her child, which occurred prior to the death of the

father, the court, in so holding, stated that, "at common law, the mother has not, like the father, a legal right to the services of a minor child; and there is consequently no ground for implying the relation of master and servant between them."

In *Jones v. Buckley*, 19 Ala. 604, *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339, and *Simpson v. Buck*, 5 Lans. 337, it was held that a mother cannot recover for the services of a minor child, without showing either that the father is dead, or that he has abandoned the child, or that she is entitled to his services as guardian.

In an action by a mother for damages for loss of services of an infant child, it must appear that, at the date of the accident, the child was in her service. *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75.

ters, of the child each to recover damages for mental suffering and loss of companionship. In the case of *Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98, the court said: "The parent is bound to maintain, to protect, and to educate his children, and, in return, he is entitled to their obedience and service. It is upon this principle he has been allowed to maintain an action for a loss of service, occasioned by beating or imprisoning his child, . . . and upon the same principle he must have a right to recover for a loss of service occasioned by the abduction of his child. The right to maintain an action for injuries of this sort no doubt belongs exclusively to the father during his life; but after his death, the mother, being the only parent, is, in contemplation of law, guardian by nature to the children, in which relation she is bound to them by the same duties, and has in them the same rights, as the father during his life." See also *Trimble v. Spiller*, 7 T. B. Mon. 394, 18 Am. Dec. 189, and *Union News Co. v. Morrow*, 20 Ky. L. Rep. 302, 46 S. W. 6.

Wherefore the judgment is affirmed.

KENTUCKY COURT OF APPEALS.

ROCHESTER GERMAN INSURANCE
COMPANY, Appt.,

v.

PEASLEE-GAULBERT COMPANY.

NATIONAL FIRE INSURANCE COM-
PANY, Appt.,

v.

SAME.

PACIFIC FIRE INSURANCE COMPANY
et al., Appts.,

v.

LOUISVILLE LEAD & COLOR COMPANY.

(.... Ky.)

1. Contract—custom—"noon."

In determining the meaning of the word "noon" in a contract, evidence is admissible to prove the prevailing custom as to the

Case Note.—The above case is of peculiar interest because of the fact that it recognizes the "standard" time of the railroad systems as the time which may govern in determining the legal rights of parties. It seems to be the first case to do this, though it is not at variance with the decisions in *Jones v. German Ins. Co.* 110 Iowa, 75, 46 L. R. A. 860, 81 N. W. 188, in holding that it is for the jury to decide whether there is a known and established custom at a certain place, when speaking of noon or of a certain hour of the day, to mean standard time. That case, like that of *ROCHESTER GERMAN INS. CO. v. PEASLEE-GAULBERT CO.*, was in respect to the time when an insurance policy expired under a provision that it should ter-

minate at "noon." In both cases it appeared that standard time was in customary use; but that sun time was also used by some people. The two cases are, therefore, agreed in principle, though in one the jury found that standard time was meant by the policy, and in the other that it was not. In the light of these decisions the question depends entirely upon the existence of a custom sufficiently general and uniform to make it evident that the parties to the contract must have intended to be governed by it.

2. Insurance—termination of risk—noon.

The word "noon" used to denote the beginning and termination of the risk under an insurance policy will be interpreted by standard, and not by sun, time, where the use of the former system of reckoning time has been the prevailing custom in the community for a long period.

3. Contract—interpretation—jury.

The question whether or not a system for reckoning time in a particular locality has been adopted by such universal custom as to raise the presumption that a particular contract was made with reference to it is for the jury.

4. Insurance—property in peril at termination of risk.

The beginning of a fire in a building which contains insured property, before the policy expires, will, if it continues to burn until it destroys the property, render the insurer liable for the loss, although the property is not actually destroyed before such expiration; but the same rule does not apply in case the property is merely imperiled at the time of the expiration of the policy, by a fire in an adjoining building, although it eventually reaches and destroys the property.

(June 15, 1905.)

APPEALS by defendants from judgments of different divisions of the Common Pleas Circuit Court for Jefferson County in favor of plaintiffs in actions brought to recover the amounts alleged to be due on certain fire insurance policies. Affirmed in part. Reversed in part.

The facts are stated in the opinion.

Messrs. Gibson, Marshall, & Gibson, Bodley, Baskin, & Flexner, and A. S. Brandeis, for appellants:

The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in business will not be recognized.

26 Am. & Eng. Enc. Law, p. 10; *Henderson v. Reynolds*, 84 Ga. 162, 7 L. R. A. 327, 10 S. E. 734; *Curtis v. Marsh*, 3 Hurlst. &

minate at "noon." In both cases it appeared that standard time was in customary use; but that sun time was also used by some people. The two cases are, therefore, agreed in principle, though in one the jury found that standard time was meant by the policy, and in the other that it was not. In the light of these decisions the question depends entirely upon the existence of a custom sufficiently general and uniform to make it evident that the parties to the contract must have intended to be governed by it.

In harmony with these decisions, also, is the determination in *Nebraska* that the presumption is that common time is intended, where there is nothing to show that a different mode of measuring the time has been in

N. 866; *Ex parte Parker*, 35 Tex. Crim. Rep. 14, 29 S. W. 480, 790; *Phoenix Ins. Co. v. Mier*, Sup. Ct. of Ohio; *Walker v. Protection Ins. Co.* 29 Me. 320; *Gordon v. Cann*, 68 L. J. Q. B. N. S. 434.

Words are to be understood in their plain and popular meaning.

Greenl. Ev. § 278; *Eaton v. Smith*, 20 Pick. 150; *Brown v. Brown*, 8 Met. 573; *Paull v. Lewis*, 4 Watts, 402; *Willmering v. McGaughey*, 30 Iowa, 205, 6 Am. Rep. 673.

Evidence cannot expressly or by implication contradict plain terms of the contract.

2 *Jones*, Ev. 472; *Lombardo v. Case*, 45 Barb. 96; *Globe Mill Co. v. Minneapolis Elevator Co.* 44 Minn. 153, 46 N. W. 306; *Parkdale v. Brown*, 1 Nott & M'C. 517, 9 Am. Dec. 720; *Allen v. Dykers*, 3 Hill, 593; *Barlow v. Lambert*, 28 Ala. 710, 65 Am. Dec. 374.

It is against the policy of law to permit local usage and custom to change the universal meaning of the word.

Stoeber v. Whitman, 6 Binn. 416; *Barnard v. Kellogg*, 10 Wall. 385, 19 L. ed. 987; *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657; *Harper v. Pound*, 10 Ind. 32; *Bolton v. Colder*, 1 Watts, 360; *Strong v. Grand Trunk R. Co.* 15 Mich. 206, 93 Am. Dec. 184; *Paull v. Lewis*, 4 Watts, 402; *Noble v. Durell*, 3 T. R. 271.

Where a policy insures against actual loss during a fixed period, there can be no recovery except for so much of the loss as was actually sustained during that time.

Lockyer v. Offley, 1 T. R. 252; *Knight v. Faith*, 15 Q. B. 649; *Howell v. Protection Ins. Co.* 7 Ohio, pt. 1, p. 284; *Coit v. Smith*, 3 Johns. Cas. 16; *Bill v. Mason*, 6 Mass. 313; *Peters v. Phoenix Ins. Co.* 3 Serg. & R. 25.

Messrs. Humphrey, Hines, & Humphrey, and *Trabue, Doolan, & Cox*, for appellees:

The courts will presume that parties use words in their "popular, rather than" their "technical, meaning."

general use; and that, therefore, when the return of a summons is to be made at an hour named, standard time, the summons should so state. *Searles v. Averhoff*, 28 Neb. 668, 44 N. W. 872.

In Georgia, however, the question has been determined as one of law, and the court held that the only standard of time in the computation of a day or the hours of a day, recognized by the law of Georgia, is the meridian of the sun; that the standard of time fixed by persons in a certain line of business cannot be substituted at will, by persons in a certain locality, for the standard recognized by the statutes of the state, as well as the general law and usage of the country. *Henderson v. Reynolds*, 84 Ga. 1 L.R.A. (N.S.)

Finnie v. Clay, 2 Bibb, 351; *Vance v. Marshall*, 3 Bibb, 150.

Where a word used in a written contract has a popular and a technical meaning, parol evidence of usage and custom is admissible to show which meaning was intended.

2 *Parsons*, Contr. 660; *Lawson*, Contr. § 383; *Greenl. Ev.* §§ 292, 295; *Browne*, Usages & Customs, 32; *Lawson*, Usages & Customs, pp. 367, 401, 405; *May*, Ins. §§ 173, 179a; *Joyce*, Ins. § 246; *Finnie v. Clay*, 2 Bibb, 351; *Vance v. Marshall*, 3 Bibb, 150; *Buckwalter v. Hutcherson*, 23 Ky. L. Rep. 2074, 66 S. W. 602; *Smith v. Wilson*, 3 Barn. & Ad. 728; *Lowe v. Lehman*, 15 Ohio St. 179; *Brown v. Byrne*, 3 El. & Bl. 702; *Coit v. Commercial Ins. Co.* 7 Johns. 385, 5 Am. Dec. 282; *Myers v. Sarl*, 30 L. J. Q. B. N. S. 9, 7 Jur. N. S. 97; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Newhall v. Appleton*, 114 N. Y. 140, 3 L. R. A. 859, 21 N. E. 105; *Rindskoff Bros. v. Barrett*, 14 Iowa, 101; *Robinson v. Fiske*, 25 Me. 401; *Hinton v. Locke*, 5 Hill, 437; *Astor v. Union Ins. Co.* 7 Cow. 202; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

Parol testimony as to the meaning of the word "noon" as used in insurance policies was properly admitted.

Jones v. German Ins. Co. 110 Iowa, 75, 46 L. R. A. 860, 81 N. W. 188.

Direct loss or damage by fire is any loss which, by an unbroken chain of causation, comes from a fire.

3 *Joyce*, Ins. §§ 2775, 2779; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 485, 65 N. W. 635; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297, 35 Am. St. Rep. 540, 33 N. E. 690.

A policy covers any loss which happens during its currency, or happens inevitably from a cause acting at the time of its expiration.

159, 7 L. R. A. 327, 10 S. E. 734. This was said in deciding when a legal day began and ended, in reply to the contention that, as the railroad or "standard" time was in use in all the cities and towns along the line of the railroads, that time should be observed by the courts instead of the meridian or sun time.

This decision was approved and followed in *Ex parte Parker*, 35 Tex. Crim. Rep. 12, 29 S. W. 480, 790, where the court said: "Certainly no reasonable objection can be urged against the recognition of true sun time as the correct time by which matters of this character, such as the meeting and adjournment of courts, should be regulated."

Lockyer v. Offley, 1 T. R. 252; Knight v. Faith, 15 Q. B. 666; Coit v. Smith, 3 Johns. Cas. 16; Howell v. Protection Ins. Co. 7 Ohio, pt. 1, p. 284; Peters v. Phenix Ins. Co. 3 Serg. & R. 25; Meretony v. Dunlop, 1 Park, Marine Ins. 51; 3 Joyce, Ins. §§ 2792, 2793 (note 309); 2 May, Ins. § 401.

O'Rear, J., delivered the opinion of the court:

The Peaslee-Gaulbert Company and Louisville Lead & Color Company are distinct corporations, but operating together a plant for the manufacture and sale of paints, oils, and so forth. The plant consisted of three buildings, located at Fifteenth street and Portland avenue, in Louisville. The buildings were separated by alleys, occupied by railroad tracks, but were connected by overhead bridges, with doors at their ends. Two of the buildings, one owned by the Peaslee-Gaulbert Company, known as the "Fifteenth Street Warehouse," and another owned by the Louisville Lead & Color Company, known as the "factory" building, were also physically connected, in addition to the bridges mentioned, by a belt canopy extending from one building to the other, and formerly used to shelter a belt operated from the factory building, so as to run a pulley and elevators in the warehouse building. It had not been used, though, for some time, and was left so that it afforded an opening from one building to the other, the canopy or chute constituting a sort of flue or vent. All the properties, including the contents of the Fifteenth street warehouse building, were insured against loss or damages by fire under a number of policies issued by various companies, including the policies sued upon in these actions. The policies are identical in terms. Two of the cases (National F. Ins. Co. v. Peaslee-Gaulbert Co., and Pacific F. Ins. Co. v. Louisville Lead & Color Co.) present the same sole question for decision on this appeal. The other case, Rochester German Ins. Co. v. Peaslee-Gaulbert Company, presents the same question and one other. Hence the appeals are heard and decided together, though coming from different branches of the circuit court.

The question for decision that is common to all the cases is the construction of the term "noon" contained in the clauses of the policies, which reads, "does insure [the insured] from the 1st day of April, 1901, at noon, to the 1st day of April, 1902, at noon." A fire occurred in the insured premises on April, 1902, by which all the insured property was totally lost. Whether the loss occurred before "noon" of that day is the question. The fire originated in the "factory" building at about 11:45 A. M., standard time. The alarm was turned in at the

fire department of the city at 11:59 A. M., standard time, according to the records of that department. The difference between central standard time, based upon the mean time of the 90th meridian west of Greenwich, and mean solar time at Louisville, is seventeen and a half minutes. So that at 11:45 A. M., standard time, it would be reckoned 12:02½ P. M., sun time at Louisville. In declaring upon the policies plaintiffs pleaded: "The plaintiff states that the word 'noon' contained in said policy, and at the time said policy was issued, had two meanings, largely dependent upon the community in which said word was used. One of these meanings was 12 o'clock midday by what is commonly called 'sun time,' and one was 12 o'clock midday by what is commonly called 'standard time.' Said fire occurred after 12 o'clock midday, sun time, and before 12 o'clock midday, standard time, as was in use in Louisville, Kentucky, where the property destroyed and damaged was situated. At the time said policy was executed and delivered the word 'noon,' as used in the city of Louisville, in business transactions, in making engagements, and in ordinary speech and writing, was understood to mean 12 o'clock midday, standard time, and such was the sense in which the parties to the policy sued on used said word in said policy." The contention of appellants is that the word "noon" has a fixed, certain, and universally understood meaning, having reference alone to the physical fact of the coincidence of the center of the sun's circle with a given meridian of the earth: that proof of custom cannot be admitted to alter or contradict plain, unequivocal words, when used in a written contract in their ordinary sense.

Authorities are abundant to the effect that words of well-understood meaning in their ordinary sense may, by the custom of a class, trade, or profession, have a peculiar and different meaning when used with reference to the custom or general dealing of such trade or profession, and evidence may be received to show such exceptional use and meaning. Tradesmen, artisans, and professionals of various callings give to certain ordinary words a meaning peculiar to their calling or trade, and in contracts may use such words altogether with reference to such terminology. It would be a miscarriage of justice not to construe such words as they were understood and used by the parties, as otherwise they would be held to have made a bargain which neither ever contemplated. But the proposition here is not to limit a word of common meaning to the use of a particular business sect, who, by its employment, have imparted to it a peculiar meaning, different from its general

one, when employed by them to express an idea or fact in the course of their business. On the contrary, it is that a word of most common use has come to have a general meaning, common to everybody, differing from its original meaning and therefore presumably used by the parties to a contract in its most common and general sense. The construction of words in a written contract is for the court, generally. If ambiguous, the meaning intended may be gathered by the aid of parol or other extrinsic evidence. Or, if used in a sense peculiar to some special calling or trade, as has been seen, the custom may likewise be shown, by parol, which has given the word its extraordinary meaning in the case. The word now under consideration had for a great many years only one meaning, which was undoubtedly the one contended for in the case by appellants. But for the last ten or fifteen years, as the court will take notice, the custom has grown to be well-nigh general throughout the country to give the word "noon" a slightly different meaning. Both meanings refer to the same fact, that is, midday. The division of time into days of twenty-four hours each is itself conventional. Nor has it been uniform always to divide it so that the day began at midnight. While it may be possible to divide the calendar year into days of exact equal length for all practical purposes, no clock has as yet been made that records accurately the apparent movement of the sun, or, strictly, the movement of the earth with respect to the sun, so that the relative position of those bodies is shown exactly day after day. As the coincidence of the sun with any given meridian of the earth varies daily, a clock or other timepiece which is not made to vary correspondingly—and none does that we know of—will not accurately record the fact of such coincidence probably more than twice in each year. It would be impracticable to attempt to apply to the ordinary affairs of life a system of marking time that had to depend upon difficult mathematical and astronomical calculations to determine the exact time, when time was an element of the fact to be determined. Instead, a system of mean or average time has been adopted always. It represents approximately by averages the relative positions of the sun and the earth's meridian. The names given to the system and its variations have been adopted by an extending of their use until by custom they have become general; words constructed to represent such divisions of time have had given to them a general meaning in keeping with their uses. Terms in contracts in which time is of the essence are construed according to 1 L.R.A. (N.S.)

the common or general meaning of the words. As is well known, words change in their meaning. This is because they come to be so frequently employed in a different sense from that of their former meaning that the changed definition comes to be the common one. Of these changes the courts must take notice, as they do judicially of all matters of common knowledge. When, however, a word is undergoing the change, its use in a contract may have reference to its former or later meaning. So it may be said to be ambiguous, having more than one meaning. The object of all construction being to arrive at the true intent of the parties to the compact, and it being the province of the courts to construe the language of written contracts, words of one meaning will be construed conclusively by the courts according to that meaning. But it would be unsafe and unjust to follow an ironclad rule of construction—that of single meaning—where it was commonly employed in different senses, even concerning the same subject. To put the court in the light of the situation in which the parties were when they entered into the contract, in construing such terms parol evidence ought to be admitted to show that the custom of that community was such, so general, and of such long standing and notoriety, that the parties may be presumed to have been controlled by it in framing the terms of their agreement. Probably no better example for the application of this course of construction will be found than in the cases at bar. Perhaps nothing entered more commonly into the affairs of life, every phase of it, than time. To know the time, and to act upon the means of such knowledge as if it were a practical certainty, is of the first importance in most of the transactions of daily life. A general custom adopted with reference to noting the hour means that in all walks it is acted upon tacitly as an accepted fact. So, although there is not, and never has been, a legal establishment of any standard time in this state, it was formally accepted without question that the customary mode of reckoning time by the solar system of days divided into twenty-four hours of sixty minutes each, each day beginning at midnight, and divided again at midday at or near the time when the sun was in the meridian, was meant, when speaking of the hour or time of day. Conditions have arisen in the last several years by which the old custom of dividing and noting time has been abandoned in a very considerable portion of the United States, and there has been substituted for it another system, no less arbitrary, but more fully meeting all the needs of society. Allowing one hour for each 15 degrees of longitude

west from Greenwich, the 75th meridian passing somewhere near Washington, the 90th near St. Louis, and so on, and, by establishing one uniform standard of time for all the territory within each of the sections named, a satisfactory, practical basis is attained. Business and social engagements naturally become adjusted to it. The custom originated, it is believed, with certain railroad lines in their endeavors to regulate the running of their trains which traverse wide sections of the country, so that unvarying and safe schedules might be adopted and enforced throughout a system where the average mean time was not widely different, yet was enough so to make danger in operating trains in different directions, on account of a minute or a few minutes' difference in the time of starting from the opposite extremes of the same line or section. Other business, including government and, finally, social affairs, adopted the same standards, until now it has become, in the more populous communities at least, almost exclusive. And this has been so for a number of years. Contracts to begin or end at an hour certain, without naming a standard for the reckoning of the hour, must be deemed to have intended the system in most common use. Or, if more than one standard was in use at the place where the contract was to be performed, and as both could not have been intended, it is admissible to prove the prevailing custom at the place of performance in the business of which the contract under consideration partook, that the court might determine which was probably in the minds of the parties. "Sun time," as it is called, has so fallen into disuse in some communities that it is known only by comparison with "standard time," or by computation. It could scarcely be maintained that parties to a contract meant to adopt an hour for the termination of important contracts which never otherwise entered into their business or social affairs.

In the early case of *Finnie v. Clay*, 2 Bibb, 351, the parties had agreed that certain lands might be surveyed in "squares to the cardinal points." The survey was made according to the magnetic needle, and not to the cardinal points, that is, the true meridian. The court decided that, as the parties had not declared whether the courses should be run according to the true meridian or magnetic needle (the former being strictly and technically the meaning of the term used), the popular, rather than the technical, meaning should be adopted; and proof was admitted showing that at that time the usual and almost universal mode of making surveys was according to the magnetic courses. Said the court: "Where

a usage has prevailed so long and so generally, it is much more reasonable to suppose the parties had reference to it than to the mode of surveying according to the true meridian, so little known and seldom used in practice. That an agreement ought to be interpreted with reference to the usage of the country, although such an interpretation is contrary to the technical meaning of the language used by the parties, is fully warranted by the English authorities."

The question we are now considering came before the supreme court of Iowa in *Jones v. German Ins. Co.* 110 Iowa, 75, 46 L. R. A. 860, 81 N. W. 188. The fire occurred after 12 o'clock by sun time, but before 12 o'clock M. standard time. The policy expired "at 12 o'clock at noon" that day. It was there said: "The court submitted to the jury whether, because of a known and established custom obtaining at Creston, the expression 'at 12 o'clock noon' was intended by the parties to the contract to mean 12 o'clock standard time. While it was admitted that central standard time was in general use there by the railroad company, the schools, and business men generally, it does not appear but that the sun time was also used by other people of the city. As common or sun time was presumed to have been intended, the burden was upon the defendant to show to the contrary, and that issue was rightly left for the determination of the jury. But is it noon at 12 o'clock standard time? If so, just before the change from central to mountain time at McCook, Nebraska, and other places on the same degree of longitude, the sun reaches the meridian at about half past 12 o'clock. We are of opinion it was not only necessary to show the customary use of standard time, but that by custom of the place 'at 12 o'clock at noon' meant at 12 o'clock standard time."

Appellants would distinguish the Iowa case from these, because the words "at 12 o'clock at noon," it is claimed, have a different meaning from the word "noon." We think the expressions amount to the same thing. Both refer to midday. Noon is midday; so is 12 o'clock in the daytime. "Noon" is merely a shorter expression than "12 o'clock in the daytime." Originally it represented the ninth hour of the day after sunrise, or about 3 o'clock P. M., and was the canonical hour of nones, at which was celebrated a religious rite. Webster's Dictionary, "Nones." It has ceased to denote the ninth hour of the day so long ago that it can scarcely be traced. It came by usage to represent midday, or 12 o'clock solar time, which was deemed midday for so many years. The word is undergoing a similar

change, or has undergone one in this country, in recent years, so that it represents now midday, not necessarily as shown by "sun time," but by the standard in use, whatever it is. It does not, as counsel argue, represent a physical phenomenon, as does "sunrise" and "sunset," any more than "10 o'clock A. M.," represents a physical phenomenon. Both terms, "noon" and "10 o'clock A. M.," are used to express practical approximations, and neither refers necessarily to the actual fact. In time, doubtless, the old standard of solar time, or for that matter, the more recent standards, may fall so entirely into disuse as to become obsolete. The word "noon" may then have but one meaning. In that event recourse to extraneous evidences to determine what it meant in written contracts would not be allowed. The evidence is that in some business, particularly that of banking, in Louisville, "sun time" is still used. In the present state of the use of the term, it was proper in our opinion to have submitted to the jury, as was done, whether the word "noon" as used in the contracts meant "12 o'clock standard time," and that, in determining that fact, the following guide should be adopted by the jury, as given in instruction No. 3 (Judge Muir's): "If the jury believe from the evidence that at the time said policy of insurance was issued there existed in Louisville, Kentucky, a custom or usage with reference to the meaning of the word 'noon,' so well settled, uniformly acted upon, and of such continuance as to raise a presumption that plaintiffs and defendant knew of it and entered into the contract of insurance sued on herein with reference to it, such usage will govern the jury in arriving at their conclusions under the first instruction."

In the Rochester German Insurance Company Case the further question arises, When must the loss occur? This question is presented by the following instruction: "The court instructs the jury that the policy of insurance sued on herein insured certain goods for plaintiffs in their warehouse at the northwest corner of Fifteenth and Portland avenue against fire from April 1, 1901, at noon, to April 1, 1902, noon. Now, if the jury believe from the evidence that the fire which destroyed said goods started in said warehouse before noon on April 1, 1902, or if they believe from the evidence that said fire did not reach said warehouse before noon, but at noon the destruction of said warehouse from such fire was inevitable, they should find for the plaintiffs; but if they believe from the evidence that the fire which destroyed said goods did not start in said warehouse before noon on April 1, 1902, and that at noon, April 1, 1902, the destruction

of said warehouse, as the result of said fire, was not inevitable, they shall find for the defendant." The evidence was conflicting whether the fire caught in this building before 12 o'clock noon, standard time. But under the instruction quoted, the jury were not required to find that it did in order to make a verdict for the plaintiff. It was held to be enough if the destruction of the warehouse from the adjacent fire was inevitable at noon. We are of opinion that this view of the case was error. The risk assumed by the insurer was that of loss or damage by fire pending the term written in the contract. It did not insure against peril to the property without loss during the policy term. If the fire broke out in the insured building before the policy expired, and continued to burn thereafter until it was totally destroyed, the loss is one occurring within the insured period. It is all deemed one event, and not severable. A damage begun is damage done, where the culmination is the natural and unbroken sequence of the beginning. We have been cited to no case which holds that mere imminence of loss, or even certainty of loss, during the life of a contract of insurance, would justify a recovery, where there was in fact no loss or damage during the life of the contract. No case in either marine, fire, or life insurance so holds. To do so would be to extend the term of the policy, and all liability under it, including its beginning, for a period beyond the contract for which the consideration was paid. Doubtless it was known to be inevitable, as it proved to be, that certain blocks of the business houses in Baltimore would be destroyed by the great fire there recently, which burnt over a considerable part of the city, and raged for several days. Yet it is entirely possible that contracts of insurance expired upon the buildings last burned after the fire had begun elsewhere in their vicinity. It would be astonishing if the liability of the insurers was extended indefinitely beyond the term of their contract merely because a danger had occurred during the contract which would lead to loss thereafter. The physical connection between the insured buildings in these cases did not make them less certainly separate buildings. They were so treated by the parties in contracting the insurance, and were so in fact.

The judgments in the cases of National F. Ins. Co. v. Peaselee-Gaulbert Co. and Pacific F. Ins. Co. v. Louisville Lead & Color Co. are affirmed. The judgment in the case of Rochester German Ins. Co. v. Peaslee-Gaulbert Co. is reversed, and that cause is

remanded for a new trial under proceedings consistent herewith.

All concur, except Cantrell, J., absent.

A petition for extension of opinion having been filed, O'Rear, J., handed down the following response on October 6, 1905:

Some of the policies were upon merchandise contained in the buildings that were discussed in the opinion, and not upon the buildings. The same principles announced in the original opinion will apply to the insured merchandise also. Where the fire had begun in the building containing the merchandise before the expiration of the policy term, and by reason of that fire it was impossible to remove or save the merchandise from loss or damage, it is to be deemed a loss occurring in the life of the policy, whether the fire was actually communicated to the specific articles of merchandise within such time, or not.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY et al., Appts.,

v.

MARY COLEY.

(... Ky. ...)

1. Railway crossings—watchmen.

A railroad company must maintain a watchman or use some other precaution commensurate with the danger at a street crossing in a city, which is much used by travelers on the highway and also by the railroad, and which, by reason of obstructed view, is especially dangerous.

Case Note.—The decision in *ILLINOIS C. R. Co. v. COLEY*, to the effect that a non-resident railroad company joined as defendant with its alleged negligent employee in an action to recover damages for such negligence cannot secure a removal of the cause to a Federal court on the ground of a separable controversy, is in accordance with the decisions of the Supreme Court of the United States. Prior to these decisions by the Federal Supreme Court, conflicting decisions on the question had been rendered in the circuit courts.

As will appear from an examination of the note to *Greenberg v. Whitcomb Lumber Co.* 28 L. R. A. 441, the authorities differ as to whether an action can be sustained against master and servant jointly, because of the responsibility of the master for the negligence of the servant. This difference of decisions is recognized by the Federal Supreme Court; but the existence of the right to sue the employer and negligent employee jointly is rendered immaterial on 1 L.R.A. (N.S.)

2. Instruction—province of jury.

Mentioning in an instruction one precaution which a railroad company might take in backing a train over a street crossing, to warn travelers on the highway, does not interfere with the province of the jury to determine what precautions were required, where the instruction immediately continues, "or use some other reasonably safe means" to give warning.

3. Same—following request.

A party cannot complain of the giving of an instruction which is substantially similar to one requested by himself.

4. Removal of cause—nonresident defendant.

A nonresident joined as defendant in an action to recover damages for negligence cannot secure a removal of the case to a Federal court by putting in issue the fact of negligence on the part of his codefendant.

5. Engineer—liability for negligence.

A railroad engineer is personally liable for negligently running his engine against a traveler at a railroad crossing.

6. Master and servant—joint liability.

A servant whose negligent act while conducting his employer's business causes injury to another, and his principal, may be sued jointly to recover damages for the injury.

7. Removal of cause—fraudulent joinder of resident—dismissal of action.

If a resident of the state is joined as defendant in an action, to prevent its removal to a Federal court, the court should, as soon as it discovers that fact, dismiss the action as to him, with costs, and remove the case to the Federal court.

8. Same—determination of fact by state court.

The state court may determine whether or not a resident of the state has been joined in a suit to prevent its removal to a Federal court, and is not bound, at the instance of the nonresident defendant, to remove the

the question of removal, by the ground on which the Supreme Court rests its decision: that court holding, in *Alabama G. S. R. Co. v. Thompson*, *infra*, that it is for the plaintiff to say whether he will elect to sue them jointly, and if he elects so to do, the fact that he has misconceived his cause of action, and has no right to prosecute them jointly, will not create a separable controversy so as to make the cause removable, though it may afford ground for defeating the plaintiff in his suit in the state court.

The question was directly passed upon in *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 122, 21 Sup. Ct. Rep. 67, where the Supreme Court, in affirming the decision of the supreme court of Kentucky, held that an action against a railroad company and two of its employees, charging them with concurrent negligence in killing a person at a railroad crossing, is joint, and not several, and therefore cannot be removed into a Federal court by the railroad company, on the ground of diverse citizenship, when the

case to the Federal court to permit it to determine that question.

(November 3, 1905.)

A PPEAL by defendants from a judgment of the Circuit Court for McCracken County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. J. M. Dickinson and Trabue, Doolan, & Cox, for appellants:

Where fraudulent joinder is alleged and facts affirmatively appear, prima facie right of removal exists and issue of fact only to be tried in the Federal court.

Dow v. Bradstreet Co. 46 Fed. 824; *Illinois C. R. Co. v. Jones*, 26 Ky. L. Rep. 31, 80 S. W. 484; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 165; *Diday v. New York, P. & O. R. Co.* 107 Fed. 565; *Boatner v. American Exp. Co.* 122 Fed. 714; *Weaver v. Northern P. R. Co.* 125 Fed. 155; *Woodson County v. Toronto Bank*, 128 Fed. 157; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Swann v. Mutual Reserve Fund Life Assn.* 116 Fed. 232; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209; *Rutherford v. Illinois C. R. Co.* 27 Ky. L. Rep. 397, 85 S. W. 199; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Winston v. Illinois C. R. Co.* 111 Ky. 954, 55 L. R. A. 603, 65 S. W. 13; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637.

An issue of fact involved in jurisdiction is triable in the Federal court.

Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; *Louisville & N. R. Co. v. Wangelin*,

132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Illinois C. R. Co. v. Jones*, 26 Ky. L. Rep. 31, 80 S. W. 484.

Messrs. Wheeler, Hughes, & Berry also for appellants.

Messrs. Hendrick, Miller, & Marble for appellee.

Hobson, Ch. J., delivered the opinion of the court:

On August 7, 1902, appellee, Mary Coley, then Mary Koerner, was being driven in a spring wagon across the Tennessee street crossing of the Illinois Central Railroad in Paducah. The wagon was struck by a backing engine on the railroad. Two of the occupants of the wagon were thrown out and killed, and Mary Coley sustained painful and serious injuries, to recover for which she filed this action against the railroad company and the engineer in charge of the engine. The railroad company filed its petition for a removal of the case to the circuit court of the United States. The court refused to remove the case. The defendants then filed answer, putting in issue the allegations of the petition, and pleading contributory negligence on the part of the plaintiff. The case being heard, the jury returned a verdict in favor of the plaintiff for the sum of \$3,500; and the defendants appeal.

The evidence on the trial showed that the Tennessee street crossing was one of the most used crossings in the city of Paducah. The accident happened just after dark. The wagon in which the plaintiff was riding was driven upon the track, when one wagon was just leaving the track, and another was just

employees are of the same state as the plaintiff. The court, in reviewing the authorities, based its decision upon the ground that the cause of action was entire as it appeared on the face of the complaint. This case was followed in *Winston v. Illinois C. R. Co.* 111 Ky. 954, 55 L. R. A. 603, 65 S. W. 13, where it was held that a nonresident railroad company sued jointly with its resident agent for injuries caused by the latter's negligence cannot remove the suit to a Federal court.

The question was again presented in *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609, which was an action by an injured employee against a railroad company and two negligent employees. On the trial the jury found against the railroad company only. On a writ of error to the Supreme Court it was contended by the railroad company that the plaintiff ought not to have been permitted to recover, since the jury found that the proof failed to show joint and concurrent negligence on the part of all of the defendants, for the reason that such a separate recovery against the railroad company amounted to a denial of the right of removal, which it would have had if sued alone; and it therefore constituted a taking of property without due process of law. The court, in holding against the railroad company's contention, based its decision upon the ground that on the face of the pleadings the company was not entitled to a removal, as a separate defense cannot deprive the plaintiff of his right to prosecute his suit to a final decision in his own way.

In two very recent cases the Supreme Court again considered the question, and reached the same conclusion. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. —, 26 Sup. Ct. Rep. 161, and *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed.—, 26 Sup. Ct. Rep. 166. The Thompson Case went to the Supreme Court on a certificate from the circuit court of appeals for the sixth cir-

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coming up to it. The wagon in which she was riding was thrown against the other wagon. The engine which did the damage was running 6 or 8 miles an hour. It was backing with the tender in front, and with a lamp hanging on either side of the tender. It approached the crossing on a curve. There were side tracks on either side of the main track, on which cars were standing, so that this engine could not be seen until it got right to the crossing. The proof was conflicting as to whether the engine gave signals of its approach by bell or whistle. The weight of the evidence, however, would indicate that the signals were in fact given; but that, owing to the number of trains passing to and fro and the fact that bells and whistles were blown so often at that point, the signals were not noticed. The amount of travel on the crossing, and its obstructed condition by reason of the cars standing on the side track, required of the engineer, in backing his engine over it, that he should have it under control, especially when it was dark, and there was no adequate light on the tender to give notice of the approach of the locomotive. It was negligence on the part of the company not to have a watchman at such a crossing, or to use some other precaution commensurate with the danger, at least during the hours when people are passing and repassing in numbers; and when the engineer, knowing that there was no watchman there, undertook to back his engine in the dark over such a crossing, he should have exercised care in proportion to the danger attending the situation. We therefore conclude that there was evidence sufficient to warrant the submission of the case to the jury, and sustain the verdict of the jury. While the proof as to the extent of the plaintiff's injuries was conflicting, if the jury credited the proof for her that her health was wrecked and permanently impaired, the verdict was not excessive.

Appellant complains that the court gave

caut. asking a decision on the following questions: "May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing, and not charged with any concurrent act of negligence? Is such a suit removable by the corporation, as a separable controversy?" The court, in answer to the questions, said that, for the purposes of determining the right of removal, the cause of action must be deemed to be joint, and the 1 L.R.A. (N.S.)

instruction G, which is as follows: "The court instructs the jury that it was the duty of defendant railroad company, when backing its trains through the city at the place mentioned in the pleadings, where the injuries, if any, occurred, to have someone on the rear part thereof, in a position to see and warn travelers of the approach of trains, or to display lights or give signals in such place as would give reasonable warning of the approach of the train, or use some other reasonably safe means to give the public using the street reasonable warning of the approach of the train; and, if the defendant failed to provide such reasonably safe means to warn the public using said crossing of approaching trains, it was guilty of negligence." Counsel's criticism of this instruction is in these words: "The law only requires that appellant should have used such means to give notice of the approach of the train as, considering the character of the crossing, was reasonably sufficient to warn travelers of the approach of the train to the crossing, and it should be left to the jury to judge of the reasonable sufficiency of the means actually employed." We are unable to see any substantial difference between the statement of counsel and the instruction of the court; for, although the court does say that it was the duty of the railroad company, in backing its trains, to have someone on the lookout to give signals of its approach, it adds, "or use some other reasonably safe means to give the public using the street warning of the approach of the train," and then it concludes by saying that the railroad company was guilty of negligence if it failed to provide such reasonably safe means. The instruction in no way conflicts with the case of *Chesapeake & O. R. Co. v. Gunter*, 108 Ky. 362, 56 S. W. 527, and it could not have been prejudicial under the facts of this case; for to back an engine over such a crossing as this was shown to be without some such precautions as are set out in

cause not removable. It based its decision upon the ground that the complaint showed a joint cause of action, and that it was not necessary to pass upon the question as to whether such a joinder is proper.

The Bohon Case was considered by the court at the same time with the Thompson Case, and a similar decision was rendered. It contained an additional feature arising out of the fact that under the state Constitution and statutes as interpreted by the state courts the plaintiff could proceed jointly or severally against the employer and negligent employee. The Supreme Court adhered to its previous holdings that the plaintiff need not sue the defendants severally, but could elect which way it would pursue them.

the instruction would manifestly be negligence on the part of the railroad company.

Appellant also complains that in instruction 1 the court used these words: "It was the duty of the employees of the defendant railroad company, in charge of the engine and train at the time plaintiff received the injuries complained of, to give the usual and customary signals of the approach of said engine and train to the Tennessee street crossing in Paducah, by blowing the whistle or continuously ringing the bell, and to keep a lookout for persons or vehicles using or about to use said crossing, and to exercise ordinary care to avoid striking or colliding with persons or vehicles using or about to use said crossing." But these words are in effect taken from instruction M, which was asked by the defendant, which begins as follows: "It was the duty of the employees of the defendant railroad company, who were in charge of the engine and train at the time of the accident complained of, to give the usual and customary signals of the approach of the engine and train to the street crossing, by blowing the whistle or ringing the bell, and to keep a lookout for persons and vehicles using or about to use the crossing. And if you believe from the evidence in this case that the said employees failed to give such notice of the approach of the engine and train to the street crossing, or failed to keep such lookout," etc. We fail to see any substantial difference between the words used by the court as to the signals of the approach of the train and the words asked by the defendant, and certainly under the facts of this case the instruction given by the circuit judge could not have been prejudicial; for, in view of the proof as to the character of the crossing, manifestly no less precautions than those set out in the instruction in backing the engine in the dark over the crossing could be tolerated.

It is not insisted that the negligence of the driver of the wagon is to be imputed to the appellee. The instruction on contributory negligence properly submitted to the jury the question whether there was negligence on her part.

It is earnestly maintained for appellant that the court should have removed the case to the Federal court, although Kothheimer, the engineer, who was a resident of the state, was sued jointly with the railroad company. The petition for removal, among other things, contains the following averments: "Your petitioner further states that it controverts all claims of any negligence of its codefendant Kothheimer, or of your petitioner, and avers that there is no pretense whatever for the claim or allegation made by plaintiff in her petition, and con-

troverts the claim that said injuries, if any were sustained, were caused by the joint or concurrent negligence of your petitioner and the said Kothheimer, and charges that plaintiff in her said petition joined your petitioner and said Kothheimer as defendants for the sole and only purpose, and the fraudulent purpose, of preventing the removal of this action to the United States circuit court for the western district of Kentucky, well knowing at the time that there was no negligence, joint, concurrent, or otherwise, occurring at the time of the alleged accident, which caused or contributed to any injuries which she may have sustained; and all such allegations and claims were fraudulently made by the said plaintiff in her petition, for the fraudulent purpose of depriving the United States circuit court for the western district of Kentucky of its rightful jurisdiction in this cause, and of depriving your petitioner of its right, as guaranteed by the Constitution of the United States and by the acts of Congress thereunder, of having this cause tried in the said United States circuit court for the western district of Kentucky. That in said petition there is a separable controversy between your petitioner and the plaintiff; and that the matter in dispute in said separable controversy exceeds, exclusive of interest and costs, the sum or value of \$2,000, and the same can be fully determined without the presence in the case of the said Kothheimer. Your petitioner charges that at the time the accident happened in which said plaintiff claims to have suffered injuries, which said accident happened at a public street crossing in the city of Paducah, the said crossing was well protected and guarded, and this plaintiff and those in the vehicle with her were warned of the approach of the engine and notified of the danger in attempting to cross the track; and that said engine was supplied with lights and other signals; and that the notice of approach of said engine to the crossing at which the accident happened was given by the ringing of the bell thereon and sounding of the whistle; and that defendant Kothheimer, who was the engineer in charge of said engine at the time, was at his post of duty, keeping a lookout in the direction in which said engine was going, as was also the fireman on said engine; and that said engine was at the time being carefully and cautiously operated; and that there was at that time every reasonable and proper care exercised, both by the watchman at said crossing and the engineer and fireman upon said engine, to prevent any accident; and when it was discovered by those in charge of said engine that plaintiff had placed herself in a perilous position on the railroad track, every possible means was used by

those in charge of said engine to stop it and prevent a collision; said engine was in good condition, equipped with the most approved appliances known to science, and in use; and that said appliances were in good working condition, and were applied and used as they should have been to stop said engine and prevent the collision; but that plaintiff went upon said track at said crossing at a time when said engine was so close thereto that it was beyond the power of those in charge of said engine, with the use of greatest care and of all said appliances, to stop said engine in time to prevent the collision."

By the act of Congress a case may only be removed to the Federal court where the defendant or defendants therein are nonresidents of the state. Where there is a joint controversy, and one of the defendants is a resident of the state, the other defendant cannot remove the case to the Federal court. It is earnestly argued that if all the plaintiff has to do is to join with the defendant a third person who is a resident of the state, and that this will in all cases defeat the right of removal, then no cases may be removed, and the purpose of the act may be defeated entirely. On the other hand, if a nonresident defendant may simply plead to the merits of the case in the petition for removal, and then take the case to the Federal court for the trial of the issue thus tendered, all cases may be removed to the Federal court, notwithstanding the provision of the act of Congress forbidding the removal of causes where there is a joint controversy and one of the defendants is a resident of the state. To illustrate: In this case it is earnestly maintained, although there has been a verdict and judgment against Kothneimer, and although the evidence in the record is sufficient to sustain the judgment, that the case should have been transferred to the Federal court. The effect of this would be to give the Federal courts jurisdiction of the merits of the case in actions of this sort, although such jurisdiction is expressly withheld by the act of Congress. The state court has jurisdiction to try the merits of the case if there is a joint controversy; and it will not do to say that the action must be transferred to the Federal court, for that court to determine whether the state court may try the case on the merits. When the plaintiff's petition states a joint cause of action against two defendants, there is a controversy, within the meaning of the act of Congress. It was not contemplated by the act, that the petition for removal should go into the merits of the controversy, and by putting in issue the allegations of the plaintiff's petition one of the defendants might remove the case from the

state court. *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 270, 271, 30 L. ed. 233, 234, 6 Sup. Ct. Rep. 1034; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

If Kothneimer negligently ran the engine against the wagon in which appellee was riding, and hurt her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as the agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself. If both he and it are liable for the wrong, they were both wrongdoers, and, being wrongdoers, may be sued jointly. A person injured in this state is not required to bring separate actions against the wrongdoers; but he may sue any or all of them at his election; the jury may find separate verdicts; and he may recover against some, and not against others. Under statutes such as ours we see no reason why the principal and the agent may not be sued jointly for the wrong done by the agent in the course of his agency. Any other rule would do injustice, as it would require the plaintiff to prosecute two actions, or force him to elect between wrongdoers as to which he would sue.

If the plaintiff trifles with the court, and joins a defendant who is a resident of the state, simply for the purpose of defeating the right of the other defendant to remove the case to the Federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and remove the case to the Federal court. The court should not, at any stage of the proceeding, allow a party to trifle with its process or to defeat the act of Congress by a fraudulent joinder of a person as defendant. But when the petition discloses a cause of action which is not within the jurisdiction of the Federal court, the case may not be removed to the Federal court for that court to try a case over which it has no jurisdiction, or to pass on the jurisdiction of the state court over the case. It cannot be maintained that the circuit court of the United States is only to determine in cases

of this sort whether the joinder is fraudulent, and made without reasonable expectation on the part of the plaintiff to prove the facts alleged, and that it is the exclusive forum to determine this question, for in not a few cases the state court would hold upon the evidence that the plaintiff had made out his case against both the defendants, while in the Federal court, upon the same evidence, it would be held that the plaintiff had failed to make out his case, and that therefore the joinder was fraudulent. The result would be that the state court would be prevented from proceeding in a case admittedly within its jurisdiction, by reason of the fact that the Federal court was of opinion that there was no merit in the case. It was not contemplated by the act of Congress that the circuit court of the United States should be given supervisory power over the state courts on the merits of joint controversies of this character.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.,

v.

J. E. HOUCHINS.

(.... Ky.)

1. Negligence—joint action against master and servant.

A railroad company may be sued jointly with the servant whose negligence caused an injury, although it was not independently at fault.

2. Removal of cause—joint action against master and servant.

An action against a resident employee of

Case Note.—Recent decisions of the United States Supreme Court, which constitute the final authority on the question, fully sustain the decision in the above case against the right of removal to a Federal court of a joint action against a resident employee of a foreign railroad corporation and the corporation itself. To the same effect, it was held, in *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. —, 26 Sup. Ct. Rep. 161, and *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed.—, 26 Sup. Ct. Rep. 166, that such joint actions by a resident against a foreign railroad company and a resident servant do not involve separable controversies.

The declaration of the state court in the above case, that, as the cause of action stated in the petition was not removable to the Federal court under the act of Congress, the latter court had no jurisdiction over the case, and that this question was therefore to be determined by the state court, and not by the Federal court, is fully in accord-
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a foreign railroad company and the company jointly is not removable by the latter to the Federal court, although a joint suit cannot be maintained in that court.

3. Same—determination of jurisdiction.

The state, and not the Federal, court should determine the question of the right to remove to the latter an action begun in the former, against a nonresident railroad company and its resident employee jointly.

4. Negligent injury — damages—expectation of life.

The expectation of life of one injured by another's negligence may be shown as a basis for the estimation of damages.

5. Evidence—American Table of Mortality.

The American Table of Mortality is admissible in evidence upon the question of expectation of life.

6. Instruction—as to effect of evidence.

The court should, upon request, instruct the jury that a mortality table introduced in evidence upon the question of expectation of life shows merely the probable duration of life, and should be considered in connection with the other proof in the case for what it is worth.

7. Negligence—admission of, by servant.

An admission by a servant whose negligence caused injury to another, made long after the accident, is not admissible in evidence against the master, but is admissible against the servant himself.

8. Evidence—limitation of—instruction as to.

In admitting evidence which is competent against one party to a joint action, but not against the other, the court should caution the jury as to its proper limitation.

9. Same—admission—impeaching witness.

An admission by a servant whose negligent act caused an injury, made long after the accident, may, in case proper foundation is laid, be admitted in evidence in an action

ance with the decision of the United States Supreme Court in *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799. That case decided that a state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which, on its face, shows that the petitioner has a right to the transfer; and further declared that, while all issues of fact, made upon the petition for removal, must be tried in the circuit court, the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. And, if the state court should decide erroneously against the removal, and proceed with the cause, its ruling on that question could be reviewed, after final judgment, by the United States Supreme Court.

The same doctrine has been declared by the United States Supreme Court in later cases, among them *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692.

against his master to discredit him as a witness.

10. Instructions as to punitive damages.

When an instruction is given on punitive damages in an action for a personal injury, the court should clearly tell the jury that the allowance of such damages is a matter for their discretion.

11. Personal injuries—excessive damages.

Ten thousand five hundred dollars is an excessive amount to be awarded for personal injuries inflicted by another's negligence, where the evidence leaves the extent of the injuries uncertain, and also the question as to what the condition of the injured person will be permanently.

(November 28, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Muhlenberg County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. J. M. Dickinson and James S. Wortham, with Messrs. Trabue, Doolan, & Cox, for appellant:

Employer and employee are not liable jointly where the employer's liability is for the imputed negligence of the servant only.

Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 749; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Shaffer v. Union Brick Co. 128 Fed. 97; McIntyre v. Southern R. Co. 131 Fed. 985.

The case was removable because no cause of action was stated against the company's codefendant.

Cincinnati, N. O. & T. P. R. Co. v. Robertson, 115 Ky. 858, 74 S. W. 1061; Davis v. Chesapeake & O. R. Co. 116 Ky. 144, 75 S. W. 275.

Messrs. B. F. Proctor, G. H. Herdman, Greene & Van Winkle, and S. D. Hines for appellee.

Hobson, Ch. J., delivered the opinion of the court:

J. E. Houchins was a postal clerk on a mail train running between Paducah and Louisville on the Illinois Central Railroad. On November 7, 1902, at 11:36 A. M., the train on which Houchins was collided with an engine and tender in the yards at Central City. By reason of the collision, Houchins was thrown against the end of the car. At first it was not thought that he was very much hurt, as there was no apparent injury of a serious character. He was taken to his home at Leitchfield, and was confined to his bed about twenty days. After that he went about on crutches for a while, and

then with a cane. Some time afterwards he undertook to go back to work on the road, and found that he could not stand the work on the train, and took a place in Louisville as transfer clerk, where he has since been employed, which pays him \$900 a year. His salary as postal clerk was \$1,000, and his living in Louisville is more expensive than at Leitchfield. There is a limp in his walk, but the proof is very conflicting as to the extent of his injuries. The trial occurred in January, 1904, or about fifteen months after he was hurt. A number of physicians testified on the trial for the railroad company that they had examined him carefully and with the aid of the X-rays, but could find nothing wrong; that he was a fine insurance risk and normal in every way. On the other hand, a number of physicians testified for him that his spine was injured and that a lump had formed in his hip joint, causing lameness and permanently disabling him from following his vocation as postal clerk. According to the evidence for him, he was to a large extent a nervous wreck, while, according to the evidence for the railroad company, he is a healthy man and in normal condition. The jury found a verdict in his behalf for \$10,500 against the railroad company and the engineer in charge of the engine with which the train collided, and the defendant appeals.

Williams, who had charge of the engine with which the train collided, had taken his engine off the side track and was going down the main track to get to his train, which was due to leave shortly. As he was going out on the main track his attention was called to the fact that the passenger train was about due, and he said that it was not due yet, that he had just looked at his time card, that the passenger train was due at 11:55, and that it was then only 11:35. He went out on the track, and just after he got on the track the passenger train came around the curve and ran into him. The fact was the passenger train was due at 11:35, and he had made a mistake in reading his time card, and had taken the leaving time of the passenger train, which was 11:55, for its arriving time, which was 11:35. Those in charge of the passenger train were in no way in fault for the collision. The train was on time, and the trouble was wholly due to Williams' making the mistake in the reading of his time card. The engineer of the train was killed, and the fireman was badly hurt, and so were several other persons. The railroad company filed its petition for a removal of the case to the circuit court of the United States, aptly alleging that Williams was fraudulently joined as a defendant for the purpose of preventing a removal of the case

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to the United States circuit court, and that the allegations of the plaintiff's petition were known to him to be untrue, and that he did not expect to prove them when he made them, and that they were made solely for the purpose of preventing a removal of the case to the United States circuit court. The court overruled the motion to remove the case, and the railroad company then filed an answer, in which it admitted that the collision was by reason of the ordinary negligence of Williams, the engineer in charge of the switch engine, and confessed to liability to Houchins in the sum of \$250.

It is insisted that the court erred in refusing to remove the case to the circuit court of the United States, on the idea that the company cannot be sued jointly with the servant whose negligence caused the injury where it was not independently at fault; that, under the allegations of the petition for removal, the railroad company had a right to remove the case, and that the circuit court of the United States must determine the questions arising on the allegations of the petition for removal. We cannot accede to this view. The plaintiff's petition stated a cause of action within the jurisdiction of the state court. The joint cause of action so stated by him in his petition was not removable to the Federal court under the act of Congress. That court had no jurisdiction over the case, and any order it made in a case of which it had no jurisdiction was void. Consent cannot confer jurisdiction, and, if the railroad company had been beaten in that court, it might, at the end of the litigation, have raised the question of jurisdiction. It was not contemplated by the act of Congress that every case, whether removable or not, should be subject to the control of the Federal courts. If the course urged in this case is to be approved, then every case to which a nonresident is a party, although liable jointly with the others, may be removed to the Federal court. The action was properly brought in the state court. That court admittedly had jurisdiction, and it certainly cannot be maintained that it should have surrendered jurisdiction over the case and sent it to a court for trial which, on the face of the papers, was without jurisdiction to make any order in it.

It is settled that, under the law of Kentucky, Williams and the railroad were jointly liable to Houchins for his injury, and might be sued jointly or severally. *Chesapeake & O. R. Co. v. Dixon*, 104 Ky. 608, 47 S. W. 615; *Cincinnati, N. O. & T. P. R. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383; *Illinois C. R. Co. v. Coley*, 28 Ky. L. Rep. 336, 89 S. W. 234. Is this action, which confessedly lies in the state court under

laws of the state, to be controlled by the Federal court, and may that court, if of opinion that a joint action does not lie, take jurisdiction of the case? Such a rule would deprive the litigant of his right to try his case under the laws of the state, and would compel him to get into the merits of his case before a tribunal without jurisdiction to sit in it. If the state court makes a mistake, an appeal may be taken to this court; and if the railroad company feels aggrieved by the decision of this court, it may in every case prosecute an appeal to the Supreme Court of the United States on the question. So it is not without remedy, and there is no possibility of its rights not being properly protected.

Houchins proved on the trial that he was twenty-nine years of age at the time of the injury. He introduced on his behalf W. T. Morgan, who, over the objections of the defendants, was allowed to testify as follows:

Q. According to the American Tables of Mortality, what is the probable expectation of the life of a man twenty-nine years of age?

A. This is a book of the Mutual Life Insurance Company of New York. Take a man at the age of twenty-nine, the probable expectancy of life for him would be thirty-six and two-tenths years; a man in good health and twenty-nine years old, his expectation of life would be thirty-six and two-tenths years.

Q. That is the American Table of Mortality?

A. Yes, sir.

Q. This book is gotten out by the Mutual Life Insurance Company of New York?

A. Yes, sir; that book was sent me this year.

According to Dr. Wigglesworth's Table, which has been adopted by this court, the expectancy of life of a man at twenty-nine years old is thirty and sixty-six hundredths years. The evidence objected to showed that the expectancy of life at twenty-nine years was nearly six years longer. When the action is to recover for the death of a person injured, as the measure of recovery is the value of his capacity to earn money, standard tables, showing the ordinary expectancy of life, are held to be competent. Where, as in this case, there is proof tending to show that the plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of life is equally competent; for the measure of recovery here is in part compensation for the impairment of his capacity to earn money. If, as is conceded, evidence of the ordinary expectation of life may be received where the capacity to earn money is

destroyed by death, it is hard to see why such evidence cannot be equally received where the capacity to earn money is partially destroyed; for in either case the jury are, in making up their verdict, to be governed by the capacity to earn money which has been destroyed, and whether this is a partial or total destruction is not material. *Greer v. Louisville & N. R. Co.* 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649.

The Carlisle Mortality Tables are based upon actual observation in the towns of Northampton and Carlisle, England. The deaths were taken, not from selected lives, but from the population generally. These tables have been very generally admitted by the courts of this country. *Lincoln v. Power*, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; 17 Am. & Eng. Enc. Law, p. 900. The field, however, was so narrow that they have never been regarded as satisfactory. It is a matter of common knowledge that the expectancy of life is increasing. The American Table of Mortality has been made out from the combined experience of the life insurance companies of America, and is now regarded as the standard throughout the United States. It is true that it is based on insurable lives or healthy persons. Still, there is no great difference between it and the Carlisle Table, as by the Carlisle Table the expectancy of life of a person twenty-nine years old is thirty-five years. In cases of this character the aim of the court is to get the best information attainable. The American Tables of Mortality have been recognized by many of the courts of the country as perhaps the best means of arriving at the expectancy of life. The Wigglesworth Tables were made before 1858. Since then there has been great advance in medical science, and the data upon which such tables are calculated are much fuller now than then. The court, as information increases, will use that table which is the best and most reliable. The American Mortality Table was held competent in the case of *Greer v. Louisville & N. R. Co.* *supra*, and this case was followed in *Louisville & N. R. Co. v. Gordon*, 24 Ky. L. Rep. 1819, 72 S. W. 311. After maturely reconsidering the subject, we have reached the conclusion to follow the rule heretofore laid down, and to hold that in each case the expectancy of life may be shown, as any other fact, by the best evidence obtainable, and that, as improved tables come into use which are of standard authority, they may be given in evidence, instead of the older tables which they supersede.

Such tables show only the probable continuance of life, and not the duration of ability to earn money. They show the probable duration of life of healthy persons who

are insurable risks; and the court, when requested, should tell the jury what the table shows, and that it is to be considered by them, in connection with the other proof in the case, for what it may be worth, considering the plaintiff's state of health and circumstances, in determining the probable duration of his capacity to earn money. 3 *Wigram*, Ev. § 1698; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

The court allowed the plaintiff to prove by a witness that Williams, long after the accident, acknowledged to backing his engine out on the main track on the time of the train, saying he forgot the dead time the train had there. This was no part of the *res gestæ*, and the admission by the servant was incompetent against the master. *Chesapeake & O. R. Co. v. Smith*, 101 Ky. 111, 30 S. W. 832. The evidence was, however, competent against Williams, who was sued jointly with the railroad company; but, when it was admitted by the court without any admonition, the jury would understand it to be competent against all the defendants. In admitting the evidence the court should have cautioned the jury that it could only be considered against the defendant Williams, and not against the other defendant. *Cincinnati, N. O. & T. P. R. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383. It often happens, in suits against two defendants, that evidence of admissions is competent against the one who made them, and not competent against his codefendant; yet it is everyday practice to admit it, with proper admonition to the jury as to the defendant against whom it may be considered. There is nothing in this class of cases to except it out of the general rule, but it is a serious error for the court to admit the evidence without cautioning the jury as to the person against whom it may be considered. *Illinois C. R. Co. v. Winslow*, 27 Ky. L. Rep. 329, 84 S. W. 1175. The statement was made in a deposition. The writing is the best evidence. If proper foundation was laid, the statement might be used to discredit Williams as a witness; but the court should tell the jury it is not in this event to be considered as substantive testimony.

On the question of damages, the court, after directing the jury to find compensatory damages, added these words to the instruction: "If the jury believe from the evidence that the said collision was caused by the gross negligence of the defendant railroad company's agents or servants in charge of the engine with which passenger train collided on the occasion in controversy, then and in that event the jury may, in addition to compensatory damages, if any, award the plaintiff punitive damages against said defendant Illinois Central Railroad Company,

not exceeding, however, in the aggregate \$15,000, the amount claimed." As to whether there was enough in the evidence to warrant the awarding of punitive damages the court is equally divided. But when an instruction is given as to punitive damages the court should clearly tell the jury that the giving of punitive damages is a matter of discretion; and in this case the court should tell the jury that, if they believe, from the evidence, that the collision was caused by the gross negligence of the railroad company or its servants in charge of the engine, then, in addition to compensatory damages, if any, the jury may or may not, in its discretion, award the plaintiff punitive damages in such sum as, under all the evidence, they deem right, not exceeding, however, \$15,000, the amount claimed in the petition. On another trial the first and second instructions will be combined in one instruction, as this will simplify the matter somewhat for the jury.

It is earnestly insisted that the verdict of the jury is palpably excessive, the result of passion and prejudice. In view of the uncertainty of the evidence as to the extent of the plaintiff's injuries, or as to what his condition will permanently be, we are of opinion that the verdict is excessive, and that, on the whole case, a new trial should be awarded.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

GEORGIA SUPREME COURT.

W. L. TIMMERMAN, Plff. in Err.,

v.

G. W. H. STANLEY.

(123 Ga. 850.)

1. Contract — abandonment — action for breach.

If one agreed to teach another in certain lines of instruction until the pupil was proficient in them, and, after beginning the course and receiving payment in full, abandoned the contract and refused to teach the

Headnotes by LUMPKIN, J.:

Case Note.—The court in the above case points out with clearness the distinctions which are recognized in cases of rescission or abandonment of a contract, with respect to the necessity of restoring or tendering back what has been received by the party who asserts the right to rescind. The duty in general to restore the status in order to rescind is clearly established; but as an exception to this general rule the court clearly states that, where one party abandons the contract, he should not complain that the other party is willing to treat it as rescinded. The question of the right to

student longer, the latter would have a right to treat the action of the teacher as a rescission, and bring suit for the amount which had been paid by him.

2. Same—inconsistent remedies.

If one of two contracting parties claims that the other has committed a breach of the contract, he cannot, in the same action, both treat the contract as rescinded and sue for the amount paid by him to the other party, and at the same time rely on the contract as existing.

3. Same—pleading.

The allegations of the declaration in this case make it a suit for the amount paid to the defendant by the plaintiff, treating the contract as rescinded. In addition, the plaintiff sought to recover certain damages resulting from a breach of the contract, treating it as of force. The latter claim should have been stricken on demurrer, as inconsistent with the former.

4. Same—demurrer—election.

The demurrer was not general for misjoinder of causes of action, so as to put the plaintiff upon his election, but was for inconsistency in joining certain claims with another, which had first been made, and which it was claimed determined the character of the action.

5. Same—rescission—restoration.

As a general rule, where one party asserts a right to rescind a contract for non-performance by the other of his covenant, the party seeking rescission must restore or tender back to the other party what has been received from him, so as to restore the parties to the condition in which they were before the contract was made. But this rule has no application to a case where one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded, and brings suit to recover the amount which he has paid under the agreement.

6. Same—pleading—damages.

Under the principles above announced there was no error in striking from the declaration certain claims for expenses in attending school, expenses pending suit, and delay in being prepared for business; but the entire case should not have been dismissed.

7. Same—copy of contract.

It does not appear that there was any con-

rescind or abandon the contract because of the other party's default has been considered in a great number of cases, which have been carefully considered and weighed in the note to *Lake Shore & M. S. R. Co. v. Richards*, 30 L. R. A. 33. This shows that there are many cases which sufficiently establish the distinction which the court makes in the above case. In general they hold that, if the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of the agreement, the contract may be considered as rescinded, and suit may be brought against

tract in writing, and a demurrer on the ground that a copy of it was not attached as an exhibit was not well founded.

(August 5, 1905.)

ERROR to the City Court of Macon to review a judgment in favor of defendant in an action brought to recover damages for breach of contract. Reversed.

Statement by Lumpkin, J.:

Timmerman brought suit against Stanley, alleging as follows: On July 29, 1903, the plaintiff bought of the defendant a scholarship in Stanley's Business College, in the city of Macon, in the telegraphic department, which embraced a course in learning telegraphy in said college. On August 12, 1903, he bought of the defendant a scholarship in the shorthand department in said college, which embraced a course in learning stenography, typewriting, etc. "The said scholarships were delivered to petitioner under the contract that a full course might be taken by him until he was proficient in said lines selected, without a limit of time." Stanley is the proprietor of the college, and the scholarships were sold by him to the plaintiff for the sum of \$64. On August 2, 1904, the plaintiff was expelled by the defendant from the college for no fault or cause on his part. He had violated no rules of the college, nor had he been guilty of any conduct to authorize the expulsion. He had not completed the courses prescribed by the scholarships, and at the time of his expulsion was still pursuing his studies at the college. "Petitioner shows that said Stanley refuses to pay back to your petitioner the \$64 paid for said scholarships, and to which your petitioner is entitled on account of said Stanley failing to carry out said agreement in said scholarships; and petitioner prays for a judgment against said Stanley for said sum." By the

breach of the contract defendant has damaged plaintiff in the sum of \$500. Plaintiff has paid out \$300 for board and expenses in attending the school in order to qualify himself for business. By reason of the expulsion he cannot now finish his courses, so as to enter business, as other business colleges will not receive him after being expelled from this one. He is now at a monthly expense of \$15, and will be so up to the time of the hearing of this action. "He prays for a judgment for said sum against the said Stanley." By reason of the breach of the contract defendant has delayed plaintiff in finishing his course so as to enter business for the current year, to his injury in the sum of \$500. The defendant demurred to the declaration generally, and also specially. The demurrer to that part of the declaration which seeks to recover the price paid for the scholarships was based on the ground that such price was not the legal measure of damages to which the plaintiff was entitled, if entitled to anything under the declaration. The allegation as to the expenditure of \$300 for board and expenses was demurred to on the ground that such items were not elements of damage for an expulsion from the college, and "because the plaintiff, having elected to disaffirm and rescind said contract by suing for recovery of the price paid for said certificate, cannot bring an action for a breach of said contract arising under said certificate;" because of an action for said expenses was an action inconsistent with a suit for the recovery of the purchase price of said scholarship, and cannot be joined in the same declaration. The allegation that the plaintiff could not enter any other business college was demurred to because it did not constitute an element of damage, for the same reasons. The allegation as to the monthly expense of \$15 was demurred to for the same reason, and also be-

the party in fault for money or property that he has already received under the contract. But this suit is in the nature of an action on the common counts, such as *indebitatus assumpsit* or *quantum meruit*. A few of the cases to this effect are Wright v. Haskell, 45 Me. 489; Miller v. Thompson, 22 Ark. 258; Dubois v. Delaware & H. Canal Co. 4 Wend. 285; Drew v. Claggett, 39 N. H. 431; Waggeman v. Janssen, 74 Ill. App. 41.

In support of this doctrine Wharton on Contracts, § 712, says: "When a contract has been in part performed, but the completion of the performance has been prevented by the action of one of the parties, then the other party may waive the contract as originally settled, and sue on an *indebitatus* count for simply the consideration actually received by the other party."

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Bishop on Contracts, § 834, says: "Where rescinding is permissible, and it has been lawfully made by the party not in fault,—or unlawfully by the other party,—the one entitled may recover back the consideration or whatever else he has paid on the contract, including compensation for work done, goods delivered, and the like, prior to the rescission."

Pingrey on Extraordinary Industrial and Interstate Contracts, § 599, states the doctrine as follows: "When one party to an entire executory contract has failed to perform on his part, and the other party is not in default, and in a condition to rescind, he may abandon the contract, and bring an action of *assumpsit* to recover back what he has paid thereunder, whenever *assumpsit* will lie independent of the contract."

cause expenses incurred by the plaintiff subsequently to the alleged breach of contract cannot be an element of damage therein. The allegation of damage by reason of delay in plaintiff's finishing his course was demurred to because the alleged damages were too remote and consequential, and not capable of exact computation; because they are not the legal and natural results of the alleged act; and because they are inconsistent with the damages laid in the paragraph seeking to recover the purchase price of the scholarships, and cannot be joined in the same action. The declaration was also demurred to because no copy of the contract was set out as an exhibit. The demurrer was sustained, and the plaintiff excepted.

Mr. M. G. Bayne, for plaintiff in error:

There was a right of action for breach of the contract.

Code, 3793; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Horan v. Strachan, 86 Ga. 408, 22 Am. St. Rep. 471, 12 S. E. 678; Harden v. Lang, 110 Ga. 392, 36 S. E. 100. The damages directly traceable to the breach, such as the expenses of attending the school, railroad fare, etc., were a loss recoverable by plaintiff.

Gore v. Malsby, 110 Ga. 894, 36 S. E. 315.

Messrs. Davis & Miller, for defendant in error:

Rescission for nonperformance is not allowable after there has been part performance.

Code, § 3712; 21 Am. & Eng. Enc. Law, pp. 84, 91.

Lumpkin, J., delivered the opinion of the court:

1-5. Assuming the allegations of the declaration to be true, as we must do in considering the demurrer, each of the contracts evidenced by the two scholarships was entire, and when the defendant repudiated them, the plaintiff had the right to treat his action as a rescission, and bring suit for the amount which had been paid by him. Supreme Council A. L. of H. v. Jordan, 117 Ga. 808, 45 S. E. 33. Or he might sue for a breach of the contract. Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51. In the latter event, that decision holds that in some cases the amount paid by the plaintiff may be considered in fixing the amount of the damages. In 8 Am. & Eng. Enc. Law, 2d ed. p. 632, it is said: "As has been said more than once, the fundamental principle of damages is compensation to the injured party. This rule in the present connection is simply the application of the principle stated to contracts, that is, the measure of damages in such cases is the value of the 1 L.R.A. (N.S.)

bargain to the complaining party, or the loss which a fulfilment of the contract would have prevented or the breach of it has entailed. Or, as it has been said, the general intent of the law, which gives damages in actions for breach of contract, is to put the injured party, so far as it can be done by money, in the same position as if the contract had been performed. According to this principle, the measure of damages for breach of a contract is not, as a general rule, the consideration paid, but rather the value of the thing contracted for, unless, indeed, the plaintiff has, under the circumstances, a right to disaffirm the contract, and sues to recover the consideration paid." The plaintiff cannot in the same action both treat the contract as rescinded and rely on it. Harden v. Lang, 110 Ga. 392, 36 S. E. 100. It is not quite easy to determine whether this action is one for breach of the contract, or one for the recovery of the purchase price of the scholarships, based on the idea of a rescission, coupled with an effort to sue for the breach of the contract in the same action. It has been held that suit to recover the purchase price is equivalent to an express disaffirmance, and that after such a disaffirmance there cannot be a proceeding to enforce the contract, either by an equitable proceeding to compel specific performance or by an action for damages. 24 Am. & Eng. Enc. Law, 2d ed. p. 645, note 5. The plaintiff alleged that the defendant refused to pay back to him the \$64 paid for the scholarships, to which the plaintiff is entitled; and he prays for a judgment for that specific sum, not as damages, or as a part of his damages, or as throwing light on the amount of damages, but as a return of the purchase money. Taking the pleadings most strongly against the pleader, the statement that the defendant refuses to pay back the amount to him implied that a demand had been made. We are of the opinion, therefore, that this part of the declaration treats the contract as at an end, and seeks to recover the amount paid by the plaintiff to the defendant under it. Such being the case, the particular portion of the declaration which sues for the recovery of such amount is not subject to demurrer on the ground urged against it.

It is contended, in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid because, in order to rescind the contract, the plaintiff must restore the status, and must tender back to the defendant what he has received from him, and that this cannot be done in the present case. Civil Code 1895, § 3712. This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of be-

ing returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He cannot hold onto the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the *status quo*. He cannot by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded. The Code section cited has no application in such a case. *Henderson Warehouse Co. v. Brand*, 105 Ga. 217, 224, 31 S. E. 551. The cases of *Alabama Gold L. Ins. Co. v. Garmany*, 74 Ga. 51, and *Supreme Council A. L. of H. v. Jordan*, 117 Ga. 808, 45 S. E. 33, are also in point as to this contention.

It was argued that there was a misjoinder of causes of action; but the demurrer does not make this objection to the entire declaration. It attacks the effort to recover the money paid by the plaintiff to the defendant on the ground already considered. It then attacks other parts of the declaration on the ground that, the action being one based on a rescission of the contract, the items of damage claimed could not be properly joined with the suit for the money paid. This contention, if sustained, would result in striking those particular items, but not in dismissing the entire action for a misjoinder of causes of action. It is not the same thing to say that a declaration contains two inconsistent causes of action, and to put the plaintiff on his election to dismiss one of them, or have the entire suit dismissed; and to say that the action is of a particular character, and that certain other claims cannot be added to it.

6. From what has been said it is evident that the claim for expenses in attending school, expenses pending the suit, and delay in being prepared for business cannot be joined with the action for the return of the purchase price, based upon a rescission of the contract. Moreover, the allegations of the declaration with respect to those items are quite vague and general, and a part of the damages would not be recoverable, even 1 L.R.A. (N.S.)

in an action based on a breach of the contract. The dismissal of the entire case was erroneous. The claim to recover the items of damage just referred to should have been stricken, and the case left to stand on the suit for the return of the price paid for the scholarships.

7. It does not affirmatively appear that there was a written contract, and the ground of the demurrer that no copy of it was attached as an exhibit is not well founded.

Judgment reversed with directions.

All the Justices concur except *Simmons*, Ch. J., absent.

GEORGIA SUPREME COURT.

M. THROWER, Plff. in Err.,
v.
CITY OF ATLANTA.

L. F. JONES, Plff. in Err.,
v.
SAME.

(... Ga. ...)

Betting—regulation by ordinance.

To maintain a "place" of any character where persons are allowed to bet, offer to bet, place an order for a bet, or telegraph

Headnote by CANDLER, J.

Case. Note.—McQuillin in his work on *Municipal Ordinances*, § 498, p. 783, says that "perhaps on no single topic of municipal corporation law have there been so many discordant utterances, even by the same courts and the same individual judges." as on this question of the right of a municipality to enact ordinances on a subject covered by state law. As the cases are practically harmonious in holding that such ordinances are valid where there has been a proper grant of power by the legislature, and the conflict arises in deciding what constitutes a sufficient grant of power,—which, of course, must be determined in each case by the wording of the particular charter or law by which the power is conferred,—it is difficult to lay down any general rules. But a carefully guarded statement of the conclusions that may legitimately be drawn from this mass of conflicting authorities is found in *Dillon on Municipal Corporations*, vol. 1, § 368. The author says: "In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: 1. A general grant of power, such as mere authority to make by-

or telephone bets, on races of any sort, is an act prohibited by Penal Code 1895, § 398; and such an act cannot, in the absence of express legislative authority, properly be made penal by a municipal ordinance.

(November 8, 1905.)

WRITS of error to the Superior Court for Fulton County to review a judgment

denying writs of certiorari to review judgments of the Recorder's Court of Atlanta convicting defendants of violating a municipal ordinance. Reversed.

The facts are stated in the opinion.

Mr. Reuben R. Arnold, for plaintiffs in error:

A municipality, in the absence of express

laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offense by the laws of the state. The intention of the state that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the state law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. 2. Where the act is, in its nature, one which constitutes two offenses, one against the state and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. 3. Where the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties and fully provided for by the general laws."

In view of the hopeless conflict on the question of the sufficiency of the grant of power,—that is, whether the delegation of authority to legislate on any particular subject must be made in express terms, or whether it may be inferred from the general grant of power to provide for the welfare and good government of the city,—it will be impossible to do more than give some illustrations of the decisions of the various courts.

That a general grant of power is not sufficient to sustain such an ordinance, but that there must be some express legislative authority, has been decided in *Re Sic*, 73 Cal. 142, 14 Pac. 405; *Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265; *Kahn v. Macon*, 95 Ga. 419, 22 S. E. 641; *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298; *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147; 1 L.R.A. (N.S.)

Penniston v. Newman, 117 Ga. 700, 45 S. E. 65; *Foster v. Brown*, 55 Iowa, 686, 8 N. W. 654; *Ex parte Bourgeois*, 60 Miss. 663, 45 Am. Rep. 420; *Washington v. Hammond*, 76 N. C. 34; *State v. Keith*, 94 N. C. 933; *Walsh v. Union*, 13 Or. 589, 11 Pac. 312; *Raleigh v. Dougherty*, 3 Humph. 11, 39 Am. Dec. 149; *Judy v. Lashley*, 50 W. Va. 628, 57 L. R. A. 413, 41 S. E. 197.

For some cases sustaining an ordinance on a subject covered by a state statute, though there is no express delegation of authority, see *Mobile v. Allaire*, 14 Ala. 400 (sustaining power to impose fine for assault and battery, under authority to enact ordinances "for the good government of the place"); *Van Buren v. Wells*, 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38 (sustaining ordinances punishing disturbances of peace, carrying concealed weapons, and keeping open saloons on Sunday, under grant of general authority to secure inhabitants against robbers, burglars, and persons violating the peace, and to preserve safety, health, prosperity, and morals of the inhabitants); *Theisen v. McDavid*, 34 Fla. 440, 26 L. R. A. 234, 16 So. 321 (sustaining ordinance forbidding any merchant or shopkeeper to keep open store or dispose of any wares or merchandise on Sunday, under authority to pass ordinances for preservation of the public peace and morals, and for the good government of the city. The court said that, were it not for the use of the word "morals" in the grant of power, they would have some hesitancy in sustaining the ordinance); *Bloomfield v. Trimble*, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586 (sustaining ordinance for arrest and punishment of persons found intoxicated, under authority to preserve peace and order, prevent riots, etc., and promote the safety, health, morals, and comfort of the inhabitants); *St. Louis v. Bentz*, 11 Mo. 61 (sustaining ordinance punishing vagrants, under power "to regulate the police of the city," although general law provided that vagrants might be proceeded against before a justice of the peace. But see *Jefferson City v. Courtmire*, 9 Mo. 692, holding that, under power "to regulate police of the city," city had no right to enact ordinance to punish summarily offense made indictable by general laws of state); *St. Louis v. Cafferata*, 24 Mo. 94 (holding general welfare clause sufficient to sustain ordinance as to keeping open place of business on Sunday); *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791 (holding general welfare clause sufficient to sustain ordinance prohibiting cruelty to animals); *Brownville v. Cook*, 4 Neb. 101 (ordi-

charter power, cannot make an act criminal which is covered by a state law.

Rothschild v. Darien, 69 Ga. 503; *Savannah v. Hussey*, 21 Ga. 80, 68 Am. Dec. 452; *Jenkins v. Thomasville*, 35 Ga. 147; *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329.

Mr. Harvey Hill also for plaintiffs in error.

Mr. J. L. Mayson, for defendant in error:
The ordinance passed by the city does

nance imposing fine on any person wilfully, maliciously, or mischievously meddling with or trespassing upon personal or real property of another sustained under general welfare clause); *Abbeville v. Leopard*, 61 S. C. 106, 39 S. E. 248 (ordinance prohibiting carrying of concealed weapons sustained under general welfare clause); *Greenville v. Kemmis*, 58 S. C. 427, 50 L. R. A. 725, 36 S. E. 727 (ordinance making it an offense to permit gaming in any place or house sustained under general welfare clause); *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 524 (sustaining ordinance imposing fine on any person connected with a lottery, under charter authority to pass ordinances for the punishment of all persons dangerous to public safety or health, and for the preservation of public morality); *State ex rel. Milwaukee v. Newman*, 96 Wis. 269, 71 N. W. 438 (sustaining ordinance providing penalty for keeping of gaming house, passed under authority of general welfare clause); *McLaughlin v. Stephens*, 2 Cranch, C. C. 148, Fed. Cas. No. 8,874 (sustaining ordinance prohibiting keeping of gaming tables in the town, under charter authority to make laws requisite for the regulation of morals and police of the town).

And Cooley in his *Constitutional Limitations*, 7th ed., page 279, says: "Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the state law on the same subject; but the state law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the state, and further penalties under proper legislative authority be imposed for its commission by municipal by-laws; and the enforcement of the one would not preclude the enforcement of the other." This he says is the clear weight of authority. And this statement has subsequently been approved by many courts. For some cases holding that where a subject is covered both by ordinance and by state law a prosecution under one does not preclude prosecution under the other, see *Gardner v. People*, 20 Ill. 430; *Mobile v. Allaire*, *supra*; *Anderson v. O'Donnell*, 29 S. C. 355, 1 L. R. A. 632, 13 Am. St. Rep. 728, 7 S. E. 523; *State ex rel. Milwaukee v. Newman*, *supra*; *United States v. Wells*, 2 Cranch, C. C. 45, Fed. Cas. No. 16,662; *Hamilton v. State*, 3 Tex. App. 643 (holding offense against the proper police regulations of a municipality, 1 L.R.A. (N.S.)

not undertake to make penal that which is made penal by the state under the head of gaming houses. On the contrary, the city leaves to the state the regulations of gaming houses, and undertakes to make illegal bookmaking at any other place or point of meeting. The city can do this.

Rothschild v. Darien, *supra*; *Hill v. Dalton*, 72 Ga. 314; *Braddy v. Milledgeville*, 74 Ga. 519; *Mayson v. Atlanta*, 77 Ga. 666:

which is also a violation of the penal laws, may be prosecuted under either): *Brownville v. Cook*, *supra*; *State v. Wister*, 62 Mo. 592; *Van Buren v. Wells*, *supra*; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Theisen v. McDavid*, *supra*. *Contra*, *State v. Cowen*, 29 Mo. 330; *State v. Thornton*, 37 Mo. 360; *Ex parte Freeland*, 38 Tex. Crim. Rep. 321, 42 S. W. 295. And, in *Rice v. State*, 3 Kan. 141, the court said it was not necessary in that case to decide whether both could punish for the same act, but added: "We have no doubt but that the one which shall first obtain jurisdiction of the person accused may punish to the extent of its power."

Where the manifest intention of the legislature is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail. *State v. Gordon*, 60 Mo. 383.

That an ordinance is not impliedly repealed by the subsequent enactment of the state statute on the same subject is decided in *People v. Hanrahan*, 75 Mich. 611, 4 L. R. A. 751, 42 N. W. 1124; *State v. Fourcade*, 45 La. Ann. 726, 40 Am. St. Rep. 249, 13 So. 187. *Contra*, *Hood v. Von Glahn*, 88 Ga. 406, 14 S. E. 564; *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329; *Southport v. Ogden*, 23 Conn. 128.

The constitutional right of the state to delegate to a municipality power to regulate by ordinance subjects which are already covered by the state law is sustained by the great weight of authority. For some authorities to this effect, see *McInerney v. Denver*, *Theisen v. McDavid*, and *Hood v. Von Glahn*, *supra*; *Re Jahn*, 55 Kan. 604, 41 Pac. 956; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493; *Brooklyn v. Toynbee*, 31 Barb. 282; *Ex parte Douglass*, 1 Utah, 108.

But power of the legislature to confer upon a city authority to make an offense against the city an act which the general state law makes an offense against the state, triable only in a court of record, is denied in *Ex parte Fagg*, 38 Tex. Crim. Rep. 573, 40 L. R. A. 212, 44 S. W. 294, where the state Constitution provides that all prosecutions shall be conducted in the name and by the authority of the state. And the power of the legislature to confer special authority to pass local laws which shall exclude general laws of the state on particular subjects is questioned in *Washington v. Hammond*, 76 N. C. 34.

Mabra v. Atlanta, 78 Ga. 683, 4 S. E. 154; Hood v. Von Glahn, 88 Ga. 411, 14 S. E. 564; Reeves v. Atlanta, 114 Ga. 851, 40 S. E. 1003.

Mr. W. P. Hill also for defendant in error.

Candler, J., delivered the opinion of the court:

The plaintiffs in error, Thrower and Jones, were tried in the recorder's court of the city of Atlanta for the alleged violation of a municipal ordinance, of which the following is a copy: "It shall be unlawful for any person, firm, or corporation, agent or employee thereof, to maintain or carry on any office or place of business, or to have a space or portion of the office, store, or place of business of another, or to maintain a place or point of meeting, in or at which any person or persons is or are allowed to bet, or offer to bet, or place an order for a bet, or telegraph or telephone bets, on horse races, boat races, bicycle races, or any kind or description of race, whether such race is to be run in the city of Atlanta or any place outside of said city." They were adjudged guilty and fined by the recorder, whereupon they presented to the judge of the superior court of Fulton county their petitions for certiorari, which were denied, and they excepted. As the evidence in the two cases was identical, and both are governed by the same principles of law, they will be considered together.

In the view that we take of this case it is not necessary to consider the question whether the evidence introduced on the trial was sufficient to show a violation of the ordinance which has been quoted. We are confronted by the broader question whether the ordinance was invalid, in that it undertook to make penal that which was already prohibited by the state law making penal the keeping of a gaming house; and this question we feel constrained to decide in the affirmative. The very evident purpose of the ordinance was to prevent the maintenance of a "place" of any sort, whether on premises owned by another, on the public streets, or elsewhere, where betting of the character designated was permitted. That this is fully covered by the statute against keeping a gaming house (Penal Code 1895, § 398) has been distinctly held by this court. In *Thrower v. State*, 117 Ga. 756, 45 S. E. 126, which was an indictment under Penal Code 1895, § 398, for keeping a gaming house, Mr. Justice Lamar, speaking for the court, said: "In prohibiting a gaming house it is intended to prevent the maintenance of a place at which persons come together for the purpose of hazarding

and betting money." Clearly, then, if the plaintiffs in error in the present cases were guilty of a violation of the municipal ordinance which has been quoted, they are guilty of a violation of the state law against keeping a gaming house; and the familiar principle that a municipality may not prohibit by ordinance that which is already made penal by state statute, unless there is express and specific legislative authority for the same, will apply.

The case of *Penniston v. Newnan*, 117 Ga. 700, 45 S. E. 65, is closely in point. There an ordinance of the city of Newnan provided that it should be unlawful for any person to keep an open business house on the Sabbath Day, or to trade or traffic on that day, or to work or cause work to be done on the Sabbath; the ordinance containing a proviso that it should not prevent the sale of drugs or the carrying on of works of necessity on the Sabbath Day. The accused, who was the proprietor of a drug store, kept open his place of business on the Sabbath Day, and his clerks therein sold tobacco and cigars. He was convicted in the police court, his petition for certiorari was overruled, and he brought the case to this court, where the judgment was reversed, on the ground that the offense proved against him was punishable under Penal Code 1895, § 422, making it penal for any person to pursue his business or the work of his ordinary calling on the Lord's Day, and that it could not be punished by the municipality. The case of *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564, relied on by counsel for the city, and the more recent one of *Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390 are not in point, for the reason that in those cases the municipal ordinances which were attacked had been authorized by express legislative enactment, while it is not claimed that the city in this case had any such legislative authority. Nor is the case of *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173, in conflict with what is here held. The dictum of Mr. Justice Lumpkin in the *Odell* Case, to the effect that the city, under the "general welfare" clause of its charter, had the right to break up the "business" of selling pools on horse races, was fully explained in the case of *Thrower v. State*, 117 Ga. 758, 45 S. E. 126, on the ground that the court in the case first mentioned was dealing solely with the legality of the alleged business or occupation, and did not have before it the question whether the city could make penal acts which were already prohibited by the state law against keeping gaming houses.

From what has been said, it follows that

the court erred in refusing to sanction the petition for certiorari.

Judgment reversed.

All the Justices concur, except Beck, J., not participating.

GEORGIA SUPREME COURT.

JOHN SILVEY et al., Plffs. in Err.,

v.

M. W. TIFT, Trustee, etc., of E. H. Griffin, Bankrupt.

(123 Ga. 804.)

1. Bankruptcy—effect of judgment.

Where creditors filed a petition to have a debtor adjudged an involuntary bankrupt, alleging several acts of bankruptcy, among them being that, while insolvent, he made a preference to a firm, named as creditors, within four months before the filing of the proceedings, and, after adjudication in bankruptcy, the trustee brought suit against such firm, alleging that they received a preference with reasonable ground for believing that it was such, the adjudication in bankruptcy, duly made, was conclusive of the status of the bankrupt as such, but did not estop the defendants from setting up, by way of defense, that, some time prior to the proceedings in bankruptcy, they sold to the bankrupt goods, relying on certain representations made by him, and that they discovered that such representations were untrue, and rescinded the sale on account of fraud, and retook their goods.

2. Bankruptcy—instructions—evidence.

Where such a defense was made, and the defendants sought to show that the purchaser returned to them after the sale and stated that he had made a material misrepresentation, and thereupon they rescind-

ed the sale, in a suit by the trustee in bankruptcy afterwards appointed, against them, as preferred creditors who had taken with reasonable ground to believe that a preference was made, it was error to instruct the jury that they could consider the statement so made solely for the purpose of impeaching the bankrupt, who was a witness for the plaintiff.

3. Sale—fraud—rescission.

If one purchasing goods makes a false representation as to a material matter, and the owner relies on such statement in making the sale, upon discovering the fraud he may rescind and reclaim his property, or so much of it as is still in the hands of the purchaser; or he may elect to continue the contract. If he elects to rescind, he must give notice to the purchaser thereof, and of his determination to reclaim the goods sold; and, if he has received anything in payment, he must return it, or tender it, to the purchaser.

4. Sale—rescission—reclamation.

If a vendor, in reliance upon material misrepresentations, has made a sale, and has rescinded it on discovery of the fraud, but all of the property sold is not in the possession of the purchaser, and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all of the property which can be recovered. As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract of sale, but based on the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. He cannot, however, proceed both under the contract of sale and against it.

5. New trial.

While in the present case there may have been sufficient evidence to authorize the verdict, it was not so clearly demanded that a new trial will not result from the errors of law.

Headnotes by LUMPKIN, J.

(August 4, 1905.)

Case Note.—In harmony with *SILVEY v. TIFT* and the authorities relied upon by the court in that case, is the similar case of *Pepperdine v. Bank of Seymour*, 100 Mo. App. 387, 73 S. W. 890, where it was held that an adjudication in involuntary bankruptcy for having, while insolvent, permitted a creditor to obtain judgment, is not conclusive as to the creditor's right in property obtained by virtue of such judgment, even though the creditor resisted the proceedings. It was said that the creditor was no party, direct or intermediate, to the bankruptcy proceedings, and, in resisting them, merely exercised a right accorded to all creditors by the statute; and that its rights in that portion of the bankrupt's property involved had attached prior to the adjudication.

And in *Harmanson v. Bain*, 1 Hughes, 188, Fed. Cas. No. 6,072, an adjudication of bankruptcy reciting a transaction similar to the 1 L.R.A. (N.S.)

one in question as an act of bankruptcy was held not to preclude the consideration, in equity, of whether the transaction amounted to a preference, for the reason that the character of the court, the evidence, the parties to the proceeding, and the technical quality of the act itself were different.

An adjudication of bankruptcy is not conclusive evidence of the giving of an unlawful preference, as alleged in the petition, to the creditor whose claim for priority is under consideration. *Re Dunkle*, 7 Nat. Bankr. Reg. 72, Fed. Cas. No. 4,160.

That a bankrupt is adjudicated upon a petition charging him with making an assignment with intent to defraud does not preclude the assignee from disputing that fact, in proceedings against him for contempt. *Re Marter*, 12 Nat. Bankr. Reg. 185, Fed. Cas. No. 9,143.

ERROR to the City Court of Atlanta to review a judgment in favor of plaintiff in an action brought to collect assets alleged to have belonged to a bankrupt. Reversed.

Statement by Lumpkin, J.:

Tift, as trustee in bankruptcy of Griffin, brought suit against John Silvey & Company, alleging as follows: On March 15, 1902, Griffin, while insolvent, transferred and delivered to the defendants a portion of a certain stock of goods belonging to him. At the time of the transfer he was insolvent, and the defendants knew and had reasonable cause to believe that such was the case. The effect of the transfer was to enable them to obtain a greater percentage of their debt than the other creditors of the bankrupt of the same class received, and was a preference in contemplation of the act of Congress of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States." Act July 1, 1898, chap. 541, 30 Stat. at L. 544 (U. S. Comp. Stat. 1901, p. 3418). The defendants received this preference, and had reasonable cause to believe that it was intended to give them a preference in contemplation of the act of Congress. They took possession of the property, carried it away, and converted it. On April 29, 1902, certain creditors of Griffin filed a petition in bankruptcy in the district court of the United States, alleging the commission of certain acts of bankruptcy by him, and praying that he be adjudicated a bankrupt. He was duly adjudicated a bankrupt, and the plaintiff was appointed trustee. In that capacity, and under leave of the court, he sues to recover of the defendants the value of the property so taken by them, which is alleged to be \$1,400. The plaintiff alleged that the defendants were concluded and estopped from setting up in this suit "any defense in contradiction to the following facts." The petition then contains what appears to be a copy of a part of the petition in bankruptcy. A demurrer having been filed, the entire petition was set out by amendment, which showed that a number of creditors of Griffin filed a petition to have him adjudicated a bankrupt, alleging him to be insolvent. Three acts of bankruptcy were alleged: First, that, within four months next preceding the filing of the petition, Griffin, while insolvent, transferred a portion of his property, namely, a large part of his stock of goods, of the value of \$500, to one Weslosky, doing business under the trading name of the Albany Grocery Company, a creditor, with intent to prefer him over his other creditors; second, that, while insolvent and within four months next pre-

ceding the filing of the petition, he transferred a portion of his property, namely, about \$1,400 worth of hats, shoes, and dry goods, to John Silvey & Company, creditors of his, with intent to prefer them over his other creditors; third, that, while insolvent and within four months next preceding the date of the petition, he suffered and permitted one Turner, a creditor, to obtain a preference through legal proceedings, and did not within five days before the sale of the property vacate or discharge such preference, the levy being under a distress warrant for rent for \$127, and being made upon a lot of hats, shoes, dry goods, etc., which were sold under the warrant, and the proceeds applied to the payment thereof. A subpoena issued to the alleged bankrupt on April 29, 1902, and on May 28th he was adjudicated a bankrupt. Later the trustee was regularly appointed. To that portion of the petition which set up an estoppel, a demurrer was urged on the ground that some of the allegations were not properly pleaded, and did not set out facts constituting an estoppel, and merely alleged legal conclusions. The allegations demurred to were as follows: "Petitioner further represents that defendants to this case are concluded and estopped from setting up in this suit any defense in contradiction to the following facts." Also: "The allegations of said petition set out above being necessary allegations of said petition, the said John Silvey & Company could then and there have pleaded, in defense to said petition, denial of the facts set out in the allegations of said petition transcribed above, and, having failed in said court to sustain any denial or contradiction of any of said facts and allegations, they are now concluded and estopped from contradicting and denying them, because of the judgment of the district court of the United States of the southern district of Georgia, made in said matter in favor of the petitioners in bankruptcy, declaring said Ernest H. Griffin bankrupt, said judgment being made and rendered duly and regularly by a court of competent jurisdiction." The court overruled the demurrer to the declaration as amended, and exceptions *pendente lite* were taken. The jury found for the plaintiff \$468.68 principal, besides interest. Defendants moved for a new trial, which was refused, and they excepted. They also assigned error on the overruling of the demurrer.

Messrs. Candler & Thomson and W. D. Thomson, for plaintiffs in error:

The alleged preference to Silvey & Company is not a "necessary allegation" of peti-

tion in bankruptcy, and we are not concluded by it.

Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 592, 18 L. ed. 554; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Re Henry Ulfelder Clothing Co. 98 Fed. 409; Re Drummond, 1 Nat. Bankr. Reg. 231, Fed. Cas. No. 4,093; Traders' Ins. Co. v. Mann, 118 Ga. 382, 45 S. E. 426.

There was a right to rescind the contract without the consent of the defendant on account of his fraud.

Clayton v. O'Conner, 29 Ga. 691; Code, 3669, 3711, 3713; Newman v. H. B. Claffin Co. 107 Ga. 89, 32 S. E. 943; Woodruff v. Saul, 70 Ga. 271; Mashburn v. Dannenberg Co. 117 Ga. 567, 44 S. E. 97; East Tennessee, V. & G. R. Co. v. Hayes, 83 Ga. 560, 10 S. E. 350; 1 Benjamin, Sales, § 661; 24 Am. & Eng. Enc. Law, p. 643.

Plaintiffs, by an effort to retake their entire property, if successful in part only, do not lose the right to pursue the original wrongdoer for the value of the unfound portion.

2 Mechem, Sales, § 999; Hersey v. Benedict, 15 Hun, 282; Moller v. Tuska, 87 N. Y. 166; Kinney v. Kiernan, 49 N. Y. 164; Heinze v. Marx, 4 Tex. Civ. App. 599, 23 S. W. 704; Sleeper v. Davis, 64 N. H. 59, 10 Am. St. Rep. 377, 6 Atl. 201.

Mr. Arthur G. Powell, for defendant in error:

A plaintiff may set up a former adjudication as a basis of his action.

9 Enc. Pl. & Pr. p. 613.

The adjudication in bankruptcy is conclusive that the bankrupt preferred the creditor, and that such preference was illegal.

Magnus v. Ketcham, 50 C. C. A. 517, 7 Am. Bankr. Rep. 463, 112 Fed. 752; Michaels v. Post, 21 Wall. 398, 22 L. ed. 520; Re Skinner, 97 Fed. 190; Re Henry Ulfelder Clothing Co. 98 Fed. 409; Shawhan v. Wherritt, 7 How. 627, 12 L. ed. 847; Lovejoy v. Murray, 3 Wall. 1-19, 18 L. ed. 129-134; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427.

It is not necessary to show that the creditor actually received the notice if the provisions enacted by the statute were observed.

Moye v. Walker, 96 Ga. 769, 22 S. E. 276; Burbage v. American Nat. Bank, 95 Ga. 503, 20 S. E. 240; Tant v. Wigfall, 65 Ga. 412; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857; 1 Am. & Eng. Enc. Law, p. 385.

Mr. Shepard Bryan also for defendant in error.

Lumpkin, J., delivered the opinion of the court:

1. The demurrer to the original declaration contained various grounds, but only 1 L.R.A. (N.S.)

one is now insisted on. We do not think it good pleading to allege that a defendant is estopped from setting up any defense in contradiction "to the following facts," and then to set out an entire proceeding in bankruptcy, containing various allegations, several grounds for the proceeding, the adjudication, and the appointment of the trustee, and to allege in sweeping terms that the allegations set out are necessary allegations, and that the defendants could have pleaded in defense of them, but failed to do so, and are estopped from contradicting or denying them. This leaves the court to ascertain what defense the pleader deems to be in conflict with "the following facts." Moreover, to copy a part of a proceeding in bankruptcy, and to allege generally that it comprises necessary allegations, is a conclusion. It appears from the order overruling the demurrer that this was done after amendment, from which we presume that it was renewed after the amendment had been made. The real question argued before us was whether the adjudication in bankruptcy was conclusive on the defendants to the effect that the goods sued for belonged to the bankrupt on March 15, 1902, and were transferred by him to them with intent to prefer them as creditors over his other creditors; he being insolvent at the time. Their defense was that they had sold goods to Griffin upon certain representations made by him; that they ascertained that these representations were false, and the goods were therefore procured from them by fraud; and that they thereupon rescinded the sale and retook such of the goods as were on hand, not as a payment or preference to creditors, but as being a taking possession of their own goods. If the plaintiff's contention as to the effect of the adjudication is correct, the defendants would be practically precluded and estopped from defending at all, save possibly on the question of notice; and there would be little to do but take a verdict for the value of the goods. The allegations which he says are necessary, in the petition to have Griffin adjudicated a bankrupt, include not only his insolvency, but also a statement of a transfer by him of a portion of his property to the defendants, the value of the goods so transferred, and that this was a preference. The presiding judge overruled the demurrer.

An adjudication in bankruptcy is in the nature of a proceeding *in rem*, and the adjudication is in the nature of a decree *in rem*, so far as it fixes the status of the defendant in the proceeding as a bankrupt. Considered in the light of a proceeding *in rem*, the *res* involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All

persons are bound by the adjudication to that effect; and this was true under the act of 1867 as well as under the act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a competent court, unless it appeared that the decree was void in form, or that due notice was not given. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.* 91 U. S. 656, 23 L. ed. 336; *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Shawhan v. Wherritt*, 7 How. 627, 12 L. ed. 847 (under the act of 1841); *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 46 L. ed. 1113, 1121, 22 Sup. Ct. Rep. 857. Where a proceeding *in rem* is against a particular piece of property, as a vessel, for charges against it, it is generally taken into possession, and the property itself is treated as the defendant, liable for its own debts or defaults; and, after seizure, subsequent proceedings are had by citation to the world, of which the owner is at liberty to avail himself by appearing in the case. In the present case, however, there was no such proceeding *in rem* against the goods. The proceeding was to determine the status of Griffin as a bankrupt, and it neither was, nor could have been, commenced by a seizure of the property claimed by the defendants. *Mankin v. Chandler*, 2 Brock. 125, Fed. Cas. No. 9,030; *The Sabine (The Mayflower v. The Sabine)* 101 U. S. 388, 25 L. ed. 984; *Freeman v. Alderson*, 119 U. S. 187, 30 L. ed. 373, 7 Sup. Ct. Rep. 165. To illustrate further, proceedings to appoint an administrator are also in the nature of proceedings *in rem*, and, where the court has jurisdiction, are not subject to collateral attack. But it will not be contended that if a person applies for administration, and sets out in his petition that the entire estate of the decedent consists of a certain house and lot, the judgment appointing him would establish the title of the estate to the property, if in fact it belonged to another than the decedent. The judgment would establish the status of the applicant as an administrator, and that he was duly appointed, but would not determine the title to the property.

There are two kinds of actions which are commonly spoken of as proceedings *in rem*. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant, but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class of actions, which are strictly *in rem*, the judgment is against the property alone. The other class of proceedings *in rem* are proceedings to determine the status of some person or sub-

ject-matter. Such are judgments of outlawry, appointments of guardians, administrators, etc., where the proceeding is to determine status, not title to property. The *res* which makes it a proceeding *in rem* is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment *in rem* has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. *Stroupper v. McCauley*, 45 Ga. 74, 78; *Childs v. Hayman*, 72 Ga. 791, 796, 797; *Woodruff v. Taylor*, 20 Vt. 65. In the act of 1898 it is provided that "the bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow." Act July 1, 1898, chap. 541, § 18b (30 Stat. at L. 551, U. S. Comp. Stat. 1901, p. 3429, 1 Fed. Stat. Anno. p. 583). The bankrupt and his creditors are those given an opportunity to appear and defend against the adjudication in bankruptcy. The defendants in the present case, however, do not claim to be creditors, or defend as such, but contend that they were defrauded out of certain goods, and upon discovering the fraud rescinded the trade and resumed possession of their own goods. To compel them to admit that they were creditors and received the goods as such would require them to waive their defense before they could make it. In some of the decisions creditors are spoken of as being privies of the bankrupt. Often, however, they claim against the debtor rather than as privies. To hold that creditors could, by the petition in bankruptcy and the adjudication, conclusively subject the property of third parties, and make it a part of the estate of the bankrupt, if in fact it was not so, would be to go far beyond the determination of his status. To put an extreme case, suppose that creditors should seek to have their debtor declared a bankrupt, and in their petition should allege that he had conveyed a house and lot to a named person, as one among other grounds of the proceeding, when in fact the debtor had never owned the house and lot, and had never transferred it to the person named at any time. Clearly, an adjudication that the debtor was bankrupt would not invest him or his trustee with title to the property, or operate to take away the title of the real owner, who had never been sued or summoned into court, and who, perhaps, never heard of the proceedings. In such a case, to hold that the adjudication of bankruptcy against the debtor would take away the property of a third person and add it to his estate would approximate more nearly con-

fiscation than adjudication. Suppose one should steal the property of another, and, upon its discovery, the real owner should resume possession; if later creditors of the thief should file a petition in bankruptcy against him, alleging that he had given a preference to the owner, surely an adjudication that the thief was a bankrupt would not vest the stolen property in him or the trustee. The object of the proceeding is to have the debtor adjudged to be a bankrupt, not to recover property from third parties. They cannot deny that he is a bankrupt, but they can deny that he owns their property. To adjudge A's status is not to adjudge B's property.

In the case of *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 382, 45 S. E. 426, where a policy of insurance had been transferred by a debtor to creditors, and the debtor was afterwards adjudicated a bankrupt, it was held: "That the adjudication in bankruptcy was based on the fact of such preference having been made did not of itself authorize the trustee to ignore the assignment; but it would have been necessary to have the same set aside, or secure a reassignment in writing, before he could sue on the policy in his own name." In the opinion Mr. Justice Lamar said: "The adjudication in bankruptcy was not binding on them [the creditors who received the policy]. As a judgment *in rem* it conclusively fixed the status of Screws as a bankrupt, but Everett, Ridley, Ragan, & Company had still a right to be heard on the validity of the transfer. They might have been able to show that it was not made within four months before the filing of the petition in bankruptcy, or that they had acted in good faith, without notice of insolvency, and purchased the policy for full value."

In *Lewis v. Sloan*, 68 N. C. 557, it was held: "The jurisdiction of a bankrupt court being conceded, its adjudication of bankruptcy is a judgment *in rem* fixing the status of the bankrupt, which upon that point is binding upon all the world, and can only be impeached for fraud in obtaining it. . . . Every court, however, in which a controversy as to the title to the property alleged to have been fraudulently conveyed may arise, has jurisdiction to inquire whether the conveyance was in fact and in law fraudulent; i. e., whether the conditions prescribed by the act to make it fraudulent existed." In the opinion it was said: "Although the adjudication of bankruptcy is a judgment *in rem*, and as such conclusive on all the world, and although in arriving at that judgment the bankrupt court declares the conveyance alleged as the act of bankruptcy to be a preference among creditors, and therefore fraudulent within the

meaning of the act,—yet such declaration is no part of the judgment, but is merely incidental to it, and, so far from being conclusive on strangers that the conveyance was fraudulent, is not even evidence against them for that purpose. It is merely *res inter alios acta quæ nemine nocere debet*. No one not a party to the record is affected by it, except so far as it is *in rem*. *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 438-447; *Barrs v. Jackson*, 1 Younge & C. Ch. Cas. 585, 1 Phill. Ch. 582. Of the American cases, see *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. In addition to what is said in those cases, there is no reason why the effect of a judgment *in rem* should be more closely confined to the precise point adjudged, viz.: That, so far as it is *in rem* and fixes the status of the person or property affected, it binds all the world; whereas a judgment *in personam* binds only parties and privies who have once had an opportunity of contesting it."

In *Neustadter v. Chicago Dry-Goods Co.* 96 Fed. 830, it was held by Judge Hanford, of the United States district court, that, "where the issues arising upon a petition in involuntary bankruptcy were decided adversely to the petitioners, and an order made dismissing the proceedings, no notice of the proposed dismissal being given to the other creditors," certain of such other creditors could not have the case reinstated, but were not debarred from bringing a new and independent petition in bankruptcy against the debtor.

In *Re Henry Ulfelder Clothing Co.* 98 Fed. 409, where in a petition for involuntary bankruptcy the debtor and one of his creditors answered the petition, putting in issue the allegation of insolvency, and also denying that the petitioner was a creditor; and on a trial the allegations of the petition were found to be true, and an adjudication in bankruptcy was made,—it was held to be conclusive evidence of the validity of the petitioner's claim when it was presented for an allowance as a claim against the bankrupt's estate; and that it could not be disputed either by the bankrupt or a creditor who joined in the proceedings and opposed the adjudication. But, the petitioning creditor having put in evidence certain promissory notes made by the debtor to third parties for the purpose of proving insolvency; and the debtor having contested their validity and consideration; and, upon the hearing, with evidence on both sides, the court having found the allegations of the petition to be true and made an adjudication of bankruptcy,—it was held that, as such notes were not directly in issue, but only collaterally brought in question; and as the holders thereof were not parties to

the proceeding,—the adjudication in bankruptcy was not conclusive of their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate. In the course of the opinion De Haven, District Judge, said: "If the court, upon the evidence then before it, had found against their validity [that is, the validity of the notes of the other creditors], and, for that reason, had adjudged that the corporation was not insolvent, and dismissed the proceeding, such finding and judgment would not have constituted a bar to a subsequent action by Henry Ulfelder and A. Levy [holders of the notes] against the bankrupt to recover upon the same claims. They would not have been estopped by such a judgment, because, not being parties, the question of the validity of their present claims was not, and could not have been, litigated by them in the involuntary proceeding. In the case of *Re Schick*, 2 Ben. 5, Fed. Cas. No. 12,455, the defendant was adjudged bankrupt upon the ground that a certain judgment confessed by him in favor of one Cowen was an act of bankruptcy; and, in the course of the opinion, it was said by Blatchford, J.: "This proceeding, however, is, so far, one merely between the petitioning creditor and the debtor. Cowen is no party to it, although examined as a witness for the creditor; and in the further progress of the matter, if the assignee of the debtor to be appointed should institute proceedings to realize, for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from doing so." And in the case of *Re Drummond*, 1 Nat. Bankr. Reg. 231, Fed. Cas. No. 4,093, McDonald, J., in adjudging the defendant bankrupt because of his act in preferring certain creditors, said: "It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in this case. . . . And, indeed, as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any matter affect their interest, except so far as it fixes the status of Drummond as a bankrupt." See also *Re Dibblee*, 3 Ben. 283, Fed. Cas. No. 3,884."

In *Magnus v. Ketcham*, 50 C. C. A. 517, 112 Fed. 752, it is stated broadly in the syllabus that "an adjudication of involuntary bankruptcy, duly entered on default for want of an answer to the petition, is as binding on the bankrupt and creditors as

one entered upon a hearing, and is conclusive of the commission of the acts of bankruptcy charged in the petition." A careful examination of the entire case, however, will show that the real question was whether the adjudication was binding on the question of the insolvency of the bankrupt, and that the creditor who was held to be concluded was a judgment creditor who had obtained the judgment by confession; that, in connection with the proceedings in bankruptcy, an injunction was prayed for and issued, restraining a sale under the execution; that the creditor appeared and moved to dissolve the injunction, and, by agreement, a modification was made in the order, and he had ample opportunity to contest the point in issue.

A slight consideration of the difference between the issues involved in a proceeding in bankruptcy and a suit to recover property from a person holding it adversely and claiming to be the owner will show that the two proceedings are not identical, and that the former is not conclusive of the latter, except as to determining the status of the bankrupt as such. The issue in the former proceeding is whether the debtor is or is not a bankrupt within the meaning of the act of Congress. Where it is sought to recover property from one alleged to be a creditor who has received a preference, the proceeding rests upon § 60b of the bankrupt act, which reads as follows: "If a bankrupt shall have given a preference within four months before the filing of petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." 30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445. The various requisites to a recovery under this section of the act are quite different from the mere determination upon the proceedings in bankruptcy that the debtor is a bankrupt.

This position may be further illustrated by considering a voluntary proceeding in bankruptcy. While differing from a proceeding *in invitum*, the adjudication there as to the status of the bankrupt would also be, to some extent, in the nature of a judgment *in rem*, so as to show that he was a bankrupt; but certainly it would not be pretended that a person voluntarily going into bankruptcy could possess himself of property which did not belong to him, or have the title to property claimed by third parties adjudicated to be his, no matter what allegation he might make in his peti-

tion or schedule. The adjudication in bankruptcy, therefore, conclusively determined the status of Griffin as a bankrupt, but did not conclude the defendants from making their defense on a suit by the trustee in bankruptcy against them to recover the property.

In the answer of the defendants no reference is made to other property, except that which they claim to have been obtained from them by fraud, and to have been recovered. It appears from the evidence that they received other property also. The question whether in fact there was a rescission for fraud, or whether there was a preference, in view of the entire evidence, was for the jury. The ground of demurrer insisted on should have been sustained. The adjudication in bankruptcy could be pleaded, but the effort to estop the defendants from pleading rescission for fraud cannot succeed. True, the court charged that the adjudication in bankruptcy did not conclude the defendants, except as to the insolvency and proper adjudication of bankruptcy; but the other ruling remained unreversed.

2. Evidence was introduced to show that Griffin made a certain statement to the defendants as a basis of credit, that they extended credit to him, and that subsequently he informed them that such statement was not true in fact, and that it did not correctly give the amount of his indebtedness; and they insist that thereupon they rescinded the sale for fraud and retook their goods. The court charged as follows: "Certain evidence, gentlemen, has been permitted to go to you as to the alleged statements made by Griffin. Any statement made by Griffin, if he made statements, would not be binding upon this plaintiff in this suit as admissions, and such evidence as has been allowed to go to you with reference to the alleged statements of Griffin is to be considered by you exclusively on the question as to whether Griffin was successfully impeached or not and should not be considered by you as an admission of Griffin's, binding upon the plaintiff in this case." One question in the case was whether, if there was a preference, those receiving it had reasonable cause to believe that a preference was intended. On this branch of the case the statements of Griffin to them were admissible and proper for consideration. They were not, of course, binding or conclusive on the plaintiff, but, as bearing on the question of knowledge by the defendants, they could be considered; and it restricted the use of this evidence too much to confine it solely to the matter of impeaching Griffin as a witness. Civil Code 1895. § 5176, declares that "when, in a legal investigation, information, conversations,

letters, and replies, and similar evidence, are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence." And § 5179 says: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*." See also *McLean v. Clark*, 47 Ga. 24; *Cook v. Pinkerton*, 81 Ga. 89, 12 Am. St. Rep. 297, 7 S. E. 171; *Cohen v. Parish*, 105 Ga. 339, 31 S. E. 205; 3 *Wigmore*, Ev. § 1777.

3. If one purchasing goods makes a false representation as to a material matter, and the owner of the goods relies on such statement and sells, upon discovering the fraud the owner may rescind and reclaim his property, or so much of it as is still in the possession of the purchaser. In order to rescind, it is not necessary that the purchaser should consent to a rescission, or to make a new contract with the vendor for that purpose. The vendor, upon discovering the fraud, may elect to rescind or to continue the contract. If he elects to rescind, he must give notice to the purchaser of such election and of his determination to reclaim the goods sold; and, if he has received anything in payment, he must return it or tender it to the purchaser. If, however, the transaction, which is claimed, on the one hand, to have been a rescission, and, on the other, to have been a preference, was accomplished by consent or agreement between the vendor and the purchaser, it is not error for the trial court to submit that fact to the jury to aid them in determining what was the real nature of the transaction. Upon the right of a vendor to rescind upon discovering that he has acted on a false representation in making a sale, see *Clayton v. O'Conner*, 29 Ga. 687; *Woodruff v. Saul*, 70 Ga. 271; *East Tennessee, V. & G. R. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350; *Newman v. H. B. Claffin Co.* 107 Ga. 89, 32 S. E. 943; *Mashburn v. Dannenberg Co.* 117 Ga. 567, 44 S. E. 97; 1 *Benjamin, Sales*, 6th Am. ed. § 661; 24 *Am. & Eng. Enc. Law*, 2d ed. p. 643; 1 *Bigelow*, Fr. 76.

4. If a vendor, in reliance upon material misrepresentations, has made a sale, and has rescinded it on discovery of the fraud; but all of the property sold is not in the possession of the purchaser; and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor,—the latter may reclaim all the property which can be recovered. As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract, but based on the theory of the conversion of the goods not found, or an action

based upon the contract implied by law where a vendee has disposed of the goods for money, and the seller has waived the tort. 2 Mechem, Sales, § 909, and citations; Hersey v. Benedict, 15 Hun, 282; Sleeper v. Davis, 64 N. H. 59, 10 Am. St. Rep. 377, 6 Atl. 201; Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399; Southern R. Co. v. Born Steel Range Co. 122 Ga. 658, 50 S. E. 489. He cannot, however, proceed both under the contract of sale and against it. He cannot take back such of the goods as remain on hand as part payment of the indebtedness arising from the contract of sale, and retain a claim or seek payment for the balance of the purchase price. These two positions would be inconsistent.

5. It is insisted by the defendant in error that the evidence demanded the verdict, and that there should be an affirmance, independently of the consideration of any alleged errors on the part of the court. There was undoubtedly ample evidence to have sustained a finding in favor of the plaintiff, but we are not prepared to hold that it so plainly required a verdict for him that an affirmance must necessarily result. The plaintiff contended that there was not in fact a legal rescission, but that Griffin, being insolvent and about to fail, came to Atlanta and conferred with the defendants for the purpose of giving them a preference; that the matter of rescission, now sought to be set up, was not the real transaction between the parties; that the admission of having made a misstatement was merely colorable; that the defendants took, not only their own goods, but other goods of Griffin; and that they did not merely seek to reclaim goods on the ground of an alleged fraud, but to get paid for the contract price, crediting the goods received thereon,—both those bought from them and others. The defendants claim that there was a bona fide rescission, and not a preference; that, if any goods were received by them in connection with the rescission which were not included in their sale to Griffin, it was a mere accident, and not intentional; and that the receipt of other goods later was a separate and distinct transaction for the purpose of partly compensating them for such of their goods as could not be reclaimed. Of course, any receipt of additional goods in payment would not stand on the basis of a rescission. While the jury might have found a verdict in favor of the plaintiff, we could not hold that it was so clearly demanded as to require an affirmance.

Judgment reversed.

All the Justices concur, except Simmons, Ch. J., absent.
1 L.R.A. (N.S.)

ILLINOIS SUPREME COURT.

GILBERT CALKINS et al., Plffs. in Err.,
v.
CHARLES CALKINS et al.

(216 Ill.458.)

Will—attestation.

Attestation of a will in another room, out of range of testator's vision, is not within a statutory requirement that it shall be in his presence; and the defect is not cured by a subsequent acknowledgment by the witnesses, or ratification and approval by the testator

(June 23, 1905.)

ERROR to the Circuit Court for Kane County to review a decree refusing to set aside the probate of the will of Cyrus Calkins, deceased. Reversed.

The facts are stated in the opinion.

Messrs. N. J. Aldrich, Theodore Worcester, and Lee Mighell, for plaintiffs in error:

The subscribing witnesses to a will should subscribe the same in a position where it is possible for the testator to see them in the act of subscribing, if so disposed.

Rev. Stat. chap. 148, § 2; Schouler, Wills, §§ 341, 342; Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Re Tobin, 196 Ill. 484, 63

Case Note.—That a statute requiring a will to be attested and subscribed by witnesses in the presence of the testator is not sufficiently complied with where the signing was done elsewhere and subsequently acknowledged in his presence and approved by him, is expressly held in Mendell v. Dunbar, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402, and Re Downie, 42 Wis. 66, cited in CALKINS v. CALKINS.

Re Downie is cited and followed in Pawtucket v. Ballou, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43, and is said in Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464, to lay down too severe a rule in holding that the subscription must take place where it is possible for the testator to see. In that case the testator could only look upward, but the signing was done in his hearing and where he could have seen had he been able to turn his head. This was held to be a signing in his presence. After the witnesses had signed, the paper was handed to the testator, who read their names and said he was glad it was done.

This last case was relied on in Cook v. Winchester, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106 (cited in the CALKINS CASE), where it was held that a signing in an adjoining room, which the testatrix might have seen by moving to the edge of her bed, which she was unable to do, was in her presence, within the meaning of the statute. The court goes on to say, however: "But we hold that the execution of this will was valid expressly upon the ground that not only

N. E. 1021; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Gallagher v. Kilkeary*, 29 Ill. App. 419; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901; *Witt v. Gardiner*, 158 Ill. 181, 49 Am. St. Rep. 150, 41 N. E. 781; *Re Downie*, 42 Wis. 66; *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Den ex dem. Mickle v. Matlack*, 17 N. J. L. 86; *Den ex dem. Compton v. Mitton*, 12 N. J. L. 70; *Duffie v. Corridon*, 40 Ga. 122; *Edelen v. Hardey*, 7 Harr. & J. 64, 16 Am. Dec. 292; *Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; *Reynolds v. Reynolds*, 1 Speers, L. 253, 40 Am. Dec. 599; *Ragland v. Huntingdon*, 23 N. C. (1 Ired. L.) 581; *Graham v. Graham*, 32 N. C. (10 Ired. L.) 219; *Re Cox*, 46 N. C. (1 Jones, L.) 321; *Pope v. Pope*, (Vt.) cited in 11 Allen, 49, 87 Am. Dec. 687; *Shires v. Glascock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395; *Doe ex dem. Wright v. Manifold*, 1 Maule & S. 294; *Todd v. Winchelsea*, *Moody & M.* 14; *Broderick v. Broderick*, 1 P. Wms. 239; *Machell v. Temple*, 2 Shower, 288; *Moore v. King*, 3 Curt. Eccl. Rep. 243; *Davis's Goods*, 3 Curt. Eccl. Rep. 748; *Chamney's Goods*, 1 Rob. Eccl.

Rep. 757; *Playne v. Scriven*, 1 Rob. Eccl. Rep. 772, 7 Notes of Cases, 122; *Cunningham's Goods*, 4 Swabey & T. 194, 29 L. J. Prob. N. S. 71; *Tribe v. Tribe*, 13 Jur. 793; *Norton v. Bazett*, *Deane & S. Eccl. Rep.* 259; *Colman's Goods*, 14 Week. Rep. 291; *Carter v. Seaton*, 85 L. T. N. S. 76; *Ellis's Goods*, 2 Curt. Eccl. Rep. 395; *Trimnell's Goods*, 11 Jur. N. S. 248; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 29 Am. & Eng. Enc. Law, p. 210.

Mr. Robert Egan, with Messrs. Raymond & Newhall, for defendants in error:

A will is duly attested in the presence of a testator, within the meaning of the statute of Illinois, where the witnesses subscribe their names in another room, but within the hearing, knowledge, and understanding of the testator; after which they immediately return to the bedside of the testator, and the will is handed to the testator for inspection, then read to the testator in the presence of the subscribing witnesses, and, after the reading thereof, including the attestation clause and signatures, the testator states that the will is in accordance with his wishes and desires.

Rev. Stat. chap. 148, § 2; *Re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *Gibson v. Nelson*,

was the act of signing by the witnesses within the hearing, knowledge, and understanding of the testatrix, but, after such signing, the witnesses came back into the room where she was with the will, which was on one sheet of paper; that the will was then again all read over to her by the scrivener, and the names of the witnesses read to her and their signatures shown to her, and she informed by the witnesses, or one of them in the presence of the other, that the will had been signed by them; and that she then said it was all right. 'just as she wanted it; witnesses and everything was all right.' This seems to us to have been a substantial compliance with the statute, and a witnessing in the presence of the testatrix."

Cook v. Winchester is cited in *Cunningham v. Cunningham*, 80 Minn. 187, 51 L. R. A. 642, 81 Am. St. Rep. 256, 83 N. W. 58, another of the cases mentioned in the *CALKINS CASE* as holding a contrary view. The statute was held to be sufficiently complied with where the witnesses signed in an adjoining room, where the testator might have seen them by stepping forward 2 or 3 feet, which he was physically capable of doing. Upon the witnesses' return he looked the paper over and pronounced it all right.

It is also cited in *Raymond v. Wagner*, 178 Mass. 315, 59 N. E. 811, where a signing was held to be in the presence of the testatrix, which took place in a room at the other side of a narrow entry, where the testatrix could have seen it by raising herself slightly in bed, although it did not appear whether she

had power to do so. Immediately after the signing, the paper was shown to the testatrix.

It is apparent that the doctrine that a subsequent acknowledgment is not equivalent to a subscription in the testator's presence is not substantially controverted by these cases, which, rather, are based on a broad construction of the phrase "in the testator's presence."

It is also to be observed that the foregoing cases are decided under statutes requiring wills to be attested and subscribed in the testator's presence, and that in the *CALKINS CASE* and other Illinois cases cited, where the statute requires the will to be so attested only, attestation is regarded as including subscription. It may be queried whether, in jurisdictions where attestation and subscription are regarded as separate acts, and the statute requires attestation only in the testator's presence, a signing not in his presence would not be good.

The rule under discussion is approved in the following text-books: *Page, Wills*, § 215, citing *Lamb v. Girtman*, 33 Ga. 289; *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43. *Contra*, *Sturdivant v. Birchett*, 10 Gratt. 67; *Parramore v. Taylor*, 11 Gratt. 220; *Gardner. Wills*. p. 238; *Jarman, Wills*, 6th ed. 91, note 1. The contrary view is preferred by Judge Redfield. See *Redf. Wills*, § 19, note 8, and note in 4 Am. L. Reg. N. S. p. 741.

181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901; Cook v. Winchester, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106; Cunningham v. Cunningham, 80 Minn. 180, 51 L. R. A. 642, 81 Am. St. Rep. 256, 83 N. W. 58; Vaughan v. Vaughan, 4 Am. L. Reg. N. S. 736; Maynard v. Vinton, 59 Mich. 148, 60 Am. Rep. 276, 26 N. W. 401; Sturdivant v. Birchett, 10 Gratt. 67; Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464; Redf. Wills, 230; O'Brien v. Gallagher, 25 Conn. 229; Parramore v. Taylor, 11 Gratt. 220; Montgomery v. Perkins, 2 Met. (Ky.) 449, 74 Am. Dec. 419; Jones v. Lake, 2 Atk. 177, note; Hall v. Hall, 17 Pick. 373; Pollock v. Glassell, 2 Gratt. 439; Rosser v. Franklin, 6 Gratt. 25, 52 Am. Dec. 97.

Cartwright, Ch. J., delivered the opinion of the court:

Appellants filed their bill in the circuit court of Kane county to contest the will of Cyrus Calkins, deceased, alleging, among other things, that the will was not executed in conformity with the requirements of the statute, for the reason that the persons signing the will as witnesses did not attest it in the presence of said Cyrus Calkins, but signed it in another room from the one in which he was lying, and out of the range of his vision, where he did not and could not see the act of attestation. F. M. McNair, the executor, and Charles Calkins and Clara Calkins, three of the appellees, by their answer alleged that the will was signed within the range of vision of the testator, and that, after it was signed by the witnesses, it was immediately presented to the testator, and by him read over and acknowledged in the presence of said witnesses who had so signed the same. An issue was formed and submitted to a jury for trial, when the alleged will was presented signed by Cyrus Calkins with his mark, and with the usual attestation clause signed by Phoebe Catlin and Edwin M. Harris. The subscribing witnesses testified that the will was prepared by the witness Harris, and was signed by the testator at 9 or 10 o'clock in the evening; that the testator was lying in bed with a broken hip; that, after affixing his mark to it, he, in response to a question by Dr. McNair, the executor, requested said witnesses to witness it; that they took the will and went into an adjoining room, out of the presence of the testator and outside of the range of his vision, where it was a physical impossibility for him to see them or the will, and sat down by a table and wrote their signatures; that Mr. Harris then took the will and a lamp, and they went back into the room where the testator was; that Mr. Harris then read the will to the testator,

including the signatures, and showed them to him, and he said it was all right. The will, being offered in evidence, was objected to by the appellants on the ground that it was not executed in accordance with the statute, and was not attested in the presence of the testator, or within his sight or view, or within the possible range of his vision. The court overruled the objection, and admitted the will in evidence. The same question was afterwards raised by instructions asked by the appellants and refused, and the court gave instructions at the instance of appellees, stating, in effect, that there was a valid attestation of the will if the jury found the facts to be as testified to by said witnesses. The verdict was that the writing introduced in evidence was the last will and testament of Cyrus Calkins, deceased, and, after overruling a motion for a new trial, the court entered a decree in accordance with the verdict. From that decree this appeal was prosecuted.

It must be borne in mind that the question, What will constitute a valid will devising property, or a valid attestation of such an instrument? is legislative, and that the only legitimate function of the court is to declare and enforce the law as enacted by the legislature. The office of the court is to interpret the language used by the legislature where it requires interpretation, but not to annex new provisions or substitute different ones. The statute requires that all wills, testaments, and codicils shall be attested in the presence of the testator or testatrix, by two or more credible witnesses, and if we should attempt to change that provision so as to authorize an attestation out of the presence of the testator or testatrix, either on account of a desire to sustain a particular will, or because we regard a subsequent acknowledgment by the witnesses, or ratification or approval by the testator, just as good and effective as an attestation according to the statute, we should justly be charged with offensive judicial legislation. Our duty is merely to determine whether this will was attested in the presence of the testator; and the evidence was that it was not so attested, but was afterwards read over to the testator, and the signatures of the witnesses were shown to him. Attestation is the act of witnessing the actual execution of an instrument, and subscribing the name of the witness in testimony of the fact. 4 Cyc. Law & Proc. p. 888. In the case of Drury v. Connell, 177 Ill. 43, 52 N. E. 368, it was said that the attestation of a will consists in the subscription of the names of the witnesses to the attestation clause as a dec-

laration that the signature of the testator was affixed or the will acknowledged in their presence; and in the case of *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952, the court considered the question whether there is a distinction between the attestation of a will and the subscription of the names of the witnesses. In that case the proponent offered to prove by one who was present that the will was signed by both the witnesses in his presence, and that it was executed and published by the deceased as and for his last will in his presence; but it was said that a different rule had been too long acquiesced in and understood in this state, and that, to render a will valid, it must be subscribed by the attesting witnesses. The supposed distinction, as applied to our statute, was rejected; and it was held that an attesting witness must be a subscribing witness, and that it is not competent to prove a will by a person who was present and witnessed its execution, but did not sign as an attesting witness.

That the attestation mentioned in the statute consists in the witnesses subscribing their names is shown by other provisions of our statute. In the case of a deceased, insane, or absent witness, the court may admit proof of the handwriting of such witness, and admit the instrument to probate as though it had been proved by such subscribing witness in his or her proper person. Proof of the handwriting or the subscribing witness in such a case raises the presumption that the witness duly attested the will in the presence of the testator, and believed him to possess testamentary capacity. *More v. More*, 211 Ill. 268, 71 N. E. 988. It is not indispensable that the witnesses shall sign a formal clause of attestation. The attestation clause may consist of a simple word, such as "witness," "attest," or "test," or there may be no words of attestation at all; and yet the signature of the witness alone constitutes an attestation of every fact necessary to make the will valid.

The provisions of the statute as to the signing by the testator and the witnesses are different. He may either sign the will in the presence of the witnesses, or acknowledge that the will is his act and deed; but, as to the witnesses, the only provision is that they shall attest the will in his presence. All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will; and, to effect that object, it is necessary that the testator shall be able to see and know that the witnesses have affixed their names

to the paper which he has signed and acknowledged as his will. The legislature have determined that such object shall be attained by requiring the attestation of the subscribing witnesses to be in the presence of the testator; and, if that is not done, it is no answer to say that some other method would effect the same object. Numerous methods may be devised by which the testator can be made acquainted with the fact that the witnesses have signed the identical will which he executed, and that there is no fraud or imposition upon him; but, where the legislature have determined in what manner the object in view shall be accomplished, no other method can be adopted, although in the opinion of the court it would be just as effective. To adopt any other rule would open a limitless field as to what would be equivalent to a compliance with the provision of the statute.

The authorities have always given to the word "presence" the meaning of conscious presence, so that the act of attestation may be within the actual personal knowledge of the testator; and in *Witt v. Gardiner*, 153 Ill. 176, 49 Am. St. Rep. 150, 41 N. E. 781, it was stated that the test of presence of the testator is contiguity, with an uninterrupted view between the testator and the subscribing witnesses, as the indispensable element to the physical signing in the testator's presence. It is not necessary that the act of attestation be performed in the same room, if it takes place within the testator's range of vision, where he can see the signing, considering his position and the state of his health at the time. It is still in his presence although he may turn and look away or choose not to look at the act. On the other hand no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see them sign. An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation. The rule so stated was reaffirmed in *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368.

But counsel say that, according to the rule so stated, a blind person would not be able to execute a will. The rule was naturally stated with reference to sight, because nearly all persons can see, and the rule would apply almost universally. In the case of a blind person, his will would be attested in his presence, if the act was brought within his personal knowledge through the medium of other senses. But,

whether a person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act, and is merely told that it has been performed in another room. Neither is there anything in the suggestion that, if a testator were lying on his bed and could only look upward, the witnesses would have to be suspended in the air over his head. Means could be adopted to comply with the law, and the plain meaning of the authorities is that an attestation is in the presence of the testator only when he has personal knowledge that the witnesses are signing their names to his will in accordance with his request.

Counsel say that in this case the attestation was within the knowledge and understanding of the testator, meaning by that statement that, from the question asked by the doctor concerning witnessing the will, and the testator's answer, and the taking of the will into the other room, he would naturally conclude that they went there to attest the will, and were attesting it. It is perfectly clear that he could not have been a witness to the attestation, but that his knowledge, as it is called, was merely an inference or conclusion as to what was going on, based on other facts.

The question here involved was decided in *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402, where the testator signed the will in the presence of the subscribing witnesses, and they withdrew to another room in the house and there subscribed it as witnesses. There was a question whether the fact that the witnesses afterwards returned to the testator, and one of them, with the assent of the others, said that they had signed the will, and showed him the signatures, and he assented thereto, was a sufficient compliance with the statute. The question was answered in the negative. The same view of the law was taken in the case of *Re Downie*, 42 Wis. 66. We have been referred to two cases adopting a contrary view: *Cook v. Winchester*, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106, and *Cunningham v. Cunningham*, 80 Minn. 180, 51 L. R. A. 642, 81 Am. St. Rep. 256, 83 N. W. 58. In each of those cases there was a conscious effort on the part of the court to sustain the will on account of the equity and justice of the case. The subsequent acknowledgment was considered as effective as the actual attestation in the presence of the testator, and was held to be a substantial compliance with the statute. But we do not regard the reasons given as sufficient to justify a departure from the plain language of our statute. If some other method than the attestation in the

presence of the testator would be just as effective to prevent fraud, imposition, or substitution of a surreptitious will, we deem it sufficient to say that the legislature has prescribed a particular method which must be followed in order to make a will legal and valid.

The court erred in overruling the objection to the will and in giving the instructions. The decree is reversed, and the cause remanded.

Petition for rehearing overruled October 11, 1905.

PENNSYLVANIA SUPREME COURT.
RE ESTATE OF CHARLES SIGEL, De-
ceased.

APPEAL OF WILLIAM SCHUDT.

(... Pa.)

1. Will—gift affected by codicil.

A gift once made by will is not to be cut down by a subsequent codicil, unless the intention of the testator to that effect appears clearly or by necessary implication.

2. Same—specific legacy in codicil.

The right of an heir under a clause in a will directing the residue to be divided between testator's heirs is not cut down by a subsequent codicil giving him a specific legacy, "and no more."

(October 9, 1905.)

APPPEAL by exceptant from a decree of the Orphans' Court for Warren County making distribution of a part of the estate of Charles Sigel, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Perry D. Clark and Jacob Stern, for appellant:

If the phrase had been expressed in full,

Case Note.—While scores of decisions are to be found in the books, in which courts have construed codicils for the purpose of ascertaining how far they modify the provisions of the will, they furnish very little aid as precedents by reason of the varying facts and language involved. They are mainly useful in determining the rules of construction. As stated by the court in *RE SIGEL'S ESTATE* "no case has been found which furnishes an exact precedent for the one now before us." This being true, we are forced to limit this inquiry to a presentation of the general rules governing the construction of codicils like the one involved in the *SIGEL CASE*.

It is undisputed that a will and codicil must be construed together as parts of one and the same instrument; and the disposition of the will shall not be disturbed further than to give effect to the codicil.

"and no more out of my whole estate," it would have excluded the legatees mentioned in the codicil from taking any part in the residuary estate.

McGovran's Estate, 190 Pa. 375, 42 Atl. 705.

The last clause in a will, of two inconsistent clauses, is the one that shall stand; and a bequest in a will, revoked by a codicil thereto, is void.

Newbold v. Boone, 52 Pa. 167; Stickley's Appeal, 29 Pa. 234; Shreiner's Appeal, 53 Pa. 106; Horwitz v. Norris, 60 Pa. 261; Hart v. Stoyer, 164 Pa. 523, 30 Atl. 497; 1 Jarman, Wills, 136.

The codicil was made after the will; it cannot be properly construed except from a point of time later than the will.

Whelen's Estate, 175 Pa. 23, 34 Atl. 329.

The words "and no more" have been frequently used by testators to prevent the legatee taking a greater share of the estate than the bequest which the words follow.

Ellison v. Woody, 6 Munf. 368; Bender v. Dietrick, 7 Watts & S. 284; McGovran's Estate, *supra*; Everitt's Estate, 195 Pa. 450, 46 Atl. 1.

Mr. John G. Johnson also for appellant.

Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Westcott v. Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306; Page, Wills, §§ 462, 470; 1 Jarman, Wills, 139.

The general rule is that, when two legacies are bequeathed to the same person, one by the will and the other by the codicil, and the testator has given both the legacies *simpliciter*, the courts in such cases, in the absence of intrinsic evidence, consider that, as the testator has given twice, he must *prima facie* be intended to mean two gifts; and it seems to be immaterial whether the legacies are of equal or unequal amounts, or whether they are of the same or different natures. 2 Roper, Legacies, 999; Manifold's Appeal, 126 Pa. 508, 19 Atl. 42; Stultz v. Kiser, 37 N. C. (2 Ired. Eq.) 538; Wainwright v. Tuckerman, 120 Mass. 232. Gray, Ch. J., in speaking of this question in the Wainwright Case, said: When legacies are given by different instruments, the general rule is that the second is to be treated as additional to the first, in the absence of anything signifying a different intention; but in this, as in all other questions of construction of testamentary instruments, the apparent intention of the testator must be the guide of the court; citing Hooley v. Hatton, 1 Bro. Ch. 390, note, 2 Dick. 461, Lofft, 122; Coote v. Boyd, 2 Bro. Ch. 521; James v. Semmens, 2 H. Bl. 213; Moggridge v. Thackwell, 1 Ves. Jr. 464; Heming v. Clutterbuck, 1 Bligh, N. R. 479; Fraser v. Byng, 1 Russ. & M. 90; Russell v. Dickson, 2 Drury & War. 133, 4 Ir. Eq. Rep. 339, 4 H. L. Cas. 293.

In case of doubt, an additional gift is presumed, rather than revocation. Schouler, Wills, § 438.

1 L.R.A. (N.S.)

Messrs. Frank Gunnison and T. A. Lamb for appellees.

Potter, J., delivered the opinion of the court:

Charles Sigel died February 21, 1904, unmarried and without issue, and leaving a large estate. On the day of his death he executed a will, by which he revoked all previous wills, gave certain legacies, and, in his own language, "the balance of my estate to the heirs of Charles Sigel;" that is, to his own heirs. On the same day he executed a codicil, which reads as follows: "I give to my sister, Matilda Sigel, of Kirchheim, Germany, Mary Schmidt, of East Orange, N. J., and Mary Schudt, of West Seneca, N. Y., each one thousand (\$1,000) dollars, and to Gus Schudt, my nephew, two thousand (\$2,000) dollars, and no more." It is agreed that Mary Schmidt and Mary Schudt were one and the same person, the daughter of a deceased sister of testator. Schudt was her maiden name, and Schmidt her married name. Gus Schudt was the son of testator's sister. All three legatees were heirs at law of the testator, and, in the absence of the codicil, would have been entitled to share in the

The codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language. Redfield v. Redfield, 126 N. Y. 466, 27 N. E. 1032.

In Goodwin v. Coddington, 154 N. Y. 283, 48 N. E. 729, O'Brien, J., lays down a rule that not only justifies the decision in *RE SIGEL'S ESTATE*, but renders any other impossible. He there says: "A codicil will not operate to revoke a previous devise or bequest beyond the clear import of the language used. Effect must be given, so far as possible, to all parts of the will, and, when the several provisions can be reconciled consistently with the intentions of the testator, as they appear and may be gathered from the original instrument and codicil, that construction will be favored. An estate once devised, or an interest intended to be given, will not be sacrificed on the ground of repugnancy, when it is possible to reconcile the provisions supposed to be in conflict," citing Van Vechten v. Keator, 63 N. Y. 55; Taggart v. Murray, 53 N. Y. 233; Freeman v. Coit, 96 N. Y. 63; Roseboom v. Roseboom, 81 N. Y. 356; Clarke v. Leupp, 88 N. Y. 228; Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Byrnes v. Stilwell, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241; Viele v. Keeler, 129 N. Y. 199, 29 N. E. 78; Redfield v. Redfield, *supra*.

In Bedford v. Bedford, 99 Ky. 273, 35 S. W. 926, it was held that, where the terms of a will clearly give an estate, the words of the codicil must manifest an equally clear intention to revoke it, before they can be construed to have such an effect.

distribution of his estate under the residuary clause of his will. Upon distribution of the balance shown by the executor's first account, the court below held that the legatees named in the codicil were entitled to receive the legacies there given them, and also to share in the residuary estate under the will.

Appellant claims that this construction of the will is erroneous, and that, by the use of the words "and no more" in the codicil, the testator expressed his intention that the amounts there given should be all that the legatees named should receive, and that the residue of his estate should be divided among his remaining heirs, to the exclusion of the three named in the codicil. In such a case as this, where a will and codicil are to be construed, the rule is well settled that they must be regarded as parts of one and the same instrument, and that the codicil is not to be allowed to vary or modify the will, unless such was the plain and manifest intention of the testator. In *Spang v. Hill*, 2 Woodw. Dec. 45, after a consideration of the authorities, the court said: "The general result of the authorities on this subject is that notwithstanding a codicil, the provisions of a will are to stand, unless, in order to effect the purposes of the codicil, it is absolutely necessary that the provisions of the will shall give way." Chief Justice Mercur said, in *Lewis's Appeal*, 108 Pa. 133: "It is not necessary to refer to the numerous English and American authorities which hold as a canon of construction that a clear gift cannot be cut down by any subsequent words, unless they show an equally clear intention. In applying this rule, it is sufficient that the subsequent words indicate the testator's intention to cut it down with reasonable certainty, and it is not necessary to institute a comparison between the two clauses as to lucidity. 1 Wms. Exrs. 185. It cannot be cut down by any doubtful expressions in the codicil. The language of the latter must be such as to clearly establish the modification claimed before such effect can be given to it." And in *Sheetz's Appeal*, 82 Pa. 213, this court said (p. 217): "The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention." The fundamental distinction between the nature of a codicil and a later will should be borne in mind. The later will works essentially a revocation, while the codicil is a confirmation, except as to the express alterations which it may contain; and therefore, while in the case of a later will a revocation may

be presumed, this is not true of a codicil. It means, rather, an addition than a revocation.

While no case has been found which furnishes an exact precedent for the one now before us, yet we think in principle it is to be governed by the authorities which hold that a gift once made by will is not to be cut down by a subsequent codicil, unless the intention of the testator to that effect appears clearly or by necessary implication. Where it is possible to construe the codicil so as to give effect to all the provisions of the will, it certainly should be done. We do not think that it can be said in this case that the intention of the testator to revoke the gifts of proportionate shares in the residue made to the heirs named in the codicil, is clear from the use of the words "and no more;" for these may be construed to apply equally well as limiting the amount of the additional gifts to the sums named in the codicil. In *Brisben's Appeal*, reported in 1 Lanc. Bar, October 9, 1869, this court, speaking through Read, J., said: "It would appear to be perfectly reasonable that, where a legacy is given by will to a particular individual, and by a codicil another legacy is given to the same person, the second should be considered as additional to the first; and, therefore, where a paper is codicillary, and two legacies are given to the same person, they are cumulative. The more recent decisions treat this as conclusive, unless a contrary purpose is distinctly manifested by the instruments themselves." In the present case this general principle would unquestionably make the gifts to the individuals named in the codicil cumulative, were it not for the words "and no more." The doubt raised by them is as to whether they limit the words of the will and defeat the right to share in the residue. Or do they limit only additional gifts? We are inclined to the latter construction, under the accepted principle that, where a devise is made of an estate, a revocation will not be implied, unless no other construction can be placed upon the language. In this case we think the construction adopted by the court below, which saves the right to share in the residue, is reasonable and fair. If the codicil be read into the will, it would then read, "and the balance of my estate to the heirs of Charles Sigel, and, in addition, to the persons named in the codicil the amounts therein named, and no more;" that is, in addition to their proportionate share of the residue as heirs, under the language of the will, they get, respectively, the amounts named, "and no more."

We cannot accept the view that the words "and no more" in the codicil clearly and necessarily apply to the provisions of the

will and cut down the gift there made. To apply them only in limitation of the amounts named in the codicil as additional gifts seems to us quite as much in line with the probable intention of the testator as the other suggestion. In *Bender v. Dietrick*, 7 Watts & S. 284, which was cited by the court below and by counsel for both sides, the decision was placed upon the ground that "an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." Justice Rogers said (p. 287), in language peculiarly applicable here: "It seems to me that the expression that they shall have \$50, and no more, of his real and personal estate, does not raise such a strong probability, as has been shown, as that a contrary intention may not be supposed. Indeed, the difficulty arising from the imperfection of the will is to ascertain what the testator did intend. His intention is at best but matter of conjecture, and certainly on such grounds no person heretofore has been deprived of his inheritance."

We think the conclusions reached by the court below in this case are justified by reason and the authorities. The assignments of error are overruled, and the decree of the Orphans' Court is affirmed, and this appeal is dismissed, at the cost of the appellant.

PENNSYLVANIA SUPREME COURT.

ESTATE OF LOUIS VANUXEM, Deceased.

APPEAL OF WILLIAM POTTER et al.,
Exrs., etc.

(212 Pa. 315.)

Collateral inheritance tax—land in other states.

The value of real estate in other states, which it is necessary to sell under authority vested in the executors to sell real estate to pay pecuniary legacies, is subject to collateral inheritance tax at testator's domicile.

(Mitchell, Ch. J., dissents.)

(June 22, 1905.)

Case Note.—1 Parmele's Wharton on Conflict of Laws, p. 201, says that treating the succession tax as a tax on the transfer of, or succession to, property, and not on property itself, it would, perhaps, be competent for a state or country in which a former owner was domiciled, by express words to that effect, to require the payment of the tax even with respect to real property in another jurisdiction; but thus far the laws imposing these taxes have been framed or

A PPEAL by the executors of Louis C. Vanuxem, deceased, from a decree of the Orphans' Court for Montgomery County, confirming an appraisement of the estate for collateral inheritance taxes. Affirmed.

The facts are stated in the opinion of the court below by SOLLY, P. J., which is referred to in the opinion of the supreme court, and which was as follows:

"Louis C. Vanuxem, a resident of the township of Springfield, this county, died therein on December 21, 1903, unmarried and testate, leaving no lineal descendants. His will is dated October 16, 1902, and has several codicils attached. In the third item he gives general pecuniary legacies to the amount of \$570,500, without deduction for taxes or like charges (which are to be paid out of the general estate), to his sisters, nieces, and other relatives and persons; payments to be made to them in the order named. In the fourth item the testator gives to his sisters, Mary and Florence, during their lives and the life of the survivor, the full and free use and occupancy, as a home for themselves and any of his sisters who may become widowed, his dwelling on Evergreen avenue, Chestnut Hill, and his plantation at Upatoi, Georgia, together with all household goods, furniture, horses, carriages, etc., at either place, on condition that they maintain the houses in good order, pay taxes and like charges, with the right to rent the premises for their benefit, should they not desire to occupy either. Upon the death of the survivor, the executors are directed to sell the properties, the proceeds of which shall pass into the residuary estate, which is devised and bequeathed in item five to and among certain persons and corporations, share and share alike, with the provision that, in the event of the death of either of two of his brothers-in-law in the lifetime of the testator, leaving his wife surviving, she shall be substituted as residuary legatee in place of her husband, and, should both husband and wife predecease him, leaving issue surviving, such issue shall take the share of their father or mother. By the third codicil, which is dated June 9, 1903, a pecuniary legacy of \$50,000 is bequeathed to Louis Vanuxem Cochran, a nephew. The residuary clause

construed so as to make the tax payable with respect to all real property within the jurisdiction, whether owned by a resident or nonresident; but with respect to no real property, even though the former owner was a resident, which is outside of the jurisdiction imposing the tax.

There is a conflict among the decisions whether the doctrine of equitable conversion may be applied for the purpose of subjecting

of the will is amended and radically changed. In lieu of the devise and bequest of equal shares of the residue of the estate to the persons named in that clause, there are general pecuniary legacies of \$10,000 each bequeathed to John Scott, Jr., James B. Walter, and Gustav H. Seelaus, and \$25,000 each to the trustees of Princeton University and the trustees of Jefferson Medical College. The interests of his sisters, Mary and Florence Vanuxem, and his brothers-in-law William Potter, John Lewis Cochran, and Daniel L. Hebard, are to remain as devised and bequeathed in the residuary clause. They are therefore the residuary devisees and legatees of the estate. The language of the seventh item of the will, in part, is as follows: 'I give unto my executors hereinafter named full power and discretion to sell any or all of my real estate whenever any such sale be necessary or expedient for any purpose of my estate, of administration, distribution, or otherwise.'

"At the time of his death the testator was possessed of personalty, consisting of bonds, stock, mortgages, notes, insurance policies, cash, etc., all of the value of about \$460,000, as fixed by the appraiser of the collateral inheritance tax. His debts amounted in round figures to \$140,000. The general pecuniary legacies bequeathed in the will and codicils foot up to about \$700,000. He was seised in fee simple of certain real estate in Pennsylvania, Georgia, Tennessee, and Illinois, a detailed statement of which, as well as the personal assets, with values, appears in the inventory and appraisement made up and filed by the collateral appraiser. Upon the real estate situated in the city of Knoxville he assessed the tax due at \$1,350.13, and upon that in the city of Chicago at \$6,741.82. He assessed no tax on the real estate at Upatoi, Georgia, because, in his opinion, it is not liable. His action is based upon the conclusion that there is an equitable conversion of the

the proceeds of sale of a resident's real property in another state to this tax.

In Pennsylvania it was held that real estate situated in Maryland was not subject to a collateral inheritance tax. The court said that all property of the citizen within the state may be taxed, and all property outside the state is drawn to or follows in law the person or domicile of the owner, such as bonds, mortgages, etc., no matter where situated. But real estate is not drawn to the person or domicile of the owner, for taxation or any other purpose; and hence cannot be taxed outside the jurisdiction where it is situated. But it may be that a state may impose a succession tax upon every citizen of the state who succeeds to either real or personal estate, from whatever source received. *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132.

In *Coleman's Estate*, 159 Pa. 233, 28 Atl. 137, it was held that proceeds of the sale of land located in the state of Pennsylvania were not subject to a collateral inheritance tax, where the testator, who was domiciled in another state, directed that the lands should be sold, and that his executors should apply the proceeds toward the payment of legacies.

In *Re Handlev*, 181 Pa. 344, 37 Atl. 587, a collateral inheritance tax was charged on the proceeds of a sale of real estate in another state, where the testator had peremptorily directed such land to be sold. The court said that as the testator had peremptorily directed a sale of land and the distribution of the proceeds, the doctrine of conversion applied, and the actual situs of the land was immaterial; as what passed under the will was not the land, but the proceeds, which were personalty, and liable to a tax. This doctrine rests on the basis that the testator intended and directed not a merely nominal or limited conversion, but an actual conversion by sale, and the blending of the proceeds with his other personalty

for purposes of administration under his will. The same rule is applied in *Miller's Estate*, 182 Pa. 157, 37 Atl. 1000; and in *Hale's Estate*, 161 Pa. 183, 28 Atl. 1071. See also *Miller v. Com.* 111 Pa. 328, 2 Atl. 492.

But in *Drayton's Appeal*, 61 Pa. 172, it was held that real estate situate in another state was not subject to a collateral inheritance tax, where the executor was given a mere authority to sell, but not a positive direction.

The doctrine of equitable conversion is applied differently in some other jurisdictions. Thus, in *Lorillard v. People*, 6 Dem. 268, it was held that a devise of land owned by a resident of New York, but situated outside of the state, was not subject to a legacy tax.

And in *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096, the court held that real estate situated out of the state, owned by a decedent residing in the state at the time of his death, was not subject to the collateral inheritance tax laws of New York, even after it had been converted into money, which was in the hands of the executors.

In *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350, the court denied the right to collect a collateral inheritance tax in a suit at law upon funds arising from the sale of land situated in another state, upon the ground of equitable conversion by will, as the doctrine of equitable conversion is not applied in courts of law.

Also in *State v. Brevard*, 62 N. C. (Phill. Eq.) 141, it was held that an executor in North Carolina is not bound to pay a collateral inheritance tax upon his testator's real property located in Alabama. The court said that our revenue law does not impose a tax on the property of the decedent which is not in the state, though given by will, or devolved by law upon one of our citizens.

real estate, because there is not only an absolute necessity to sell the same to execute the will, but also such a blending of the real and personal estate by the testator as to show his intention to bequeath the fund arising out of the same as money. He cites a number of authorities to support the assessment of the tax on the Tennessee and Illinois lands. The executors and legatees have taken this appeal from the assessment of these lands. Their contention is that these lands pass as real estate to the legatees, there being no equitable conversion under the will. The act of May 6, 1887 (P. L. 79), provides that all estates,—real, personal, and mixed,—of every kind whatsoever, situated within this state, whether the person or persons dying seised thereof be domiciled within or out of this state, and all such estates situated in another state, territory, or country, when the person or persons dying seised thereof shall have their domicile within this commonwealth, which pass to collaterals, shall be subject to the payment of collateral inheritance tax. The tax imposed is not a succession duty on the recipient of the property, but is a tax upon the property itself, as appears from the second proviso in the third section,—that it shall remain a lien on the real estate on which the same is chargeable until paid. When the legislature undertook to impose such tax upon real estate situated in another state, it transcended the power of the state. *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132; *Drayton's Appeal*, 61 Pa. 172; *Com. v. Coleman*, 52 Pa. 468. The border line, however, is reached when property which is in fact real estate is to be treated as personalty under the doctrine of equitable conversion. *Re Handley*, 181 Pa. 339, 37 Atl. 587.

"Is there an equitable conversion of the lands situated in Knoxville and Chicago? If there is not, then they are not subject to the tax, for the 'state cannot exercise extraterritorial taxing power.' If there is a conversion, then they are liable, and the action of the appraiser must be sustained. Conversion is always a question of intent. The intent of a testator is to be gathered from his entire will, rather than from the terms of a particular devise, which, regarded alone, might be inconsistent with the testamentary scheme as a whole. *Dean v. Winton*, 150 Pa. 227, 24 Atl. 664. In *Hunt's Appeal*, 105 Pa. 128, Mr. Justice Paxson said: 'It ought to be settled by this time that, in order to work a conversion, there must be either—1st, a positive direction to sell; or 2d, an absolute necessity to sell in order to execute the will; or 3d, such blending of real

and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied.' This case has been cited and the language of Justice Paxson quoted approvingly again and again by the appellate courts. Among instances are *Irving v. Patchen*, 164 Pa. 51, 30 Atl. 436; *Sauerbier's Estate*, 202 Pa. 187, 51 Atl. 751; *Rauch's Estate*, 21 Pa. Super. Ct. 60. Mr. Justice Mitchell, in the late case of *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186, says: 'The doctrine of equitable conversion is based on the rule that what is to be or ought to be done shall be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator or settlor, never to defeat it. Its application requires constant watchfulness to guard against the tendency to become a formal rule *de jure* without regard to its real purpose and necessity. It should never be overlooked that there is no real conversion. The property remains all the time in fact, realty or personalty, as it was; but for the purpose of the will, so far as it may be necessary, and only so far, it is treated in contemplation of law as if it had been converted. Few testators have any knowledge of the doctrine, or any actual intent to change the nature of their property, except when and to the extent that may be required to carry out the special purpose of the will. The presumption, therefore, no matter what the form of words used, is always against conversion, and even where it is required, it must be kept within the limits of actual necessity.' But conversion will take place, though the language confers a mere discretionary power of sale, where it is not possible to execute certain provisions of the will without a sale of the real and personal property into money. 'If a testator authorizes his executors to sell his real estate and to execute and deliver to the purchasers deeds in fee simple, . . . and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell, and operate as an equitable conversion. If, in addition to this clear intention of the testator, it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell.' *Fahnestock v. Fahnestock*,

152 Pa. 56, 34 Am. St. Rep. 623, 25 Atl. 313.

"With these authoritative explanations of the doctrine of equitable conversion as applied in Pennsylvania, we turn to the will of the testator to ascertain his intent and his scheme of distribution. In brief, he gives general pecuniary legacies upwards of \$700,000; devises certain of his real estate to two of his sisters for life, and at their death directs a sale by the executors; and devises and bequeaths the residue of his estate to his two sisters and three brothers-in-law. Whenever it is necessary or expedient for any purpose of the estate, of administration, distribution, or otherwise, the executors are given full power and discretion to sell any or all the real estate. The pecuniary legacies are to be paid before those to whom the residuary is given shall receive anything, because it is only what remains of the estate, after the specific legacies are paid, that passes as residue or remainder. These legacies pass to the legatees as money. The testator intended them to be paid in cash. There is nothing in the language of the will to show they are to be paid in any other way. Their character is personalty. He must have foreseen the necessity for a sale of his real estate to carry out his scheme of dividing his estate by first bestowing gifts upon the beneficiaries, in the form of pecuniary legacies. Else how were they to be paid? He therefore gives his executors full power to sell real estate whenever a sale is necessary for any purpose of the estate, of administration, distribution, or otherwise. It is true the power is discretionary, not direct and positive; but the intent is manifest that it is to be exercised if the purposes of distribution require it. The power is therefore to be construed as a direction to sell. The last codicil to the will was executed June 9, 1903,—less than seven months before testator's death. It will be observed he bequeaths \$80,000 in pecuniary legacies to certain legatees who were included in the residuary clause of the will, thus giving them preference over the remaining residuary legatees. This amount, together with the legacies, given in the will, made money gifts, aggregating nearly \$700,000, or several hundred thousand dollars more than his personal estate was then worth. The testator is presumed to have known the value of his personal estate at that time. He undoubtedly knew the extent of his gifts, and it would be passing strange if he intended their payment to be confined to the proceeds of the personal estate, resulting in each legatee receiving much less than the amount of the gift. The manifest intention of the testator is to first give

legacies of different amounts, and what is left of the estate to five residuary legatees. The latter take what remains of the estate after the legacies have been first paid and satisfied thereout. 'A residuary clause in a will . . . is a gift of all that is left after the gifts specified or designated have been paid or satisfied.' Per Penrose, J., in *Wood's Estate*, 13 Pa. Dist. R. 195. It may be said the testator blended his real and personal estate, authorized a sale of the former by the executors when, in their discretion, the purpose of distribution required it. But there can be no shadow of doubt that in order to execute the will, carry out the provisions, and pay the general pecuniary legacies, it is absolutely necessary to sell the real estate. Effect cannot be given to the will without the exercise of the power of sale. For the purpose of administration and distribution, the proceeds of the lands must come into this court. It follows that an equitable conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell. In reaching this conclusion, the injunction of *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186, to 'keep within the limits of actual necessity,' is observed.

"Although the tax is assessed by the appraiser upon the value of the lands situate in foreign states, it is really upon the proceeds to be brought here for distribution. In strictness it is the legacies themselves that are subject to the tax. General pecuniary legacies pass to the legatees only in the form of money. If real estate should be conveyed to such legatees in satisfaction of their legacies, it would only be a substituted equivalent for the pecuniary sum of the legacies. *Miller v. Com.* 111 Pa. 321, 2 Atl. 492. It is immaterial to this inquiry what the statutes of the states of Illinois and Tennessee are on the subject of collateral inheritance tax on lands within their jurisdiction owned by one dying domiciled in another state. Whether lands of this decedent situated in those states are liable to pay such tax or succession duty cannot affect the question before us. If there is an equitable conversion of the lands into personalty under the will of the decedent and the proceeds are brought in to this court for distribution among collaterals, the legacies payable out of such proceeds are liable for the collateral inheritance. From what has been said, it follows that the action of the appraiser must be sustained. In our view there is such an absolute necessity to sell the lands in the states of Illinois and Tennessee, and convert them into money, in order to pay gen-

eral pecuniary legacies and carry out the intent of the testator and the provisions of his will, as to work an equitable conversion into personalty, the proceeds of which sales must be brought into this court for distribution. And now, July 21, 1904, appeal dismissed, at costs of appellants."

Mr. N. H. Larzelere, for appellants:

The status of the property at the instant of death must govern the question of tax, both as to liability and amount.

Re Handley, 181 Pa. 346, 37 Atl. 587; Drayton's Appeal, 91 Pa. 172; Mellon's Appeal, 114 Pa. 564, 8 Atl. 183; Williamson's Estate, 153 Pa. 508, 26 Atl. 246.

Where the conversion is not referable to the exact instant of testator's death, and where it may only take place provided the executors choose to exercise the power of sale, no legal conversion takes place which will bring the estate within the taxing power of the commonwealth.

Hale's Estate, 161 Pa. 182, 28 Atl. 1071; Yerkes v. Yerkes, 200 Pa. 425, 50 Atl. 186; Sauerbier's Estate, 202 Pa. 187, 51 Atl. 751; Neely v. Grantham, 58 Pa. 437.

Mr. J. A. Strassburger, for appellees:

There is a conversion by the will of testator of the real estate in Illinois and Tennessee so as to make the proceeds liable for collateral inheritance tax in this state.

Hunt's Appeal, 105 Pa. 141; Fahnestock v. Fahnestock, 152 Pa. 56, 34 Am. St. Rep. 623, 25 Atl. 313; Yerkes v. Yerkes, 200 Pa. 423, 50 Atl. 186; Sauerbier's Estate, 202 Pa. 187, 51 Atl. 751; Jones v. Caldwell, 97 Pa. 45; Peterson's Appeal, 88 Pa. 403; Perot's Appeal, 102 Pa. 256; Henry v. M'Closkey, 9 Watts, 145; Curry's Estate, 19 Phila. 94; Miller v. Com. 111 Pa. 321, 2 Atl. 492; Williamson's Estate, 153 Pa. 508, 26 Atl. 246.

Where real estate or securities situate outside the state are directed by will to be sold or converted into money to pay pecuniary legacies, the legacies pass to the legatees as money, and subject to collateral inheritance tax of such legatees or collaterals.

Miller's Estate, 182 Pa. 157, 37 Atl. 1000; Coleman's Estate, 159 Pa. 231, 28 Atl. 137; Lewis's Estate, 203 Pa. 211, 52 Atl. 205.

Potter, J., delivered the opinion of the court:

Louis C. Vanuxem, Esq., of Springfield township, Montgomery county, made his last will and testament, dated October 16, 1902. By item seven of his will he gives his executors full power and discretion to sell any or all of his real estate, whenever any such sale be necessary or expedient for any purpose of his estate, of administra-

tion, distribution, or otherwise. He was seised of certain real estate in Tennessee and Illinois, and upon this property the appraiser of collateral inheritance tax assessed taxes. This was done upon the ground that the directions in the will worked an equitable conversion of the lands into personal property, by authorizing the executors, in their discretion, to sell for distribution, and the further fact that it became necessary to sell in order to pay the pecuniary legatees. The orphans' court sustained the action of the appraiser. It was not pretended that the real estate in other states could be charged with collateral inheritance tax as real estate, but only by reason of the fact that it was necessary for the executors to sell it, in order to provide the money to pay the pecuniary legacies. And that being the case, the power to sell, if necessary to make distribution, became, under the manifest intent of the testator, a direction to sell. The judge of the orphans' court thus reasons it out in his opinion: "The pecuniary legacies are to be paid before those to whom the residuary is given shall receive anything, because it is only what remains of the estate, after the specific legacies are paid, that passes as residue or remainder. These legacies pass to the legatees as money. The testator intended them to be paid in cash. There is nothing in the language of the will to show they are to be paid in any other way. Their character is personalty. He must have foreseen the necessity for the sale of his real estate to carry out his scheme of dividing his estate by first bestowing gifts upon the beneficiaries in the form of pecuniary legacies. Else, how were they to be paid?"

The pecuniary legacies aggregated nearly \$700,000, or very much more than the amount of the personal estate, so that we cannot see any way by which the executors can escape converting the land into money in order to carry out the provisions of the will. We agree with the conclusion of the court below that "an equitable conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell." It follows as a matter of course that, if sold, the proceeds of these lands must come into the courts of Pennsylvania for distribution. The tax, therefore, falls upon the legacies themselves, rather than upon the lands, which are now appraised in order to determine the amount of the tax. The opinion of the court below has met so clearly the questions involved in this appeal, and has disposed of them so fully, that further elaboration upon our part is both difficult and unnecessary.

The assignments of error are overruled and the decree of the orphan's court is affirmed.

Mitchell, Ch. J., dissenting:

I would reverse this judgment. The taxation of land not within the territorial limits of the state is admittedly beyond the legislative power, and the taxation of the value or proceeds of such land, under whatever form or disguise it is sought to be exercised, is upon the border line of questionable jurisdiction, and should be scrutinized closely, with every presumption against its validity. But, even if the lands in this case were within Pennsylvania, there was no proper conversion. They were devised as land to devisees named, and there is in the will no direction to sell, but only a power and discretion to do so when the executors should deem it expedient. The learned court below founded its judgment on the doctrine of necessity to carry out the will. But on this point the case falls clearly within the principle of *Hunt's Appeal*, 105 Pa. 128, 141, where it was held: "The most that can be said is that . . . [the testator] made a mistake as to the extent of his estate, and a sale of his real estate became necessary in order to pay his debts. But this is not to the purpose. The scheme of his will did not contemplate this, and if, by reason of the depreciation of his property, or for other cause, a necessity to sell the real estate arose which was not foreseen by the testator, it will not work a conversion, for the obvious reason that a conversion is always a question of intent." The necessity to sell which effects a conversion is one which must have been contemplated by the testator in order to carry out the scheme of his will, not a necessity as a matter of fact arising out of the actual circumstances of the estate after his death. Suppose the personalty, though insufficient to pay the pecuniary legacies at the time of testator's death, had so increased in value as to be sufficient before the time of payment: clearly there would have been no conversion which would require or justify an exertion of the executor's discretion which would subject these devisees' land to the payment of this tax, and equally so in the contrary case of a sufficiency of personalty at the death and a subsequent decline in value. Either case would come exactly within the quotation above made from *Hunt's Appeal*. To attribute the necessity to sell as within the contemplation of the testator seems to me like attributing the gift of foresight to those who are wise after the event. The testator gave large pecuniary legacies, but he had personal estate of still larger nominal value, and with this knowledge of his affairs

he gave his executors, not a direction, but only a discretion, to sell. Clearly he did not contemplate a sale as a necessity, but only as a contingency, to be dealt with in the discretion of his executors.

I regard the present decision as at variance with the principles of all our later decisions, particularly *Hunt's Appeal*, 105 Pa. 128; *Re Handley*, 181 Pa. 339, 37 Atl. 587; *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186; *Sauerbier's Estate*, 202 Pa. 187, 51 Atl. 751; and *Cooper's Estate*, 208 Pa. 628, 98 Am. St. Rep. 799, 56 Atl. 67.

PENNSYLVANIA SUPREME COURT.

GIRARD TRUST COMPANY

v.

MONTAGU M. W. BAIRD, Appt., et al.

(212 Pa. 41.)

Equitable mortgage—keeping alive after payment.

An assignment of real estate in the nature of an equitable mortgage may, by agreement between the parties, be kept alive after payment, so as to be valid security for a larger loan subsequently made, which will take priority over an assignment afterwards made to secure a loan from another person having notice of the prior agreement.

(May 8, 1905.)

APPPEAL by defendant Baird from a decree of the Court of Common Pleas, No. 2, for Philadelphia County in a proceeding to enforce a lien against certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. J. W. Bayard, John G. Johnson, and Frank P. Prichard, for appellant:

The assignment of December 18, 1897,

Case Note.—The court, in deciding that the parties to an equitable mortgage may hold it after payment, as a continuing security for further advances, and that it is valid as against subsequent creditors with notice, cited *Mitchell v. Coombs*, 96 Pa. 430. This was a case in which a mortgage was executed to a bank as security for the payment of a bond. After the payment of the bond, the mortgagor being still indebted to the mortgagee, the mortgage, which had not been satisfied, was assigned to another bank, which advanced the amount still due. After the assignment was made, and before its record, other liens were filed, and the property was subsequently sold on foreclosure. In determining the priority of claims, the court held that, as to the mortgagor, his acquiescence in such an arrangement would, no doubt, estop him from

was at most a mere mortgage of Tobias's interest in the real estate.

Kellum v. Smith, 33 Pa. 158; *Harper's Appeal*, 64 Pa. 315; *Fessler's Appeal*, 75 Pa. 483; *Kinports v. Boynton*, 120 Pa. 306, 6 Am. St. Rep. 706, 14 Atl. 135.

The loan secured by this mortgage having been paid off, the mortgage was extinguished, and cannot, as against creditors of the mortgagor, be revived.

Thomas's Appeal, 30 Pa. 378; *Mitchell v. Coombs*, 96 Pa. 430; *Loverin v. Humboldt Safe Deposit & T. Co.* 113 Pa. 6, 4 Atl. 191; *Meigs v. Bunting*, 141 Pa. 233, 23 Am. St. Rep. 273, 21 Atl. 588; *Zimmerman v. Raup*, 162 Pa. 112, 29 Atl. 352; *Neale v. Dempster*, 179 Pa. 569, 36 Atl. 338; *Cook v. Berry*, 193 Pa. 377, 44 Atl. 771.

If this mortgage had any validity as security for the loan of December 31, 1900. for \$7,000, it was only valid to the extent

of its face amount, namely, \$2,500, and not the amount of that loan.

Re Neff, 185 Pa. 98, 39 Atl. 830; *Bank of Commerce's Appeal*, 44 Pa. 423.

Messrs. A. H. Wintersteen and George Tucker Bispham for appellee.

Mestrezat, J., delivered the opinion of the court:

Joseph F. Tobias was the equitable owner of an undivided 169/800 part of certain real estate in Philadelphia, known as the "Old Oaks property," the legal title to which was in W. H. Jenks. Tobias borrowed money from the Fidelity Trust Company, from the Girard Trust Company, the plaintiff, from Montagu M. W. Baird, the defendant and appellant, and from Mr. Jenks. As collateral security for these loans, he "bargained, sold, assigned, and transferred" his

setting up the payment of the bond to defeat a second mortgage, but, as to his judgment creditors, the transaction was of no legal force. As to them, the mortgage was satisfied, and no arrangement not apparent on its face would avail to continue its lien.

The same case was also cited in *Peirce v. Black*, 105 Pa. 345, in which the court held that an arrangement between the creditor and the judgment debtor, to keep a judgment alive to secure future advances, was valid between the parties. The court said: "We have no doubt that it is competent for the parties to a judgment . . . to change the purposes for which it may be held." But, with reference to creditors, the court said: "It is undoubtedly true that, as against subsequent lien creditors a mortgage or judgment once paid cannot be kept alive."

The cases of *Loverin v. Humboldt Safe Deposit & T. Co.* 113 Pa. 6, 4 Atl. 191, also cited in *GIRARD TRUST CO. v. BAIRD*, and *Mitchell v. Coombs*, were both referred to in *Meigs v. Bunting*, 141 Pa. 239, 23 Am. St. Rep. 273, 21 Atl. 588, in which the court said that, in the case of a mortgage, and a judgment on the accompanying bond, satisfaction of one is only presumptive payment of the debt. "The parties have an unquestionable right to extinguish one security, and keep the other alive." With reference to the right of a purchaser of the mortgaged premises at a sheriff's sale, the court said: A purchaser, finding the mortgage satisfied, but the judgment on the bond still apparently in force, may rely upon the records as conclusive evidence that the parties have exercised their right to maintain the judgment as a subsisting encumbrance, and therefore that the sale will discharge a mortgage subsequent thereto.

The *Loverin Case* is cited in *Reap v. Battle*, 155 Pa. 271, 20 Atl. 439, in which the court held that the satisfaction of a 1 L.R.A. (N.S.)

mortgage by giving a renewal does not defeat the mortgagor's right to apply on the principal indebtedness an amount paid on the first mortgage as usury. The court said: "Though actual payment discharges a judgment or other encumbrance at law, it does not discharge it in equity if there are interests which require it to be kept alive for their protection." "There is no doubt that a mortgage may be kept alive, even after payment in full, if such was the intention of the parties. *Wilson v. Murphy*, 1 Phila. 203."

Another authority cited is *Joslyn v. Wyman*, 5 Allen, 62. This was a case in which the owner of an equity of redemption attempted to compel the mortgagee to execute a release of the mortgage after payment and surrender of the notes secured by it, but where the mortgagee had advanced a new loan, and new notes had been given, but the original mortgage had not been canceled. A court of equity, in refusing to grant relief, said: Such cases are based upon the fact that at no period of time has there been an actual extinguishment of the indebtedness secured by the mortgage. But it seems equally clear that, after an actual payment of the debt, the mortgage cannot be revived by an oral agreement to keep it in force to secure a distinct and independent debt. *Merrill v. Chase*, 3 Allen, 339.

The *Joslyn Case* is cited in *Edwards v. Dwight*, 68 Ala. 391, in which the court said that reasons, founded on public policy, would cause us to hesitate long before declaring that, before a mortgage security is executed to secure a debt of definite amount, parol evidence may be let in to tack to the mortgage another or different debt, whether sought to be done under an alleged contemporaneous or subsequent agreement. But the court also said: "There are cases that hold that, after a mortgage has become inoperative by the pay-

interest in the Old Oaks property to each of his creditors, but none of these assignments was recorded. This bill was filed by the Girard Trust Company against Tobias, the Fidelity Trust Company, Baird, and Jenks for the purpose of having determined the priorities of lien of the several assignments, and for a decree directing the sale of Tobias's interest in the property and application of the proceeds to the payment of the plaintiff's lien. The plaintiff loaned Tobias \$2,500 on August 19, 1897, and the same amount on December 18, 1897, and on each occasion took as collateral security the assignment of his interest in the Old Oaks property. Subsequently these loans were paid, but, instead of the assignment of December 18, 1897, being returned to Tobias, it was then agreed by the parties that the plaintiff should retain it to secure future loans. On December 31, 1900, the plaintiff

company loaned Tobias \$7,000, for which a promissory note was given, in which it was recited that he had "deposited as collateral security for the payment of this liability . . . assignment of an undivided interest of 169/800 in Old Oaks property, dated 12/19/97." The loan of the Fidelity Trust Company was made July 13, 1886; of Mr. Jenks, July 12, 1900; and of Mr. Baird, February 20, 1901. Accompanying each of the several loans was an assignment of Tobias's interest in the Old Oaks property as collateral security.

The court below held that the assignments were unrecorded equitable mortgages, and entered a decree that the several assignees had a lien against Tobias's interest in the Old Oaks property from the dates of their respective assignments, and that they were entitled to participate in the proceeds of the property according to the priority of date

ment of the debt secured, it may be again delivered as a security for a further indebtedness, and will be binding on the parties to the transaction;" and to this cited *Choteau v. Thompson*, 2 Ohio St. 114, and *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260.

The court also cited the case of *Stone v. Lane*, 10 Allen, 74, which was a case in which the owner of an equity of redemption, who received the conveyance from the assignees in insolvency of the mortgagor, sought to redeem a mortgage which was held, after a breach of a condition under an oral agreement, as security for further payments in behalf of the mortgagor. In this case the court granted relief after allowance was made for such advancements.

In *Atwater v. Underhill*, 22 N. J. Eq. 599, also cited as an authority, the mortgage of a third person, which had been given as collateral security, was discharged by the release of the debtor from liability, but was repledged without the knowledge or authority of the owner of the mortgaged premises. The court said: "A mortgage which has been satisfied may be given a new vitality by a redelivery by the mortgagor to the mortgagee, or a third person, upon a new consideration, or for a purpose different from that for which it was made. *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687. But, to give such effect to the mortgage, the repledging must be made by the authority of the person whose estate is sought to be held for the performance of the new obligation."

Other cases and text-books citing the authorities referred to in *GIRARD TRUST CO. v. BAIRD* may be mentioned as bearing on the doctrine established in that case.

In *Carpenter v. Plagge*, 192 Ill. 96, 61 N. E. 530, the court held that a mortgage which was due because of a breach of a condition may be held as security for additional L.R.A. (N.S.)

vances made subsequent to the breach; and cites *Anthony v. Anthony*, 23 Ark. 479; *Scripture v. Johnson*, 3 Conn. 211; and *Brown v. Stewart*, 56 Md. 431,—as sustaining that doctrine. This is on the theory that he who wishes the aid of a court of equity must do equity by paying the debt intended to be secured, according to the real equities between the parties. But the rule is limited to cases where the mortgagee is invested with the legal title to the property, and where the rights of subsequent encumbrancers are not prejudiced. Among the cases of this kind are *Brown v. Gaffney*, 32 Ill. 251; *Williamson v. Downs*, 34 Miss. 402; *Upton v. National Bank*, 120 Mass. 153; *Pierce v. Le Monier*, 172 Mass. 513, 53 N. E. 125; *Re Neff*, 185 Pa. 101, 39 Atl. 830. See also 11 Am. & Eng. Enc. Law, 2d ed. p. 230.

In *Jones on Mortgages*, § 362, it is stated that a mortgage which has been satisfied, and delivered up to the mortgagor without being canceled, may again be delivered by him as a valid security for another debt, by agreement of the parties; redelivery gives it validity again, except as against intervening interests. But section 947 states the rule as follows: "After a mortgage is once paid, whether it can, by a mere verbal agreement of parties, be transferred to a new debt, which it was not originally given to secure, may be questioned, but it is certain that the mortgage cannot be retained against the will of the mortgagor, as security for another debt." Section 948 states: "Generally the chief difficulty in reviving or continuing in force a mortgage which has been substantially satisfied is on account of the intervening rights of third persons."

Substantially the same doctrine is stated in *Pingrey on Mortgages*, §§ 475, 489, 1214, 2189.

of the assignments. From this decree Baird has appealed, and raises the single question of the right of the plaintiff company to have priority over him in the distribution of the proceeds of the sale of the interest of Tobias in the Old Oaks property. The appellant contends (1) that the original loan of \$2,500 by the Girard Trust Company, secured by the assignment of December 18, 1897, having been paid off, the assignment, which is conceded to be a mortgage, was extinguished, and could not, as against creditors of the mortgagor, be revived; and (2) that, if the mortgagor had any validity as a security for the loan of \$7,000 of December 31, 1900, it was only valid to the extent of its face amount, \$2,500, and not the amount of the larger loan.

We do not regard either of these positions as tenable. The appellant concedes that the several assignments made by Tobias were equitable mortgages on his undivided interest in the Old Oaks property, and acquiesces in the position of the court below that they have priority according to their respective dates. It is true that a mortgage paid by the mortgagor cannot be kept alive and retain its lien against subsequent mortgage and judgment creditors without notice. But, as between the parties to the instrument, the mortgage may, by agreement, be kept alive and be enforced against the mortgagor for the amount of the loan secured by it. In *Mitchell v. Coombs*, 96 Pa. 430, a mortgage was given to a bank to secure a bond, which was subsequently paid by the obligor, but the mortgage was retained by the bank as security for further discounts. In delivering the opinion of this court, Mr. Justice Gordon says: "As to Coombs [mortgagor], his acquiescence in this arrangement [retention of mortgage to secure future advancements] would, no doubt, estop him from setting up the payment of the bond to defeat the mortgage; but, as to his judgment creditors, the transaction was of no legal force. As to them the mortgage was satisfied, and no arrangement, not apparent on its face, would avail to continue its lien." *Loverin v. Humboldt Safe Deposit & T. Co.* 113 Pa. 6, 4 Atl. 191, was, as stated by the court, an attempt to keep alive a mortgage which had been paid by the mortgagors against a subsequent unpaid mortgage given by the same mortgagors upon the same premises. Of course, this could not be done but in delivering the opinion Mr. Justice Paxson says: "Where creditors are not concerned there is perhaps no legal reason why it [keeping the mortgage alive] may not be done. Though actual payment discharges a judgment or other encumbrance at law, it does not discharge it in equity, if there are interests which require it to be
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kept alive for their protection. Thus it may be kept on foot for the protection of a paying surety, and other cases which it is not necessary to name. And it was said by Sharswood, J., in *Wilson v. Murphy*, 1 Phila. 203, 'there is no doubt that a mortgage may be kept alive, even after payment in full, if such were the intention of the parties, and even though there be no actual assignment to a trustee.' And in Massachusetts, while a mortgage cannot be kept alive by an oral agreement as security for a new indebtedness, yet it is there held that if such an agreement has been made, and money has been advanced in consequence thereof by the mortgagee to the mortgagor, a court of equity will not aid the latter, or one claiming under him with knowledge of the facts, in obtaining a discharge of the mortgage. *Joslyn v. Wyman*, 5 Allen, 62 *Stone v. Lane*, 10 Allen, 74; *Upton v. National Bank*, 120 Mass. 153.

It is therefore clear, we think, that the parties to a judgment or mortgage, as between themselves, may, by agreement, continue its lien, notwithstanding payment in full has been made by the debtor. There is no reason why this should not be so. It is simply permitting the parties to exercise the right of contract which they unquestionably have; and such an agreement binds not only the parties to the instrument, but also subsequent creditors with notice. It is settled that a third party with notice is bound by a contract between the mortgagor and the mortgagee to keep alive the security. Such party has no standing in law or equity to demand that his mortgage, taken with notice, shall have precedence over a prior mortgage, held to secure payment, of a bona fide loan. This principle is supported by authority as well as by reason. In *Nice's Appeal*, 54 Pa. 200, it is distinctly held that an unrecorded mortgage will avail, not only against the mortgagor, but also against his alienee and mortgage with notice. In *Mellon's Appeal*, 32 Pa. 121, Mr. Justice Strong, speaking for the court, says that, notwithstanding the recording acts, it has uniformly been held that an unrecorded mortgage is good as against the mortgagor, or anyone claiming under him with notice; and in *Britton's Appeal*, 45 Pa. 172, it was held that a mortgage given for the purchase-money of real estate, executed before, but not recorded until after, judgments had been entered against the mortgagor, is entitled to priority over them in the distribution of the proceeds of a sheriff's sale of the land, where the judgment creditors had actual knowledge of the mortgage before the debts were contracted for which the judgments were obtained. The doctrine of these authorities

has been announced and enforced in many other cases decided by this court.

We are of opinion that the parties to the assignment of December 18, 1897, could agree to keep it alive in order to secure further loans, and that the assignment was valid, and had priority over a subsequent assignment by Tobias, taken with notice of the agreement. It was found as a fact by the court below that Baird, before making his loan to Tobias, had notice of the prior assignment to the Girard Trust Company, which was retained to secure the payment of the \$7,000 loan made in December, 1900, and hence he is not in a position to deny its priority over his assignment made in February, 1901. And we also think that the assignment retained by the plaintiff company was effective to secure the full amount of the new loan. This is on the same principle that the parties could, by agreement, continue its validity to secure another loan. If the parties by contract could give the assignment life to secure another loan after the amount named in it had been paid, there is no reason why they could not at the same time stipulate the amount for which it was to remain a security. "We have no doubt," says Paxson, J., in *Peirce v. Black*, 105 Pa. 342, "that it is competent for the parties to a judgment, by their own agreement, to change the purposes for which it may be held." And in *Atwater v. Underhill*, 22 N. J. Eq. 599, Depue, J., in delivering the opinion, says: "A mortgage which has been satisfied may be given a new vitality by a redelivery by the mortgagor to the mortgagee, or a third person, upon a new consideration, or for a purpose different from that for which it was made." The original loan to Tobias was paid, and therefore the assignment was no longer held to secure its payment. The assignor received another sum of money from the assignee, for which the parties agreed that the instrument should remain a security. Tobias, the assignor, is not seeking to invalidate his contract, and is not contesting the right of the plaintiff to retain the assignment to secure the payment of the larger loan; and why should Baird, with notice of the sum loaned, occupy a higher ground? Why permit him to attack the validity of the contract, and enable him to prevent the payment of the plaintiff's loan and thereby secure his own loan, made with full knowledge of the contract and the amount of the loan the assignment secured? To permit him to do so under the circumstances would be a fraud on the plaintiff company, which on the faith of the contract furnished the \$7,000. A court of equity will not lend its assistance to a party to secure a fund on which an L.R.A. (N.S.)

other has a claim which is prior in time and of superior equity.

The decree is affirmed.

PENNSYLVANIA SUPREME COURT.

JAMES RUSS, Appt.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(210 Pa. 544.)

1. Legislative committee—public function—contract for entertainment.

Authority to contract for transportation and entertainment is conferred upon a legislative committee by a resolution, treated by the legislature as legislation, by which it decides to attend a public function in a body, and refers all matters pertaining to such attendance to the committee.

2. Salary limit—allowance for expenses.

A resolution by a legislative body to attend a patriotic event at public expense does not contravene a constitutional provision fixing the salaries of the members, and ordaining that they shall receive no other compensation whatever.

(Mestrezat and Potter, JJ., dissent.)

(January 9, 1905.)

APPPEAL by petitioner from a judgment of the Court of Common Pleas for Dauphin County dismissing his petition to secure compensation for services alleged to have been rendered to the legislature. Reversed.

The facts are stated in the following opinion delivered by WEISS, P. J., in the court below, overruling a motion to take off the judgment of nonsuit:

The plaintiff was authorized and allowed by an act of assembly approved April 25,

Case Note.—The questions decided in the above case do not seem to have been decided or considered in any prior decision. Legislative committees from Congress and state legislatures have often been sent to attend public functions of various kinds, at which it seemed fitting to the legislatures that there should be representation and participation on behalf of the government. Of the cases cited in briefs of counsel in support of the expenditure in the above case, that of *Morton v. Philadelphia*, 4 Pa. Dist. R. 523, decided that the sending of the Liberty Bell to the Atlanta exposition as a Pennsylvania exhibit was not unlawful; and that an appropriation to pay the expenses of the transfer and committee attending it was also lawful. The court, in this case, cites various decisions in support of the doctrine that it is within the power and discretion of municipal authorities to appropriate money for the commemoration of events of public in-

1903 (P. L. 315), to bring suit in this court against the commonwealth "to recover any sum or sums of money that may be legally or justly due him." He sued in assumpsit, and in his statement claims \$5,911.16, with interest from May 1, 1897, on a book account for "table supplies, wines, liquors, car fare, services, etc." furnished to the legislature of Pennsylvania on the occasion of the excursion of that body "to New York city to attend the General Grant monument dedication ceremonies." April 27, 1897. The claim is founded upon a contract entered into by the committee of military affairs of the senate and house of representatives of Pennsylvania with the plaintiff, claiming to act pursuant to a concurrent resolution passed by the senate and house of representatives after the same was disapproved by the governor and returned with his objections to the senate, in which it originated, and the house of representatives, and which read as follows: "In the Senate, March 25, 1897. Whereas, the dedication of a monument, erected in memory of the late General U. S. Grant, in New York, occurs on April 27th, and is a matter of national importance, which the commonwealth of Pennsylvania should suitably recognize as commemorating the life and deeds of a hero whose memory we revere; therefore, be it resolved (if

the house concur), that the members of the senate and house of representatives attend said dedication in a body, and that all matters pertaining to such attendance be referred to the committee of military affairs of the senate and house." The cause came on for trial, and was so proceeded in that at the close of the plaintiff's testimony the defendant moved that a nonsuit be directed to be entered, which the court allowed, and the correctness of the allowance of the motion therefor is now for consideration.

The question embraces the authority of the committee of military affairs to make the contract, and, if such authority is given, whether the legislature has the power to confer the authority to enter into the contract with the plaintiff. The plaintiff urges the view that, as the legislature has unlimited power to tax, so it has unlimited power to expend public moneys, except as it is restrained by constitutional ordinance. The power to tax the subject, when exercised, is for public purposes, and it ought to follow that the power to expend public revenues is exercisable for public uses. A contract authorized by the legislature ought to be expressed in clear and unambiguous terms. Nothing relating to the essence of the contract should be left to inference. The reverence for the memory of the hero whose

terest, or for the entertainment of guests of the city. One of these cases is *Tagg v. Philadelphia*, 18 W. N. C. 79, which decided that it was entirely competent for the city council to appropriate money for a dinner given by the city to a committee headed by the mayor of New Orleans, who came as an official escort of honor to the Liberty Bell upon its return from the New Orleans exposition of 1885; although, in contrast to this, *United States Judge Pardee* held, in *Bayle v. New Orleans*, 23 Fed. 843, that the city of New Orleans should be enjoined from making an appropriation to defray the expenses of returning that bell to Philadelphia on that occasion. The case was brought within the jurisdiction of the Federal court by joining a citizen of the French Republic as a plaintiff. In *Tatham v. Philadelphia*, 2 W. N. C., page 564, an appropriation of \$50,000 to meet the contingent expenses incident to the Centennial Exposition at Philadelphia was sustained on the authority of other cases, some of them unreported, in which expenditures of public money for entertaining guests of the city, and for similar objects, had been upheld. The court also refers to numerous instances in which such expenditure had been incurred without being contested in court. In this case the court quotes from *Dillon on Municipal Corporations*, vol. 1, § 149, to the effect that, "without express power, a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests;" 1 L.R.A. (N.S.)

citing the following cases: *Hodges v. Bufalo*, 2 Denio, 110; *Cornell v. Guilford*, 1 Denio, 510; *Hood v. Lynn*, 1 Allen, 103; *Gerry v. Stoneham*, 1 Allen, 319; *Hale v. People*, 87 Ill. 72; and further citing *Tash v. Adams*, 10 Cush. 252, in denial of the right to use public money of a municipality to celebrate the surrender of Cornwallis. These cases are, however, distinguished by the *Tatham* Case on the ground that the interpretation of the Philadelphia charter must be made in the light of long usage, under which such expenditures had been made many times.

Without going at greater length into this question of the power of a municipality to make such expenditures, it is, of course, obvious that this question is very different from the question of the power of the state legislature, which is limited only by constitutional provisions. None of the works on constitutional law seem to furnish any specific authority on this question. It therefore seems to rest entirely on the general doctrines of the extent of legislative power, except as limited by constitutional restrictions. The contention in the above case of *Russ v. Com.*, that the payment from public money of the expenses of the whole body of the legislature while in attendance on a public function to celebrate a patriotic event amounts to an unconstitutional increase in their salaries, raises an entirely new question so far as can be discovered, and the decision on that point is one of first impression.

monument was to be dedicated is expressed in apt language in the concurrent resolution. So is that part of the resolution which recognizes the propriety of attendance by the senate and house of representatives at the ceremonies incident to the commemoration of the life and deeds of the great soldier. But the entertaining clause, from which the authority to contract must be derived, lacks the perspicuity which characterizes the other declarations. "All matters pertaining to such attendance be referred to the committee of military affairs" is not expressive of authority to contract for food and drink. The latter are incident to sustenance, but not to attendance, as such, upon a ceremonial. It would have been an easy task to embody in the resolution the delegation of authority to the joint committee to make the contract with the plaintiff. It could not be said of a person who would refer all matters pertaining to a mission, not of a business character, to another, not theretofore employed by him, that authority was thereby given to bind the party referring the matters, by a contract. The very act of reference would indicate that some report should be made to him. The resolution is silent as to the character and extent of the entertainment or the price to be paid. If it contemplated viands, it was unlimited in quantity and expenditure. It is true, the intention of the legislature must be ascertained; but it must be ascertained from the context, and not from what may have been in the breasts of the legislators or of the members of the joint committee. Little can be predicated upon the construction put upon the resolution by the joint committee or the members of the legislature. The testimony discloses the alacrity with which some of the members of the joint committee engaged potables immediately after its organization. It was incurring indebtedness for personal and private objects. That the attendance was to be by the body does not stamp it with a public character. The dedicatory services were of a general public character. But the attendance by the members of the senate and house of representatives in a body was nevertheless a private or personal affair. The effect of such construction is that public moneys are expended upon the members of the legislature attending the dedication in a body, and that by themselves upon themselves. The resolution lacks every element of authority to expend public money for public purposes, and interpretation of the resolution by themselves for their personal entertainment is not persuasive.

The vice of the resolution, so far as concerns a contract, is that it does not obligate the state to pay, or authorize it to be done; 1 L.R.A. (N.S.)

nor does it disclose the banqueting feature as an incident to the dedication, nor that public money was to be appropriated to defray the expenses incurred during the attendance. That may have been the intention in the mind of the legislators, or it may be gathered from the subsequent action of the body or committee. But the resolution itself gives no token of such a purpose, and no extraneous intention can be read into it.

Nor is the act of May 15, 1903 (P. L. 406), making an appropriation for badges furnished, or "merchandise furnished," as it is generically called in the act, any aid in construing the resolution as conferring authority to contract this bill. An appropriation following the resolution would establish an analogy, but bills of appropriation made for the purpose were twice vetoed by two successive governors. Concurrent resolutions were passed in 1899 (P. L. 407) and in 1903 (P. L. 547) authorizing the appointment of committees to make arrangements for the inauguration of governors, who were authorized to expend a designated sum in carrying out the same, and whose chairmen were required to file with the accounting department vouchers and full proofs showing the manner of disbursements; and these were followed by appropriations of moneys for the purpose (P. L. 1899, p. 48; P. L. 1903, p. 534). It is apparent that this affords no guide to the interpretation of the resolution under consideration.

A reference by the legislature of all matters pertaining to an excursion to a committee is too vague and uncertain to warrant the conclusion that thereby the committee was empowered to contract with the plaintiff for food and drink to be furnished on this occasion. That the members of the legislature participated in the feast does not show that providing and serving it was contemplated by the terms of the concurrent resolution, nor does so doing bind the commonwealth. It is against the interest of the state to sustain the doctrine that the legislature may expend public money upon a banquet provided during an attendance by the members in a body upon a dedication public in its nature, pursuant to a resolution of reference to a committee, which in general terms embraces all matters pertaining to the attendance. It is no hardship to require, if such power exists, that the purpose be clearly expressed; and rules of interpretation cannot be invoked, by way of enlarging authority, to transform a memorial resolution into a contract for a festival. A reference does not imply power of final action. The resolution is ominously silent in respect of the object of the reference so far as relates to the subject-matter of this claim, or of the commonwealth's liability for

anything the committee might do, or of the extent of the obligation to be incurred, or of the moneys to be appropriated therefor. If not suppressed, all this is unexpressed. Except by ratification, authority in writing is not construed into a contract by subsequent events. It is established by the instrument, and a reference of matters pertaining to an attendance upon a ceremony is at variance with power to contract a bill for food and drink, which, however necessary, are not pertinent to the attendance. Assuming the general power of the legislature to make or authorize a contract of this kind, a safe premise to lay down is that the contract or the authority to make it must be set forth in clear and unambiguous language, and that nothing substantive can be left to conjecture. This resolution, in our opinion, offends against this rule, and the right of the committee to make the contract claimed must be denied.

Having failed to show authority on the part of the committee with whom he contracted, the plaintiff's claim falls. He has no cause of action, and consequently has no right of recovery from the commonwealth. In view of the foregoing, there is no need to determine whether there is a constitutional inhibition against the making of the contract or authorizing it to be made by the legislature, and the motion to take off the judgment of nonsuit is accordingly overruled.

Messrs. John E. Fox and M. W. Jacobs, for appellant:

The power to make arrangements necessarily carried with it the power to create expenses for the carrying out of the arrangements.

The joint committee, composed of a large number of members of both houses, construed the resolution to authorize the incurring of expenses: a great majority of the members of both houses so construed it, as also did the legislature of 1897, by passing the vetoed bill, and the legislature of 1903, by passing the approved act. We thus have the contemporaneous construction, which is always valuable and persuasive, and the subsequent act, which was not only *in pari materia*, but was directly interpretative.

United States v. Freeman, 3 How. 556, 11 L. ed. 724; Morris v. Mellin, 6 Barn. & C. 454; Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 22 L. ed. 348; Endlich, Interpretation of Statutes, §§ 365, 366.

The intention of the legislature is the thing to be ascertained, and, in ascertaining 1 L.R.A. (N.S.)

it, if the circumstances so require, the courts will go beyond the letter of the legislative act, and even give the act a construction which appears to be contrary to its letter.

Com. v. Fraim, 16 Pa. 163; Big Black Creek Improv. Co. v. Com. 94 Pa. 450; Re Umholtz, 191 Pa. 177, 43 Atl. 75.

The granting of authority to make contracts binding upon the state belongs to the legislative power.

Just as the legislature had practically unlimited power of taxation (Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403; Kirby v. Shaw, 19 Pa. 258), so it had practically unlimited power to spend the money raised by taxation.

Prima facie, the legislative authority is absolute, except where expressly limited.

Com. ex rel. Elkin v. Moir, 199 Pa. 534, 53 L. R. A. 837, 85 Am. St. Rep. 801, 49 Atl. 351; Norris v. Clymer, 2 Pa. St. 277; Com. v. McCloskey, 2 Rawle, 374; Com. ex rel. Dysart v. M'Williams, 11 Pa. 61; Lewis's Appeal, 67 Pa. 153; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Pennsylvania R. Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360; Com. ex rel. Wolfe v. Butler, 99 Pa. 535; Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; Com. ex rel. McCormick v. Reeder, 171 Pa. 505, 33 L. R. A. 141, 33 Atl. 67; Cooley, Const. Lim. chap. 7, § 6; Re Sugar Notch, 192 Pa. 355, 43 Atl. 985; Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432; Cooley, Const. Lim. 6th ed. 1890, chap. 7, § 4, p. 201.

If long-continued and constant legislative practice is entitled to any weight in the construction of legislative powers, there is on our statute books a vast accumulation of precedents in favor of this claim.

Moers v. Reading, 21 Pa. 188; Norris v. Clymer, 2 Pa. St. 277; Briscoe v. Bank of Commonwealth, 11 Pet. 257, 9 L. ed. 709; 6 Am. & Eng. Enc. Law, pp. 931-933.

The furnishing of entertainment is not of itself beyond the powers of the legislature.

Tatham v. Philadelphia, 2 W. N. C. 565; Tagg v. Philadelphia, 18 W. N. C. 79; Morton v. Philadelphia, 4 Pa. Dist. R. 523.

The furnishing of the meals to the members of the legislature who participated in the trip was not intended as, nor was it, "compensation" for any services rendered by them.

6 Am. & Eng. Enc. Law, p. 369; 8 Cyc. Law & Proc. pp. 401-403.

The argument that the possibility of the abuse of the power to make such contracts must result in denying the existence of the power has no more merit.

Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

Messrs. C. H. Bergner, Frederic W. Fleitz, and Hampton L. Carson, Attorney General, for appellee:

If the language used in the joint resolution does not plainly and unmistakably mean that a contract binding the state is authorized to be made by the committee of military affairs, a subsequent act of the legislature, expressly declaring that the words used shall be construed to mean that such contract could be made, would be unconstitutional.

Com. ex rel. Roney v. Warwick, 172 Pa. 144, 33 Atl. 373.

A single meal, or a single drink of liquor, for a member of the legislature, paid for by the state, is as much an increase of his compensation to that extent as it would be to add a substantial sum of money to his salary, or to treble his mileage.

Buckalew, Const. p. 40.

Brown, J., delivered the opinion of the court:

Want of authority from the state to the committees of military affairs of the senate and house to enter into a contract with the plaintiff was the reason given for the entry of the nonsuit, and the refusal to take it off. If there was such authority, it is to be found in the following preamble and resolution passed over the veto of the governor: "Whereas, the dedication of a monument erected in memory of the late General U. S. Grant, in New York, occurs on April 27th, and is a matter of national importance, which the commonwealth of Pennsylvania should suitably recognize as commemorating the life and deeds of a hero whose memory we revere; therefore, be it resolved (if the house concur), that the members of the senate and house of representatives attend such dedication in a body, and that all matters pertaining to such attendance be referred to the committee of military affairs of the senate and house." In the preamble there is not only a recognition by the people of the state, through their representatives, of the national importance of the dedication of the monument to a great soldier, but an avowal of the commonwealth's duty to suitably recognize the event. This was laudable, because it was patriotic. By the resolution, action was taken, committing the state to participation in the dedicatory exercises. It was sent to the governor for his approval, because it must have been regarded by those who passed it as committing the state to it; and, if so, it was a matter in the nature of legislation. It is only such resolutions that require executive approval, under § 26 of article 3 of the Constitution of 1874. Com. ex rel. Elkin v. Griest, 196 Pa. 396, 50 L. R. A. 568, 46 Atl. 505. If both houses had 1 L.R.A. (N.S.)

simply resolved to attend the exercises in a body, and to adjourn for a day for that purpose, it would have been no concern of the governor, and they could have gone with or without his approval; but, if more was embodied in the resolution, amounting practically to an enactment authorizing special committees of the senate and house to act on behalf of the state in making suitable the recognition which both branches of the legislature had agreed upon, it was for the governor to approve or disapprove.

But the contention of the learned counsel for the commonwealth is that, even if the resolution does involve legislation, no authority to act was conferred upon the committees by the words, "all matters pertaining to such attendance be referred to the committee of military affairs of the senate and house;" their duty being simply to consider and report to the respective houses. This cannot be regarded as the reasonable meaning of the words. While there is no express authority given to the committees to do any particular thing, there is, on the other hand, no direction to them to report; and that they were to act, and not simply report what further action each house should take, seems to be manifest. The resolution was first introduced in the senate. Why should it ask for a report from the committee of military affairs of the house as to what it should do, and why should the house, subsequently concurring in the resolution to attend the dedication in a body, ask for a report from the senate's committee? Both bodies had resolved to go, and referred all matters in connection with their going to a joint committee composed of the appropriate committee of each. The intention of the legislature is to be gathered, not from the strained, but from the natural, meaning of the reference to the committee of all matters relating to the attendance. "All matters pertaining to such attendance" certainly included arrangements for the transportation and entertainment of the members of the legislature, and, if these were referred to the committees, the common understanding would be that they were to make them. If so, the power had necessarily been conferred on the committees of contracting for such arrangements. They so understood the resolution; the plaintiff, who dealt with them, had the same understanding of it; and the members themselves intended that it should be so understood, for, without calling for or receiving any report from the committees, they accepted the arrangements that had been made for them. The failure of the learned court below to so interpret it must be regarded as error. We consider this clear, with nothing before us except the resolution itself;

but subsequent legislation, while not purporting to be expository of it, unmistakably indicates the legislative understanding of what was intended by it. By an act passed at the same session, though vetoed by the governor because regarded as an improper expenditure of the public funds, an appropriation was made for the payment of the expenses incurred by the legislature "in attending the ceremonies connected with the unveiling of the monument at the tomb of General U. S. Grant." From the testimony, it appears that the only expenses incurred were for the entertainment furnished by the plaintiff, and for badges supplied by J. H. Shaw. By the act of May 15, 1903 (P. L. 406), the sum of \$421 was appropriated in payment of the badges furnished by Shaw. These acts were passed by the legislature with § 11 of article 3 of the Constitution before it, providing that no bill shall be passed "for the payment of any claim against the commonwealth without previous authority of law." The authority of law here was the reference by the legislature of all matters pertaining to the attendance to the committees of military affairs of the senate and house. The resolution and acts of 1897 and 1903 related to the same subject-matter, and are to be considered together in determining the legislative intention. "The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; and it is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law. Dougl. 30; 2 T. R. 387, 586; 4 Maule & S. 210. If a thing contained in a subsequent statute be within the reason of the former statute, it shall be taken to be within the meaning of that statute. Id. Raym. 1028. And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. Morris v. Mellin, 6 Barn. & C. 454; 7 Barn. & C. 99. Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words. Wimbish v. Tailbois, 1 Plowd. 57. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. Stowel v. Zouch, 1 Plowd. 356. These citations are but different illustrations of the rule that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the pur- 1 L.R.A. (N.S.)

pose which was designed,—the limitation of the rule being that, to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason." United States v. Freeman, 3 How. 556, 11 L. ed. 724.

A second question raised by the appellee is as to the power of the legislature to authorize the committees to make such a contract as the one on which the plaintiff sues. The test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do. It is hardly needful that authorities be cited and multiplied in support of this, but, as they seem to be unheeded whenever legislation is not in accord with the sense of right, propriety, and reason of those affected by it, there is nothing for us to do, except to keep on repeating, even at great length, what has been said, in the hope that ultimately legislative power may be better understood. "The Constitution allows to the legislature every power which it does not positively prohibit." Norris v. Clymer, 2 Pa. St. 277. "To me it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the Federal Constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the Constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers. The Constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely. The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The

wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied for the faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do, if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice." Black, Ch. J., in *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759. "However easy it may be to demonstrate that public debts ought not to be created for the benefit of private corporations, and that such a system of making improvements is impolitic, dangerous, and contrary to the principles of a sound public morality, we can find nothing in the Constitution on which we can rest our consciences in saying that it is forbidden by that instrument." *Moers v. Reading*, 21 Pa. 188. "Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360. "To justify a court in pronouncing an act of the legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act. This rule of construction is so well settled by authority that it is entirely unnecessary to cite the cases." Com. ex rel. *Wolfe v. Butler*, 99 Pa. 535. "In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it vests in and may be exercised by the sovereign power of any state, subject only to such restrictions as they have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is intrusted with the general authority to make laws at discre-

tion." *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913. "But whatever the people have not, by their Constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. This latter body represents their will just as completely as a constitutional convention in all matters left open by the written Constitution. Certain grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislation. Then come the specific restraints imposed by our own Constitution upon our own legislature; these must be respected; but in that wide domain not included in either of these boundaries the right of the people, through the legislature, to enact such laws as they choose, is absolute. Of the use the people may make of this unrestrained power, it is not the business of the courts to inquire. We peruse the expressions of their will in the statute; then examine the Constitution, and ascertain if this instrument says: 'Thou shalt not;' and, if we find no inhibition, then the statute is the law, simply because it is the will of the people, and not because it is wise or unwise." Com. ex rel. *McCormick v. Reeder*, 171 Pa. 505, 33 L. R. A. 141, 33 Atl. 67. "Prima facie, the legislative authority is absolute, except where expressly limited. This is the uniform principle of all political and legal views, and of all constructions recognized by constitutional law." Com. ex rel. *Elkin v. Moir*, 199 Pa. 534, 53 L. R. A. 837, 85 Am. St. Rep. 801, 49 Atl. 351. "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice, or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of repub-

lican government, unless it shall be found that these principles are placed beyond legislative encroachment by the Constitution." Cooley, Const. Lim. 6th ed. 1890, chap 7, §§ 4, 5, p. 201.

Scanning the list of expressly forbidden legislation, as found in § 7, art. 3, of the Constitution, there is no restriction upon what was done by the legislature in its action assailed in this proceeding; nor is there any other line in that instrument by which the action is impliedly prohibited, for nowhere is such legislation, or anything relating to it, mentioned. The resolution may be regarded by some as unwise and improper, and, if in any legislative district there were those so minded at the time it was adopted, and they happened to be in the majority, they had the opportunity to exhibit their disapproval if any senator or member who voted for it came up for re-election. It is doubtful, however, if any legislative career would have been cut short for support of the measure. From time out of mind, legislative bodies have, at the public expense, and with hearty popular approval, paid fitting tribute to the deserving dead, who, in peace or war, had served the state or nation; and public money so expended is well spent for the public, for it strengthens and elevates patriotism, and helps to make better men and women of the young who witness the homage so paid. But this digression need proceed no further.

We do not understand that, if the legislature had named a separate commission to represent the state at the exercises, and had provided for the payment of its expenses, the power to do so would be questioned; but, because the two bodies constituted themselves such representatives, the power is questioned, for the reason that, as the claim of the plaintiff is for food and drink furnished them, they will, if it is allowed, receive compensation in violation of § 8, art. 2, of the Constitution, which provides that "the members of the general assembly shall receive such salary or mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise." Proper entertainment of the legislature was not merely incidental to its attendance at the dedication, but was necessary, and therefore formed part of the state's expenses in making suitable recognition of the ceremony. The concurrent resolution contemplated the payment of nothing but such expenses, and their payment to the man who furnished what was so necessary cannot be regarded as compensation or pay to the members of the legislature for their services as legislators, in any sense, whether such strained meaning for "compen-

sation" be searched for in dictionary or encyclopedia of law, or the word is to be interpreted as popularly understood.

It is conceded by the learned and able counsel for appellee that the payment of the expenses may not be technically compensation; and yet, by the process of reasoning through which they would have us declare it to be compensation, within the constitutional prohibition, the very ink furnished to senators and members, and the pens dipped into it in answering the daily inquiries of constituents, would have to be regarded as constitutionally unlawful compensation to them, if paid for by the state.

The payment of expenses by the state in having itself fittingly represented, when it ought to be represented on great public occasions, involves nothing but the maintenance of its own dignity; and who shall represent it or how it shall be represented, is for the legislature alone. If, in their judgment, its members, representing every portion of the state, ought to do so, who can better represent the commonwealth; and, when they do so, what legislative service are they rendering for which they are receiving forbidden compensation because the state pays the expenses necessarily incident to its representation? The state is often represented by commissions created by the legislature, composed in part of members of the senate and house; but no one has ever thought of asking a court to say that those members of such a commission who happen to be senators or representatives receive prohibited compensation because their hotel bills are paid, with those of the other members of the commission, out of the appropriation for the payment of its legitimate expenses. That members of a legislature may be only part of such commission, instead of, as one body, being the state's sole representative, can make no difference in principle, if the position taken by the appellee is to be sustained. It has not been very elaborately pressed by the learned counsel representing the commonwealth, and we need not discuss it further.

In disposing of the questions raised on this appeal, we have nothing to do with the appellant's claim as presented in the court below, and it would therefore be improper for us to say anything about it. If, after it shall have been passed upon by a jury, the plaintiff or defendant should feel aggrieved by the finding, and the court below should not correct any wrong that may be done, the alleged grievance may be the subject of another appeal. All that we now decide is that, by the act authorizing the appellant to sue the commonwealth, he is to recover such sum, as, under the rules of pleading and evidence, may be justly due him. Under these

rules the case must be tried, and such sum awarded to him as, under proper instructions from the court and under all the proofs, the jury may find to be just.

Judgment reversed and *procedendo* awarded.

Mestrezat and Potter, J.J., dissenting:

That there may be no doubt as to the claim for which this action was instituted, and the items of which the majority of this court says are chargeable against the commonwealth of Pennsylvania, we state the claim in the language of the plaintiff himself, as found in his statement as follows:

Legislature of Pennsylvania, Excursion to New York City, General Grant Monument Dedication. To James Russ, Dr.

April 27, 1897.

To table supplies.....	\$1,078 36	
wines and liquors....	3,026 60	
supper at Dooner's for		
Com.	61 90	
J. H. Riebel, cigars..	450 00	
hire of china and		
breakage	187 53	
employees' service ..	240 00	
car fare	202 50	
purchase of stoves...	70 00	
freight charges	8 75	
James Russ, incidental expenses	175 00	
		\$6,100 64
Cr.		
By liquors returned....	\$ 157 00	
sale of stoves.....	32 00	
		189 00
		\$5,911 64

The edibles and drink were furnished as a lunch and dinner; both meals being served between the hours of 11:30 A. M. and 6 P. M. on the boat which carried the legislative excursionists on the Hudson river from Jersey City to a point opposite the Grant monument, a distance of 10 miles or less, and back. There were 425 persons, of which number 253 were members of the legislature.

Relative to the meals and liquors furnished, Senator Krause, chairman of the joint committee to make arrangements for the excursion, testifies as follows:

Q. Tell us what he [Russ] furnished.

A. He furnished the lunch. As soon as we arrived at Jersey City and got on the boat, there was a very nice lunch prepared for us.

Q. Go on and state what else Mr. Russ did.

A. After the ceremonies were over, he furnished an elegant dinner for us, with wines and liquors and everything included, with the cigars; had cigars going on the train, cigars on the boat, and everything in first-class order.

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Q. Do you remember the kind of wine that was furnished?

A. White Seal; wasn't any too good for the members of the legislature, we thought.

Q. Do you remember what else was furnished— Can you tell what was furnished in the way of food for the dinner?

A. Oh, it was so fine that I forget exactly all the elegancies that we had. We had everything first-class.

Q. Can you tell us what other liquors were furnished.

A. Liquors of all description.

Q. Describe them; tell what they were?

A. We had plenty of whisky, and we had plenty of beer, and plenty of apollinaris. I don't know how many drank apollinaris, but apollinaris was furnished.

Q. Did you specify what liquors?

A. Yes, sir; as far as the wines were concerned, because that was a motion unanimously carried in the committee.

Q. You did not specify anything with respect to the whisky, beer, or cigars?

A. Oh, I told him we wanted all those things.

Q. I understand, generally speaking, Senator, that you ordered nothing special from Mr. Russ except the wine?

A. That is all.

Q. You left it to his discretion?

A. That is right.

John Riebel, a cigar manufacturer of Philadelphia, was a member of the military committee of the house, as well as of the joint committee to arrange for the excursion. He was called as a witness by the plaintiff, and testified that the joint committee, about three fourths of which were present, held a meeting in Philadelphia the night before the excursion, and that Mr. Dooner served them with a lunch, for which a charge is made in plaintiff's bill.

He further testified:

Q. Can you tell what he [Russ] gave to you as lunch?

A. Only a first-class lunch. I can't begin to enumerate what articles he had there, or what food he had there; a first-class lunch in every respect.

Q. State whether he provided anything else.

A. On our return back he had supplied one of the finest dinners a man wanted to sit down to, served on the boat; had all the elegancies of the season,—anything you can mention in the eatable line, almost.

As to the contract made with him by Senator Krause, and what was furnished in pursuance of it the plaintiff testifies:

Q. What did he say to you when he came there?

A. He told me he wanted a first-class lay-out,—everything up to date,—and I did so.

Q. What did he tell you he wanted as to the number of meals, if anything?

A. Well, a lunch the moment we got on the boat, and a dinner returning towards New York—Jersey City.

Q. What did he [Krause] say?

A. He said I should go ahead and make all arrangements, and especially the one thing that they [the committee] put out especially was "White Seal champagne."

Q. (Mr. Fox) Now can you state what you did furnish?

A. Oh, Lord! I furnished everything. They had a nice lunch and very fine dinner.

Q. Now, about how much a head did you calculate to charge?

A. I did not calculate at all. There was no price whatever. If it cost \$5,000,000, there was no price at all that was to it.

Q. In other words, there was no limit put on the cost?

A. No, sir; not a cent.

Q. You don't know the kind of liquors returned?

A. No.

Q. Do you know the price charged for the returned liquors?

A. Just that much there. It was very lucky any was returned at all.

The only basis for this claim of \$5,911.64 against the state for table supplies, wines, and liquors, cigars, and "incidental expenses" (about one half of the claim, it will be observed, being for wines and liquors) is a joint resolution passed by the senate and house of representatives over the veto of the governor, in which it is resolved that the "senate and house of representatives attend said dedication [of the General Grant monument in New York] in a body, and that all matters pertaining to such attendance be referred to the committee on military affairs of the senate and house." The learned trial judge held that this resolution conferred no authority on the committee to make a contract with the plaintiff for the items charged in his bill, and hence he had no valid claim against the state. For the reasons set forth at length in the opinion refusing to take off the nonsuit, we entirely concur with the conclusion of the court below, and would affirm the judgment.

It does not aid the position of the majority of the court to cite authorities to sustain the proposition, conceded to be the settled rule in all the states of the Federal Union, that the power of the general assembly

of a state to legislate is absolute, subject only to the restrictions and limitations imposed by the Constitution of the state and that of the United States. That principle is not controverted, but it is most strenuously denied that the legislature, by the joint resolution in question, gave authority to the committee on military affairs to bind the state by a contract to pay the plaintiff the claim for which this action was brought. It is apparent that the language of the resolution conferred no direct authority on the committee to enter into a contract to bind the state for any expense incurred by the legislature in attending the dedicatory exercises. If any authority to contract for such purpose is given, it is by implication, and that alone; and, not being necessarily implied from the power conferred upon the committee by the joint resolution, the court should not sustain it on that ground. The character of the claim conclusively rebuts any implication that the legislature, in passing the resolution, intended to authorize the committee to make a contract for it. Such interpretation of the resolution opens the door to raids upon the state treasury by committees of the legislature, by which the taxpayers of the state can be made to pay claims which, as in this instance, neither the general assembly of the commonwealth, nor any other self-respecting legislative body, would for one instant think of approving. Had the plaintiff's claim, the character of which is shown by the items thereof and the testimony, been presented to the senate and house in open session at the time the joint resolution was passed, we are satisfied that those bodies would not have authorized the committee to contract for or pay it. It would have shocked the legislative conscience, as well as that of the people of the commonwealth. The testimony leaves no doubt as to the purpose in view when the contract was made, and what was expected to be, and what was, furnished in pursuance of it. About \$1,700 worth of food and \$3,000 worth of wines and liquors were consumed on the steamer by the 425 guests of the state in six and one half hours. This tells the brief but comprehensive story of the manner in which the money claimed here was applied (in the language of the preamble to the joint resolution) "in commemoration of the life and deeds of a hero whose memory we revere." Further comment upon the subject is unnecessary. To hold that authority was conferred upon the legislative committee by the concurrent resolution to contract for such a claim is vio-

lative of all sound rules of interpretation, and is not supported by reason or authority.

We would, moreover, take a step further than the trial court, and hold that the legislature was prohibited by the Constitution from authorizing the committee to make the contract under which this claim is made against the state. Section 8 of article 2 of that instrument provides: "The members of the general assembly shall receive such salary or mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for services upon committee or otherwise. No member of either house shall, during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term." At the time of the excursion to New York the members of the legislature were receiving as compensation a salary and mileage fixed by law; and hence, under this constitutional provision, they could receive "no other compensation whatever." Equally explicit and mandatory is the provision that no member shall "receive any increase for salary or mileage under any law passed during the term" for which he is elected. Mr. Buckalew, a recognized authority upon the interpretation of the Constitution, says (Const. 40): "Compensation to members is properly for time spent, for service performed, and for personal expenses incurred for the public; but the forms of the compensation to be made to them for outlay, time, and labor are the two expressly fixed by the Constitution, namely, salary and mileage, which are declared to exclude all others." A member of the legislature is therefore confined to his salary and mileage as compensation for his services, in neither of which is the claim here presented included. The joint resolution shows that the members attended the dedication as a legislative body, and the claim for the edibles, liquors, cigars, etc., furnished by the plaintiff, is "other compensation" to the members of the legislature than salary and mileage, and therefore is clearly within the constitutional inhibition. If the sum claimed by the plaintiff had been paid by the state to the members to defray their expenses in attending the dedication, it would clearly have been additional to the compensation allowed them by law. The practical effect of a payment by the state direct to the plaintiff is the same as a payment of the amount to the members, and by them to the plaintiff. In either case, they receive an additional compensation from the state for their services as members of the legislative body to which they belong.

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INDIANA SUPREME COURT.

OLLIE GIPE, Appt.,
v.
STATE OF INDIANA.

(.... Ind....)

1. Dying declarations—discretion as to admission.

The conclusion of a trial court that dying declarations were admissible in evidence will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion.

2. Same—extremity.

The deduction that declarations were made under a sense of impending death, without hope of recovery, is warranted where the person making them, after great shock and exposure, declared that he did not believe that he could get well, and made them several hours later, having been sinking all the time, and having reached a state of extreme weakness.

3. Indictment—homicide—variance.

An indictment for killing by striking, wounding, and throwing the victim into a well is not supported by evidence of frightening him into insanity by an attempted burglary, so that he jumped into the well.

4. Instructions — verdict — presumption of harm.

That accused was found guilty of involuntary manslaughter does not show that an instruction was harmless which permitted a conviction on an indictment for striking, wounding, and throwing the victim into a well, although the evidence shows the frightening of him into insanity so that he jumped into the well.

(November 1, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Henry County convicting him of involuntary manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. William A. Brown and Fred C. Gause, for appellant:

To be admissible; the declaration must be made under a sense that dissolution is not only impending, but certain.

Case Note.—The doctrine that a dying declaration which can be received in evidence as such must have been made under a consciousness of impending death is sustained by a great number of cases, among them, *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *Westbrook v. People*, 126 Ill. 81, 18 N. E. 304; *State v. Perigo*, 80 Iowa, 37, 45 N. W. 399; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713; *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355; *Taylor v. State*, 38 Tex. Crim. Rep. 552, 43 S. W. 1019, and many other cases.

While the time elapsing between the

Gillett, *Indirect & Collateral Ev.* § 195; *Morgan v. State*, 31 Ind. 193.

Unnecessary matters of description in an indictment or information must be proved as charged.

Taylor v. State, 130 Ind. 67, 29 N. E. 415.

Messrs. William C. Geake, C. C. Hadley, and L. G. Rothschild, with Mr. Charles W. Miller, Attorney General, for appellee:

Dying declarations, to be competent, must be made after an abandonment of hope of recovery, and under a realization that death is impending; still, this condition of mind may be inferred from the surrounding circumstances, even in the absence of any express declaration.

Gillett, *Indirect & Collateral Ev.* § 196; *Green v. State*, 154 Ind. 658, 57 N. E. 637; 2 Wigmore, *Ev.* § 1442.

The instruction was not reversible error. *Shields v. State*, 149 Ind. 395, 49 N. E. 351; *Hart v. State*, 149 Ind. 585, 49 N. E. 580; *Ginn v. State*, 161 Ind. 292, 68 N. E. 294; *Robinson v. State*, 152 Ind. 304, 53 N. E. 223; *Rains v. State*, 152 Ind. 69, 52 N. E. 450; *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Jarrell v. State*, 58 Ind. 293.

Gillett, J., delivered the opinion of the court:

Appellant was charged by indictment with the murder of one Mollie Starbuck and her infant child. There was a verdict of involuntary manslaughter, on which judgment was pronounced.

The first question which this appeal presents is whether the trial court erred in admitting as dying declarations certain statements of said Mollie Starbuck. On a Saturday night, between the hours of nine and ten, said decedent was found, in a frenzied condition, with said infant, in a shallow well, situate about 1,000 feet to the rear of her house. She and the child were the only members of her family who were at home during the evening, and there was evidence tending to show that the house was

broken into that night, at some hour previous to the time that they were found in the well. Said declarant died about 4 A. M. the next Monday. One of the attending physicians testified that the cause of death was acute pulmonary congestion, while another physician, in testifying, ascribed her death to shock, fright, and exhaustion. The evidence warranted the conclusion that her condition and death were due to her experience of the preceding Saturday night. She continued very ill from the time she was found. She was in a highly nervous condition, and was suffering from pulmonary hemorrhage. She was better Sunday morning, but during that time, and up to her death, her breathing was heavy and labored. Between 2 and 3 P. M. of said day she asked one of the attending physicians whether he thought she could get well. He told her he had hopes of her recovery, that she had improved nicely, and he saw no reason why she should not get well. She replied that she did not believe she would. Between that time and midnight Sunday, when the declarations were made, there was a gradual decline in her condition, and said physician testified that at the latter hour he had no hope of her recovery. The declarations in question, and the circumstances in which they were made, are thus stated by said witness: "At one of her waking spells I said to her: 'Mollie,' I says, 'do you know me?' And she made no answer, and she looked at me, and I said: 'If you cannot answer me, Mollie' (she was getting weak), 'raise your hand if you know me,' and she raised her hand or finger. And I said: 'There are some things we want to know, and very badly, and, if you can possibly let us know any way whatever, do so.' I said: 'Was it some bad man carried you off?' And she summoned a great effort and said, 'Yes.' The nurse asked her then: 'Did they come in at the window?' And she said, 'Yes,' and looked toward the window where the screen had been torn away. And then the nurse asked her if there were more than one, and

declarations and the occurrence of death is an element to be considered, the rule is laid down in 1 Greenleaf on Evidence, § 158, as follows: "It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible." To this effect, the decisions on the subject are substantially unanimous. The fact that the declarant lives a few hours after having made such statements under a sense of impending death does not make them inadmissible under any of the authoritative cases on the subject. *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *People v. Weaver*, 108 Mich. 649, 66 N. W. 567. Even the fact that the declarant lived for some

days after has been repeatedly held to be insufficient to render the declarations inadmissible. *State v. Jones*, 38 La. Ann. 792; *Jones v. State*, 71 Ind. 66; *Rex v. Bonner*, 6 Car. & P. 386; *Com. v. Haney*, 127 Mass. 455.

In *Baxter v. State*, 15 Lea, 657, and *State v. Yee Wee*, 7 Idaho, 188, 61 Pac. 588, declarations were held admissible though made sixteen days before death. Other cases sustaining declarations made even longer before death are: *Com. v. Cooper*, 5 Allen, 495, 81 Am. Dec. 702; *Lowry v. State*, 12 Lea, 142; *Reg. v. Bernadotti*, 11 Cox, C. C. 316; *Craven's Case*, 1 Lewin. C. C. 77. These cases fairly represent the great body of the decisions on the subject.

she said, 'I don't know.' And then I asked her if she recognized anyone and she made some answer, but we could not understand her,—she was getting very weak."

With this statement of the facts, we proceed to the discussion of the admissibility of said declarations. In *John's Case*, as reported in 1 East, P. C. 357, 358, from the MSS. of Buller, J., it appears that it was the unanimous opinion of the judges that, "if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence." That the character of the wound may of itself warrant the inference that the declarant was under a sense of certain and speedy death is settled upon the authorities. *King v. Woodcock*, 1 Leach, C. L. 503; *Anthony v. State*, Meigs, 265, 33 Am. Dec. 143; *McLean v. State*, 16 Ala. 672; *Hill v. Com.* 2 Gratt. 594, 608; 3 Russell, Crimes, 9th American from 4th London ed. p. 250; and see *Green v. State*, 154 Ind. 655, 57 N. E. 637. The question as to the competency of the declaration was one which the trial court was called on to decide before admitting the testimony. 1 East, P. C. 358; *John's Case*, *supra*; *Donnelly v. State*, 26 N. J. L. 463; *Starkey v. People*, 17 Ill. 17; 1 Roscoe, Crim. Ev. *37; 1 Bishop, New Crim. Proc. § 1212; 1 Elliott, Ev. § 355. Its conclusion that the declarations were admissible is one which will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion. *Swisher v. Com.* 26 Gratt. 963, 21 Am. Rep. 330. Professor Wigmore, who discusses the propositions above laid down, says: "In ascertaining this consciousness of approaching death, recourse should naturally be had to the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose, or, less broadly, that the nature of the injury alone could not be sufficient; i. e., in effect, that the declarant must have shown in some way, by conduct or language, that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude. . . . No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed, and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances." 2 Ev. § 1442. In this case it appears that on 1 L.R.A.(N.S.)

Sunday afternoon said decedent expressed the belief that she would not get well. Assuming that to have been her opinion then, and considering that she gradually grew worse until the physician had abandoned hope of her recovery, and bearing in mind her extreme weakness, as evidenced by the physician's testimony as to the circumstances in which her statements were made, we can but regard the deduction of the trial court as authorized that the declarations were made under a sense of impending death, without hope of recovery. The remarks of Eyre, C. B., in *Woodcock's Case*, *supra*, seem quite apropos in this connection, but we need not pause to quote them.

The indictment charged that appellant "did then and there unlawfully, feloniously, purposely, and with premeditated malice kill and murder Mollie Starbuck and Beulah Starbuck, by then and there feloniously, purposely, and with premeditated malice unlawfully striking and wounding and forcibly throwing the said Mollie Starbuck and Beulah May Starbuck in a well, then and there being." It is contended by appellant that, in view of the charge in the indictment as to the means by which the deaths alleged were caused, the court erred in giving to the jury instruction No. 3. By that instruction, the court, after calling the attention of the jury to the provisions of statute relative to the killing of a human being in the perpetration of, or attempt to perpetrate, the crime of robbery or burglary, charged that, if the jury found that appellant, either by himself or with others confederating with him, broke and entered the Starbuck house under certain circumstances set forth in the instruction (amounting in law to a burglary); and that, by reason of said acts, the said Mollie Starbuck was put in great fear and agitation, to such an extent that she lost her reason and became insane; and that by reason thereof, while in such state of insanity, she left the house and jumped into the well, carrying with her the infant child; and that, by reason of her exposure therein and her extreme fright and agitation, brought upon her by the facts aforesaid, she afterward died,—appellant would be guilty of murder in the first degree. In this case, as will be observed, the charge was a killing by "striking and wounding and forcibly throwing" said Mollie Starbuck and Beulah May Starbuck into a well. This clearly means that the killing was accomplished by physical violence. In an English nisi prius case, involving a state of facts somewhat similar to that involved in the hypothesis embodied in said instruction, we find that the facts as to the manner in which death occurred were pleaded. *Reg. v. Pitts*, Car. & M. 284. It is settled in

this jurisdiction that the charge that the killing was by ways and means unknown to the grand jury is sufficient; and then it is a question whether the proof supports the averment. *Waggoner v. State*, 155 Ind. 341, 80 Am. St. Rep. 237, 58 N. E. 190; *Donahue v. State* (at this term) 74 N. E. 996. We have here, however, a case in which it is alleged that the killing was accomplished by an act of physical violence. The averment is descriptive of the crime charged, and it was therefore necessary to prove the allegation substantially as laid. *Taylor v. State*, 130 Ind. 66, 29 N. E. 415. As respects the allegation and proof as to the manner of death, it is sufficient if the proof agree with the allegation in its substance and generic character; precise conformity is not required; but, to quote from one of the older writers, "if a person be indicted or appealed for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling." 1 East, P. C. 341. See also *Mackalley's Case*, 9 Coke, 67; *Rex v. Waters*, 7 Car. & P. 250; *State v. Dame*, 11 N. H. 271, 35 Am. Dec. 495; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *State v. Fox*, 25 N. J. L. 566; *State v. Hoyt*, 13 Minn. 132, 142, Gil. 125, 127; *State v. Jenkins*, 14 Rich. L. 215, 94 Am. Dec. 132; 10 Enc. Pl. & Pr. 128.

It is contended that the above instruction is shown to have been harmless, because the jury did not find appellant guilty of murder, but of involuntary manslaughter. There is no merit in this contention. The instruction, in view of the evidence, was strongly calculated to be influential, because of its indication to the jury that there might be a conviction for the homicide, if such it was, although the conclusion of the jury as to the manner of killing might be that death was caused by a means totally different from that which was alleged. It must not be forgotten that a charge of murder in the first degree comprehends every grade of felonious homicide, and that a finding of involuntary manslaughter cannot be disturbed on appeal because the evidence shows that the defendant was guilty of murder. *Hasenfuss v. State*, 150 Ind. 246, 59 N. E. 463. It has been declared, and properly so, that if an "error is in itself radical and affects substantial rights in a material degree, or may probably so affect such rights, then the error cannot be regarded as uninfluential unless the record, with decisive clearness and strength, affirmatively shows that it did not influence the final decision in the case to the prejudice of the party who complains." *Elliott, App. Proc.* § 643, note.
1 L.R.A. (N.S.)

After a careful consideration of the question which the giving of said instruction presents, viewed, not in the abstract, but in the concrete, as applied to the testimony in the record, it is our conclusion that it does not clearly appear that appellant was not prejudiced. A reversal must therefore follow.

Judgment reversed, and a new trial ordered. The clerk will issue the proper notice of the return of the prisoner.

INDIANA SUPREME COURT.

ÆTNA LIFE INSURANCE COMPANY,
Appt.,
v.
PHILANDER H. FITZGERALD.

(... Ind.)

1. Accident insurance—disease.

An insurance against loss of business time resulting from bodily injuries effected through external, violent, and accidental means covers loss of time by disease, if it was proximately caused by a bodily injury through the stipulated means.

2. Accident insurance—periostitis.

Periostitis of the metacarpal bones, caused by placing the hand, during sleep, between the head and the edge of the bed rail, and using it as a headrest until it becomes numb and bruised, is covered by an insurance against injuries effected through external, violent, and accidental means.

3. Insurance—notice of loss—waiver.

Failure to give notice of loss within a reasonable time, as required by the terms of the policy, is not waived by subsequent denial of all liability on the ground that the loss is not covered by the policy.

(October 11, 1905.)

TRANSFER by the Appellate Court, for the opinion of the Supreme Court, of an appeal by defendant from a judgment of the Superior Court for Marion County in plaintiff's favor in an action brought to

Case Note.—It is evident, from the nature of things, that instances of an injury resulting from some act of an insured person while asleep, as in *ÆTNA L. INS. Co. v. FITZGERALD*, which do not fall within the usually excepted risks of accidents from somnambulism, are extremely rare. An extensive search has failed to discover a similar case.

In most of the following cases of injury resulting to the insured from some act of his own while asleep, dazed, delirious, or otherwise not in full possession of his faculties, the injury was admittedly violent and accidental, and the question involved was

recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. W. H. H. Miller, John B. Elam, James W. Fesler, and Samuel D. Miller, for appellant:

Such policies as this do not make the insurer liable for the consequence of disease when there has been no accident within the meaning of the contract.

Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Sinclair v. Maritime Passengers' Assur. Co. 3 El. & El. 478; Dozier v. Fidelity & C. Co. 13 L. R. A. 114, 46 Fed. 446; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Bacon v. United States Mut. Acci. Asso. 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; McCarthy v. Travelers' Ins. Co. 8 Biss. 362, Fed. Cas.

No. 8,682; Appel v. Ætna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238; Niskern v. United Brotherhood of Carpenters & Joiners, 93 App. Div. 364, 87 N. Y. Supp. 640; Southard v. Railway Pass. Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L. R. A. 693, 70 Am. St. Rep. 212, 78 N. W. 252.

Periostitis, which the jury find was the injury here, is classed as a disease, and not as an accidental injury.

MacDonald, Surgical Diagnosis & Treatment, pp. 89, 90; American Text-Book of Surgery, p. 505; Warren, Surgical Pathology & Therapeutics, p. 628.

The elements of an estoppel did not exist in this case.

Security Ins. Co. v. Fay, 22 Mich. 468, 7 Am. Rep. 670; Dale v. Continental Ins. Co.

whether or not the cause was among risks excepted by the terms of the policy.

Where a sleeping person is asphyxiated by gas, without any intention to commit suicide, it has been held that death is due to "external, violent, and accidental means." Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758, 20 N. E. 347. Affirming 45 Hun, 313.

Such an accident is not an "inhaling of gas," within the clause of the policy exempting the insurer from liability where the injury is caused "by taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation, or medical treatment." Ibid.

Nor is it a taking of poison, or contact with a poisonous substance, within the meaning of such clause. United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805.

Nor is it within an exception of "death or disablement arising from anything accidentally taken, administered, or inhaled." Menneiley v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L. R. A. 686, 51 Am. St. Rep. 716, 43 N. E. 54.

Nor is it within a clause providing that the insurance does not cover "injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled." Fidelity & C. Co. v. Waterman, 161 Ill. 632, 52 L. R. A. 654, 44 N. E. 283, Affirming 59 Ill. App. 297; Fidelity & C. Co. v. Lowenstein, 46 L. R. A. 450, 38 C. C. A. 29, 97 Fed. 17, Affirming 88 Fed. 474.

Where one walking in his sleep falls from a window, and is killed, somnambulism may be regarded as the proximate cause; though it would not be so regarded if the deceased got up in his sleep, and subsequently fell out of the window while asleep. Traveler's Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 554.

A fall from a window while delirious is not covered by an accident insurance policy excepting from risks assumed injuries received "in consequence of being, or having

been, under the influence of, or affected by, or resulting directly or indirectly, in whole or in part, from, . . . disease or bodily infirmity." Carr v. Pacific Mut. L. Ins. Co. 100 Mo. App. 602, 75 S. W. 180.

A complaint alleging that the plaintiff, while traveling, fell asleep from weariness and motion of the cars, and, when it was quite dark, "and while he was in a dozed and unconscious condition of mind, and not knowing or realizing what he was doing, involuntarily arose from his seat and walked unconsciously to the platform of said car, and, without fault on his part, fell therefrom to the ground," and was injured, sufficiently shows that the injuries were not "self-inflicted," nor the result of "design" or "voluntary exposure to unnecessary danger," which risks were excepted in the policy. Scheiderer v. Travelers' Ins. Co. 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47.

Where the insured, who was recovering from an attack of pneumonia, was suddenly awakened and directed to dress quickly, and arose, appearing dazed and confused, and, while endeavoring to remove his nightshirt, in which he became entangled, ruptured a blood vessel and died, his death cannot be said to have resulted "from an accidental cause," within the meaning of a policy of insurance: since his movements cannot be regarded as involuntary. Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53.

Death caused by the insured hanging himself, or cutting his throat, while insane, is covered by a policy of insurance against injury through "external, violent, and accidental means." Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; Blackstone v. Standard Life & Acci. Ins. Co. 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812.

And it is not within the exception of "self-inflicted" injuries. Accident Ins. Co. v. Crandal, and Blackstone v. Standard Life & Acci. Ins. Co. *supra*.

95 Tenn. 38, 31 S. W. 266; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; Cassimus Bros. v. Scottish Union & Nat. Ins. Co. 135 Ala. 256, 33 So. 163; Diehl v. Adams County Mut. Ins. Co. 58 Pa. 443, 98 Am. Dec. 302; Beatty v. Lycoming County Mut. Ins. Co. 66 Pa. 9, 5 Am. Rep. 318; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; Gibson Electric Co. v. Liverpool & L. & G. Ins. Co. 159 N. Y. 418, 54 N. E. 23; 16 Am. & Eng. Enc. Law, 2d ed, p. 935.

After it is too late to cure a defect as to notice or proof, a defense based on such defect is not waived by mentioning only another defense to the policy when demand is made.

Phenix Ins. Co. v. Pickel, 3 Ind. App. 332, 29 N. E. 432; Fidelity & C. Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167; Railway Officials Acci. Asso. v. Armstrong, 22 Ind. App. 406, 53 N. E. 1037; Standard Life & Acci. Ins. Co. v. Strong, 13 Ind. App. 315, 41 N. E. 604; Bolan v. Fire Asso. 58 Mo. App. 225; Brink v. Hanover F. Ins. Co. 70 N. Y. 593; Brown v. London Assur. Corp. 40 Hun, 101; Employer's Liability Assur. Corp. v. Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; State Ins. Co. v. School Dist. No. 19, 66 Kan. 77, 71 Pac. 272; Peninsular Land Transp. & Mfg. Co. v. Franklin, 35 W. Va. 666, 14 S. E. 237; Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; Hagadorn v. Masonic Acci. Asso. 59 App. Div. 321, 69 N. Y. Supp. 831; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Gale v. State Ins. Co. 33 Mo. App. 669; Smith v. State Ins. Co. 64 Iowa, 716, 21 N. W. 145; Patrick v. Farmers' Ins. Co. 43 N. H. 621, 80 Am. Dec. 197; Burlington Ins. Co. v. Ross, 48 Kan. 228, 29 Pac. 469; May, Ins. §§ 464, 507.

Messrs. Robert W. McBride, Caleb S. Denny, and George L. Denny, for appellee:

"Force" or "violence" means something more than the movement of heavy masses. "The degree of violence is of no moment."

Bacon v. United States Mut. Acci. Asso. 44 Hun, 599; Southard v. Railway Pass. Assur. Co. 34 Conn. 574; Kerr, Ins. p. 380; Westmoreland v. Preferred Acci. Ins. Co. 75 Fed. 245; Western Commercial Travelers' Asso. v. Smith, 40 L. R. A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401.

The fact that the presence of a disease of some kind formed one link in the chain of causation does not relieve the company.

Richards, Ins. p. 215; National Ben. Asso. v. Grauman, 107 Ind. 288, 7 N. E. 233; Western Commercial Travelers' Asso. v. Smith, 40 L. R. A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Fetter v. Fidelity & 1 L.R.A. (N.S.)

C. Co. 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 500, 73 S. W. 592; Mardorf v. Accident Ins. Co. [1903] 1 K. B. 584; Smith v. Etna L. Ins. Co. 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153, 88 N. W. 368; Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Dozier v. Fidelity & C. Co. 13 L. R. A. 114, 46 Fed. 446; Appel v. Etna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238.

A denial, by the insurer, of all liability under the policy will operate as a waiver of the provision requiring notice and proofs of loss, or any defects in notice or proofs.

Joyce, Ins. § 3373; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677; Peabody v. Fraternal Acci. Asso. 89 Me. 96, 35 Atl. 1020; Fowle v. Ocean Acci. & Guarantee Corp. 4 Ont. L. Rep. 146; Comstock v. Fraternal Acci. Asso. 116 Wis. 382, 93 N. W. 22; Hayes v. Continental Casualty Co. 98 Mo. App. 410, 72 S. W. 135.

Gillett, J., delivered the opinion of the court:

Action by appellee against appellant on an accident policy. By the contract, the company insured appellee "against loss of business time . . . resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means." The motion for a new trial presents the question as to whether the disability involved was due to an injury within the terms of the policy. It appears from the testimony that on July 31, 1902, appellee, being much fatigued from an extended business trip, retired about 8 p. m. As he was somewhat restless, he placed his left hand between the pillow and his head, in order to raise it higher. The hand was placed on edge, with the thumb next to the head, and he fell asleep in that position. Some time during the night, while asleep, he moved so that his hand, with his head continuing upon it as before, rested upon the edge of the bed rail, and he continued to sleep in that posture until 4 a. m., when he awoke. He found that his hand was wholly numb, and it continued in that condition for the space of half an hour. There was a black mark upon it, where it had rested upon the rail, and this mark existed for some time thereafter. The hand pained him a great deal during the following day, and during the next night he was compelled to call a physician. The testimony of the latter, as well as that of the family physician, who took charge of the case upon returning from a vacation, shows that the

pressure on the hand while upon the bed rail resulted in an inflammation of the periosteum of the metacarpal bones lying back of the third and fourth fingers,—a condition which made an operation necessary and caused a protracted illness. The expert evidence shows that cases of inflammation of the periosteum, or, as the difficulty is technically termed, periostitis, are traumatic,—at least for the most part,—and that it is the opinion of the medical profession that all of such cases are due to some injury, perhaps forgotten.

The principal contention of counsel for appellant on the question of the sufficiency of the evidence is that appellee's loss of time was due to disease, and not to an injury within the terms of the contract. We hold that the policy in suit was an insurance against loss of business time by disease, provided that the disability was proximately caused by a bodily injury occasioned through external, violent, and accidental means. It is the general understanding that this class of policies insures against diseases so occasioned; and, where medical science reveals the fact that back of the disease stands a proximate cause answering in all respects to the terms of the policy, it will not suffice to discharge the company that the consequence is accounted a disease. The insured cannot know what may befall him as the result of possible injuries, and it must be taken to have been the understanding of the parties that loss of time occasioned by disease was insured against, where the disability was proximately occasioned by an injury within the provisions of the contract. It will be time enough to deal with the difficult cases suggested by appellant's counsel, involving subtle, external causes of disease, when they arise. There was no evidence tending to show that the inflammation from which appellee suffered was due to any cause other than that of the long-continuing force exerted by the weight of the head. It was said in *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682, that "an efficient, adequate cause, being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." See also *Continental Casualty Co. v. Lloyd (Ind.)* 73 N. E. 824; *National Ben. Assn. v. Grauman*, 107 Ind. 288, 7 N. E. 233. It was declared by this court, in *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818, that the word "accident," as used in an accident policy, "should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation." We are not here called on to 1 L.R.A. (N.S.)

consider a case where the result is one which follows from ordinary means voluntarily employed, and in which the only element of unexpectedness lies in the fact that the pursuit of the means unexpectedly brings about a physical condition which makes disease possible. Here the element of volition was wholly absent, and the fact that, during a period of unconsciousness, there was a distinct and long-continued force applied, which compressed the tissues and blood vessels surrounding the bones, and thereby caused the inflammation, marks the case as one of accident.

We are also of opinion that the injury was a violent one within the terms of the policy. The degree of violence is not always a controlling consideration. *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, Fed. Cas. No. 13,182. We are not to be understood as holding that violence will be wholly implied to bring an accident within the terms of the policy. Our holding is that, where an injury proximately proceeds from a cause which falls within the limitations of the policy, interpreted according to the ordinary understanding of the force of words, that interpretation is to be preferred, rather than one which would defeat the protection of the assured in a large class of cases. *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 844; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Healey v. Mutual Acci. Assn.* 133 Ill. 556, 9 L. R. A. 371, 23 Am. St. Rep. 637, 25 N. E. 52. There were present in this instance, in a substantial sense, all of the elements necessary to bring the proximate cause of the disability within the requirement that the loss of time must result from a bodily injury effected through external, violent, and accidental means. The only thing that was extraordinary about the case was the result; but this will not relieve, for the company was paid for its undertaking to provide a conventional measure of indemnity against the fortuitous, provided that it proximately proceeded from such an injury as the policy describes. We hold that the evidence was sufficient to support the verdict.

Appellant has assigned as an error that the court below erred in overruling a demurrer to the complaint. As the only objection which is urged to that pleading has, in effect, been determined by us to be untenable in passing on the question as to the sufficiency of the evidence, it is enough to announce that appellant is not entitled to a reversal based on the overruling of said demurrer.

The policy in suit provided that an immediate notice of the injury should be given the company. Appellee did not give notice

until about fifty days after the injury. October 23, 1902, the company, by its general agents at Indianapolis, sent appellee a letter, stating that the company declined to approve the claim on the ground that it did not "come within the classification of an accident." The trial court, by instructions which are not complained of, submitted to the jury trying the cause the question, as one of fact, whether, in view of appellant's condition, notice was given within a reasonable time; but the court also gave to the jury the following instruction, for which a reversal is sought: "On the question of waiver and the provision of the policy requiring immediate notice, I instruct you that, if you should find, from the evidence, that the notice required by the policy was not given within a reasonable time after the happening of the alleged accident and injury, but was given some time later; and that, after it was given, a claim was made upon the defendant on said policy for the injury in controversy; and that, in response to said claim, the defendant denied all liability, and placed its denial of liability solely on the ground that the policy sued on did not cover such an injury as this was, without saying anything about the failure to have given this notice required in the policy,—such fact would amount to a waiver of the provisions requiring immediate notice." Under the provisions of the Indiana statutes concerning foreign insurance companies, the provision of the policy above referred to amounted to a requirement of notice within a reasonable time. *Burns's Anno. Stat.* 1901, § 4923; *Insurance Co. of N. A. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Pickel v. Phenix Ins. Co.* 119 Ind. 291, 21 N. E. 898; *Peele v. Provident Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990. It will be observed, however, that, by the instruction above set forth, the court instructed upon the hypothesis that notice was not given within a reasonable time, and informed the jury that a subsequent denial of liability on another ground, without mentioning the failure to give notice, would amount to a waiver. If this was a correct exposition of the law as applied to the facts, there was no question, under the uncontradicted evidence, to submit to the jury.

We considered the doctrine of waiver of proofs of loss at some length in *Germania F. Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003, and, in view of what was there said, this case can be disposed of without much further discussion. It is true that we held in the *Pitcher* Case that there might be a waiver after the time for making proofs of loss had expired, but it will be observed that there the disagreement was as to the amount of the loss. A protracted negotia-

tion over such a question after the expiration of the time for the making of proofs might warrant a jury in concluding that the company was recognizing a subsisting obligation to the extent of what it conceived to be the amount of the loss; but we cannot sanction the view that, after the assured has sinned away all right of recovery under the policy, he may yet recover by proof that the company refused to pay on the ground that the policy did not cover the claim asserted in the notice. The refusal to pay on a wholly different ground, made within the time that the policy holder may take steps to make good his right under the contract, is treated in this state as a waiver *per se*; but we perceive no reason, after the right is gone, for permitting the policy holder to go to the jury on the question of waiver under proof of the solitary fact that the company had afterwards declined for another reason to recognize the validity of the policy. The authorities support us in this view of the law. *Fidelity & C. Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167, and cases cited: *Patrick v. Farmers' Ins. Co.* 43 N. H. 621, 80 Am. Dec. 197; *Beatty v. Lycoming County Mut. Ins. Co.* 66 Pa. 9, 5 Am. Rep. 318; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 451; *State Ins. Co. v. School Dist. No. 19*, 66 Kan. 77, 71 Pac. 272; *Employer's Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869; *May, Ins.* § 464. In fact, we have not been able to find a case which seems to support appellee upon this point, unless it be *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108, which is cited in the brief filed on his behalf. The value of that case as a precedent in appellee's favor was destroyed by *Devens v. Mechanics' & T. Ins. Co.* 83 N. Y. 168, where the court, referring to the *Brink* Case, said: "The doctrine of waiver was, we think, properly applied in that case; but it should not be extended, so as to deprive a party of his defense, merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that, with full knowledge of the facts, there was an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

Appellee's counsel contend that, under the evidence, it appears that notice was given within a reasonable time. We have read the evidence as set out in the bill of exceptions, and, while we are of opinion that the ques-

tion of reasonable time was for the jury, in view of the evidence as to appellee's condition, yet the case which he seeks to make out was not so convincing upon that point as to render harmless the giving of the above instruction.

Judgment reversed, and a new trial ordered.

IOWA SUPREME COURT.

NELLIE WILLIAMS, Appt.,

v.

MINERAL CITY PARK ASSOCIATION.

(.... Iowa)

1. Amusement park—negligence.

Failure to provide around a band stand erected above the seats provided for patrons, by an amusement association, a barrier which will prevent articles falling therefrom, is not negligence as matter of law.

2. Amusement park—care—jury.

The jury must determine the question of the duty of the keeper of a place of amusement to keep clear of articles which will fall therefrom, the platform of a band stand which is erected above seats, provided for patrons.

3. Trial—instruction—omission.

A party cannot complain of the omission from an instruction, which is right so far

as it goes, of elements which he deems material, unless he calls the court's attention thereto.

4. Amusement park—injury to patron by employee.

The owner of a place of amusement is not liable for injury to a patron by a bottle carelessly dropped by a musician from a band stand erected over seats provided for patrons.

5. Amusement park—duty to patrons.

Reasonable care is the measure of duty under which the owner of a place of amusement rests with respect to the safety of places provided for patrons.

(March 8, 1905.)

A PPEAL by plaintiff from a judgment of the District Court for Webster County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. M. E. Mack and J. B. McCrary, for appellant:

The care required by appellee toward appellant was commensurate with the duty assumed by the contract.

Larkin v. Chicago & G. W. R. Co. 118 Iowa, 652, 92 N. W. 891; Burgess v. Sims Drug Co. 114 Iowa, 277, 54 L. R. A. 364,

Case Note.—The court in *WILLIAMS v. MINERAL CITY PARK ASSO.* cites the case of *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620, as one of the authorities which imposes upon the proprietor of a hall or place of amusement to which the public is invited the duty to exercise reasonable care and diligence in protecting the persons attending from injury. This obligation is analogous to that of a carrier toward passengers; and there is a contract which implies a warranty, not only of due care on the part of the proprietor and his servants, but also on the part of himself and any independent contractor who may be employed to construct the building or stands, or to give exhibits.

In *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620, the court denied the liability for injury to a patron of a public exhibition, caused by collision with a race horse which had become frightened and ran away. The same rule is applied in the case of *Hallyburton v. Burke County Fair Asso.* 119 N. C. 526, 38 L. R. A. 156, 26 S. E. 114, in which it was held that a fair association is not liable for injuries to one who is injured by the bolting of a horse from a track where a race is being held, if it has provided a suitable grand stand from which the race may be viewed, and has erected a railing between the race course and the place where spectators are seated.
1 L.R.A. (N.S.)

In Thompson's Commentaries on the Law of Negligence, § 7665, it is stated that negligence of persons conducting a public exhibition of horse racing cannot be presumed from the mere fact that a spectator was injured by a runaway horse, while in the place reserved for spectators.

Hart v. Washington Park Club, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620, is cited in *Thornton v. Maine State Agri. Soc.* 97 Me. 114, 94 Am. St. Rep. 488, 53 Atl. 979, in which an agricultural society was held liable for the death of one who was killed at the entrance of a fair ground by a bullet which penetrated the target of a shooting gallery. This decision was based on the theory that, when one expressly, or by implication, invites others to come upon his premises for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the place reasonably safe for the visit. The same doctrine is laid down in *Cooley on Torts*, 2d ed. p. 718.

WILLIAMS v. MINERAL CITY PARK ASSO. also cites *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636, in which it was held that one who maintained a hall for public exhibitions was liable to one who was injured by the breaking of a defective guard rail while watching a game of polo.

As another authority, the court referred to the case of *Richmond & M. R. Co. v.*

89 Am. St. Rep. 359, 86 N. W. 307; *Haworth v. SeEVERS Mfg. Co.* 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828; *Cooley, Torts*, 1878, p. 663; 1 *Thomp. Neg.* ¶ 995; *Shearm. & Redf. Neg.* 3d ed. ¶ 54; *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; *Francis v. Cockrell, L. R.* 5 Q. B. 501; 2 *Thomp. Neg.* p. 906.

The appellee impliedly warranted to this appellant that the place would be safe if used by her for the purposes intended.

Whittaker's Smith, Neg. p. 215.

There was a legal presumption of negligence on appellee's part from the injury occurring to appellant in an amphitheater when she was without fault.

Cooley, Torts, p. 665; *Barrows, Neg.* p. 170; *Shearm. & Redf. Neg.* 3d ed. p. 68, ¶ 54; 1 *Thomp. Neg.* 995.

Contractual relation makes a positive duty.

Burgess v. Sims Drug Co. 114 Iowa, 275, 54 L. R. A. 364, 89 Am. St. Rep. 359, 86 N. W. 307; *Haworth v. SeEVERS Mfg. Co.* 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828.

Appellee, for a consideration, assented to the care and control of appellant, and, for her safety, was required to exercise the

highest degree of care reasonably to be expected from human diligence and foresight.

Larkin v. Chicago & G. W. R. Co. 118 Iowa, 652, 92 N. W. 891; *Beresford v. American Coal Co.* 124 Iowa, 34, 98 N. W. 902; *Heaven v. Pender, L. R.* 11 Q. B. Div. 506; *Whittaker's Smith, Neg.* 1st Am. ed. p. 10, note.

The obligation of care and control by appellee over its seats extends upward indefinitely for the purpose of their use and enjoyment: and its duty is commensurate with its obligation.

2 *Dill. Mun. Corp.* 3d ed. ¶ 1013; *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262.

Messrs. Healy Brothers & Kelleher, for appellee:

The appellee invited the public to its premises, and was, therefore, only required to exercise ordinary diligence in maintaining said premises in a reasonably safe condition.

Larkin v. O'Neill, 119 N. Y. 221, 23 N. E. 563; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354; *Flynn v. Central R. Co.* 142 N. Y. 439, 37 N. E. 514; *McCaldin v. Parke*, 142 N. Y. 564, 37 N. E. 623; *Sebeck v. Platt-deutsche Volkfest Verein*, 64 N. J. L. 624, 50 L. R. A. 199, 81 Am. St. Rep. 512, 46 Atl. 631; *Hallyburton v. Burke County Fair Assn.* 119 N. C. 526, 38 L. R. A. 156, 26 S.

Moore, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70, in which it was held that a street car company, which owns and manages a park to which it seeks to attract visitors, will be liable for the death of a boy killed by the release of a pole used in connection with a balloon ascension, if no notice that the pole would fall was given, and no precaution taken. This case was cited with approval in *Texas State Fair v. Brittain*, 56 C. C. A. 499, 118 Fed. 716, which sustained a spectator's right to recover for injuries sustained by the falling of seats at a show on a state fair ground. It was also cited in *Indianapolis Street R. Co. v. Dawson*, 31 Ind. App. 607, 68 N. E. 909, which held a street railway company liable for an assault upon a colored person in a park maintained by it, where the company had knowledge of a conspiracy to assault colored people.

In *Mastad v. Swedish Brethren*, 83 Minn. 40, 53 L. R. A. 803, 85 Am. St. Rep. 446, 85 N. W. 913, which is also cited in the case of *WILLIAMS v. MINERAL CITY PARK ASSO.*, it was held that a person controlling a public place of amusement, to which he invites the public on the payment of an admission fee, and at which place he sells intoxicating liquors; and who sells such liquors to one in attendance at such place, thereby rendering him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others,—is bound to exercise reasonable care to protect his other patrons 1 L.R.A. (N.S.)

from such insults; and, for the failure to do so, is liable for damages. The same rule is applied in *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, and *Curran v. Olson*, 88 Minn. 308, 60 L. R. A. 733, 97 Am. St. Rep. 517, 92 N. W. 1124.

Some additional cases, which also sustain the rule as to the exercise of reasonable care toward spectators at a place of amusement, are as follows:

In *Selinas v. Vermont State Agri. Soc.* 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117, the court sustained the liability of an agricultural society for an injury inflicted on a visitor, who was hit by a mallet used to pound a striking machine which was on exhibition on the grounds.

And in *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the proprietor of a theater was held liable for acts of a janitor and ticket taker in wrongfully assaulting a person because he was engaged in a dispute with the ticket seller, who had attacked and was beating him.

In *Clark v. Northern P. R. Co.* 29 Wash. 145, 59 L. R. A. 508, 69 Pac. 636, the court denied the liability of a railroad company to one who was injured while crossing the switch yard on his way to attend a circus which the railroad company permitted to be held on its vacant land adjoining the switch yard.

In *Fox v. Buffalo Park*, 21 App. Div. 321,

E. 114; *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; *Cooley, Torts*, 2d ed. p. 718; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Boyce v. Union P. R. Co.* 8 Utah, 353, 18 L. R. A. 509, 31 Pac. 450; *Knottnerus v. North Park Street R. Co.* 93 Mich. 348, 17 L. R. A. 726, 53 N. W. 529.

If the injury to the appellant resulted from the negligence of an employee of an independent contractor during the performance of an act, not hazardous or dangerous in itself, the appellee is not liable for the negligence of such servant of the independent contractor.

Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Humpton v. Unterkircher*, 97 Iowa, 514, 66 N. W. 776; *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 74; *Kellogg v. Payne*, 21 Iowa, 577; *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 562; *Johnson v. Owen*, 33 Iowa, 514; *Wood v. Independent School District*, 44 Iowa, 29.

Weaver, J., delivered the opinion of the court:

The defendant association is a corporation under whose management and direction a place or field for public amusements

47 N. Y. Supp. 788, the court sustained the right of a visitor at a public exhibition to recover for injuries resulting from the defective construction of a grand stand; and the proprietor was not allowed to avoid liability on the ground that he had employed a competent architect to construct the seats. In *Currier v. Boston Music Hall Asso.* 135 Mass. 414, the court held the proprietor's ignorance of the defects to be immaterial.

In *Phillips v. Wisconsin State Agri. Soc.* 60 Wis. 401, 19 N. W. 377, it was held that it was not, as matter of law, negligence for an agricultural society to leave unprotected the coupling of a shaft used for transmitting power to machinery, at the fair.

Shearman & Redfield on Negligence, § 706, states that, if the visitor is present for the benefit of the host, the latter should be held liable for the want of any ordinary care in respect to the condition of the property; citing *Selinas v. Vermont State Agri. Soc.* 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117, and *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 93, 1 L. R. A. 754, 15 Am. St. Rep. 556, 18 N. E. 496.

The proprietor of a place of amusement is not relieved of the duty as to reasonable care because the particular exhibition which injured the spectator was not given by himself. This rule is illustrated in *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L. R. A. 199, 81 Am. St. Rep. 512, 46 L. R. A. (N.S.)

has been established at or near the city of Ft. Dodge, Iowa. Within this inclosure is erected a so-called "grand stand" or amphitheater containing benches or seats for the accommodation of the people attending the races and other exhibitions there given. Over the central portion of this amphitheater, at a height of some 25 feet, is a platform intended to be occupied by a band of music. This platform was inclosed by a rail 2 by 4 inches in size extending around the four sides about 3½ feet from the floor. On three sides, near the rail, were benches for the accommodation of the musicians. Except as described, the platform was inclosed by no barrier or netting to guard against the fall of any substance or article from the platform upon the audience seated below. An entrance fee was collected from visitors for admission to the grounds, and an additional fee for a seat in the amphitheater. Upon the day in question certain races had been provided by the defendant, to which, by the usual methods of advertising, the public was invited. The plaintiff attended the entertainment, paid the usual charges for admission to the ground and to the amphitheater, and was given a seat below the band platform. While sitting in the place thus provided, and without any apparent fault on her part, a quart bottle was dropped or fell from the platform upon

Atl. 631, which is also cited in *WILLIAMS v. MINERAL CITY PARK ASSO.*, and in which the court said that, having invited the public to his park, the proprietor is chargeable with the duty of using reasonable care to see that the premises are kept in a safe condition for the use of his guests; and if the exhibition, though given by an independent contractor, was of a character to jeopardize the safety of those who were present on the defendant's invitation, the duty is cast upon the latter of using due precautions to guard against injury.

And in *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913, which is also cited in *WILLIAMS v. MINERAL CITY PARK ASSO.*, a street railway company was held liable for an injury received by a spectator at an exhibition of marksmanship at a pleasure resort, although the performance was conducted by an independent contractor, where a small fragment of a bullet flew from the impact when the bullet hit the butt, striking the spectator in the eye.

On the contrary, in *Smith v. Benick*, 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56, it was held that a proprietor of a public resort, who employed an independent contractor to make a balloon ascension to attract visitors, was not liable for an injury to a visitor by a pole which fell by the negligence of the balloonist while he was endeavoring to raise the pole for use in inflating the balloon.

the head of the plaintiff, resulting, it is alleged, in her serious injury. The plaintiff's petition sets out these facts, and charges the defendant with negligence (1) in constructing the platform without netting or other barrier to guard against such injuries to persons seated below; and (2) in giving the plaintiff a seat under said platform, when, in the exercise of due care, it should have known and provided against the danger to which she was thus exposed.

There was evidence tending to show that on one or more occasions during the day and prior to the accident, bottles of some kind had been seen upon the platform floor, and it is the theory of the appellant that the bottle by which she was hurt rolled, or was in some manner crowded or pushed, from said floor. No one testifies to seeing anything of this kind, but it is sought to be inferred from the facts above stated. On the other hand, a witness for the defendant testifies to having seen a member of the band pick up from the floor two quart bottles, and, in attempting to hold them on the rail with one hand, while he reached for the third with the other hand, a bottle slipped from his grasp, and fell over the rail. The witness, who was also a member of the band, immediately went below and learned that plaintiff was injured, evidently by the bottle which he had seen fall.

1. Appellant's counsel have given considerable attention in argument to the measure of duty incumbent upon the defendant to provide and care for the safety of persons attending its exhibitions, to which the public is invited. For the purposes of this case, most of the propositions advanced on this subject may be admitted. We find, however, by reference to the record, that, generally speaking, the trial court adopted the theory now contended for as regards the law of negligence, and instructed the jury accordingly. For instance, it is the claim of counsel that due care on part of the defendant required the inclosing of the space between the rail above referred to and the floor of the platform with boards, or netting, or other barrier; and that such protection, if provided, would have prevented the accident to plaintiff. Now, the trial court distinctly instructed the jury that, if ordinary care for the protection of the people below required the use of any such device, the failure to provide it was negligence; and if, by reason of such negligence, plaintiff was injured, she was entitled to a verdict. This instruction seems fairly to cover the entire contention of the appellant on this branch of the case. It is not, and could not well be, contended that the failure to provide the barrier was negligence as

a matter of law. If that be true, the court could do no more than to instruct as it did instruct, and leave the question to the determination of the jury. The jury found the fact against the plaintiff, and we cannot say that the verdict is without support in the testimony.

2. It is further claimed that defendant was negligent in failing to exercise such care and control over the use and occupancy of the band platform as was required for the safety of persons seated below. There is evidence tending to show that dealers in various kinds of liquids were permitted to carry their wares to persons on the band platform, and that bottles of such kind were seen on the floor; and it is said that due care on part of defendant required it to keep the platform clear of such obstructions. In this, as in respect to the other charge of negligence, we have to say that the question thus presented was for the jury, and was fairly submitted to their consideration. It is argued that an instruction which told the jury that defendant would be liable for the negligence of its officers is erroneous, because it did not refer to the acts of its agents, servants, and employees, as well as officers. The instruction being unquestionably right as far as it went, and plaintiff having failed to call the court's attention to the further proposition now suggested, there is no ground to allege error. *Wimer v. Allbaugh*, 78 Iowa, 79, 16 Am. St. Rep. 422, 42 N. W. 587; *Churchill v. Gronewig*, 81 Iowa, 449, 46 N. W. 1063; *State v. Viers*, 82 Iowa, 397, 48 N. W. 732; *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119.

Complaint is made of an instruction to the effect that, if members of the band were drinking beer on the platform, and one of them carelessly dropped the bottle which injured the plaintiff, the defendant would not be liable. Counsel profess to believe this charge was "grossly unfair, very misleading, and injects something into the case not alleged or proved by either party, and takes away from the jury one of the vital points in the case." We do not so view it. There was evidence from which it might be found that beer was being consumed by some persons in and about the stand, and that the instrument of plaintiff's injury was a beer bottle. Certainly, the mere fact that a member of the band, whether he was the employee of the defendant or of the band director, carelessly dropped a bottle upon the plaintiff, would not sustain a charge of negligence against the defendant. The negligence of the servant for which the master must respond to a third person is negligence in some act, or failure to act, within the scope of his em-

ployment. This is elementary, and requires no citation of authorities. So far as the record shows, the employment of the band was for no other purpose than to provide music for the occasion, and ordinarily, at least, the relation of beer to harmony of sound is not so obvious or necessary that the passing of bottles between members can be said to be within the scope of a musician's employment. We are unable to see how the instruction complained of could in any manner have prejudiced the plaintiff's case. Exceptions are taken to other instructions, but we cannot notice them in detail without unduly prolonging this opinion. We have examined them all, and find no error.

We are not sure that we quite understand the proposition of counsel that "the obligation of care and control by defendant over its seats in the amphitheater and the right of its patrons to use them in safety extends upward indefinitely for the purpose of their use and enjoyment, and the duty of the defendant is commensurate with this obligation." If thereby it is meant to say that, in the erection of buildings, stands, platforms, and other elevated structures upon grounds to which the public is invited, the defendant must use reasonable care not to create or permit conditions which endanger the persons of visitors who are in their proper place, or in seats provided for their use, there can be no dispute of the correctness of the statement. We think, however, that this principle, so far as applicable, was fairly embodied in the instructions. As bearing upon the degree of care which the law imposes upon the owners and managers of exhibitions and places of amusement, the decided cases are not numerous, but, so far as the courts have expressed themselves, it appears to be settled that reasonable care in such cases is the measure of duty. We are therefore not prepared to accept counsel's contention that, when "plaintiff placed her person in defendant's hands for a consideration" it created "a sort of bailment, just as if she had placed herself in a railroad's hands as passenger." It would require too much ingenuity to adjust the law of bailments to the implied contract which arises between the proprietor of a place of public amusement and the visitor who attends such place upon the proprietor's invitation; and the undertaking of such a proprietor is not so similar to that of a common carrier of passengers as to call for an application of the same rule of responsibility. As holding to the rule of reasonable care in such case, see *Hart v. Washington Park Assn.* 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; *Fox v. Buffalo* 1 L.R.A. (N.S.)

Park, 21 App. Div. 321, 47 N. Y. Supp. 788; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L. R. A. 708, 64 N. W. 382; *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636; *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 93, 1 L. R. A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; *Mastad v. Swedish Brethren*, 83 Minn. 40, 53 L. R. A. 803, 85 Am. St. Rep. 446, 85 N. W. 913; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L. R. A. 199, 81 Am. St. Rep. 512, 46 Atl. 631.

Counsel for appellee have dwelt at some length upon the theory that the band, or its director, is to be considered as an independent contractor, which had undertaken to furnish the music for defendant's exhibition, and that the latter cannot be held liable for any negligence of the former. The rule contended for is certainly not correct in all cases (see *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L. R. A. 199, 81 Am. St. Rep. 512, 46 Atl. 631), though it would doubtless be applicable under some circumstances. The case before us may readily be disposed of without passing upon that branch of the discussion, and we shall not attempt to do so.

The record before us presents a controversy which is almost wholly one of fact for the consideration of the jury. It has been so considered, and it is not within our province to disturb the verdict. Appellant has filed a motion to tax the appellee with the cost of an amended abstract filed by it in this court. An examination of the amendment indicates that it supplies some material omissions from the principal abstract, and the motion is overruled.

The judgment appealed from is affirmed.

Petition for rehearing overruled.

IOWA SUPREME COURT.

FRANK ROSS, Appt.,

v.

BOARD OF SUPERVISORS OF WRIGHT COUNTY et al.

(.... Iowa)

1. Drainage—validating act.

Authority to continue existing proceed-

Case Note.—The court, in *ROSS v. WRIGHT COUNTY*, in sustaining the power of the legislature to cure a constitutional defect in a previous statute which it had the power to

ings for the construction of a drainage ditch, which have been declared void because of the invalidity of the statute under which they were instituted, for failure to provide for notice to owners of land not touched by the improvement, but which may be assessed for the cost, may be conferred by a statute correcting this defect by providing such notice, in the absence of any constitutional prohibition of retroactive laws.

2. Drainage—implied validation.

Pending proceedings for a drainage im-

provement need not be expressly legalized in order to permit their completion, by a statute enacted to provide for notice to persons liable to assessment, for want of which the statute has been held unconstitutional; it is sufficient if the statute assumes that the pending proceedings will continue, and would be idle and meaningless unless that intention was imputed to the legislature.

3. Drainage—notice—want of.

Proceedings for the construction of a drainage ditch cannot be avoided by prop-

enact, and to give such amendment retroactive and curative effect upon proceedings instituted under such defective statute, settles a question which the courts have not frequently been called upon to decide. In arriving at this decision, the court discusses with approval the case of *Ferry v. Campbell*, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604. This case has been cited frequently in other cases, but on different questions. The court also cites and discusses with approval the case of *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, which has also been cited frequently, but on different questions.

On this proposition, the court, in *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, said that the legislature can enact statutes on subjects which properly come within the cognizance of the courts, which may form the basis of judicial consideration and judgment in suits pending at the time of their enactment. Curative statutes, when valid and applicable, should govern the courts in such cases. They govern on the ground that the bringing of the suit vests in the party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit is brought, but when the judgment is rendered.

In *Donley v. Pittsburgh*, 147 Pa. 348, 30 Am. St. Rep. 738, 23 Atl. 394, the court held that an assessment made under a void statute may be collected under a subsequent statute which cured the defect in the statute under which the assessment was imposed. The same rule is applied in *Schenley v. Com.* 36 Pa. 29, 78 Am. Dec. 359.

In *Blake v. People*, 100 Ill. 504, it was held that an assessment for a levee constructed under a statute which was unconstitutional in part may be collected under the authority of a subsequent statute which cured the defect in the prior statute.

But in *State, Boice, Prosecutor, v. Plainfield*, 38 N. J. L. 95, it was held that proceedings for widening streets under an ordinance which was void for failure to provide for notice could not be remedied by subsequent legislation, so as to render the proceedings valid. The distinction between this case and *Ross v. Wright County* lies in the fact that, in the former, the invalidity of the statute was fundamental, but in the latter case the statute was only partly defective.

In *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421, the court said that the true limit of the curative power of the legislature (N.S.)

lature, as gathered from all of the authorities, and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void,—defects of execution only, not of authority or jurisdiction; and is confined to defective proceedings under previous legislative authority.

In *Strosser v. Ft. Wayne*, 100 Ind. 443, curative acts were held to be valid, and to heal defects in judicial proceedings; but proceedings had in a tribunal having no jurisdiction of the matter are invalid, and cannot be made valid by a curative statute.

In *Tilton v. Swift*, 40 Iowa. 78, the court held that remedies are always within the control of the legislature, and retrospective laws which affect pending suits are not unconstitutional.

And in *Herriott v. Potter*, 115 Iowa, 648, 89 N. W. 91, it was held that the succession to property during the existence of an invalid inheritance tax law cannot be subjected to such a tax under a subsequent amendment curing the defect in the prior statute.

In *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, the court held that a portion of a statute which is unconstitutional may be amended so as to cure the defect.

The case of *Grubbs v. State*, 24 Ind. 205, is sometimes cited as denying the power of the legislature to amend a void statute. But in this case the curative act itself was void on the ground that it did not remove the defect.

Wade on Constitutional Limitations, § 206, states that the legislature cannot do, by legislative statute, what it could not have previously authorized.

Sutherland on Statutory Construction, § 482, and Cooley on Constitutional Limitations, both lay down the doctrine that curative statutes are not invalid, although necessarily retroactive. The general rule is that the legislature can validate any act which it might have originally authorized; and such curative statutes should receive a liberal construction, as their purpose is to correct evils.

The rule as to curative statute is stated in *Black's Constitutional Law*, § 289, which says that retrospective curative statutes may be employed to remedy such defects in proceeding as amount to mere irregularities, but not to supply want of jurisdiction. Thus, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect.

erty owners properly served with notice because one owner of property affected was not served,—at least, where he subsequently appears, and presents and establishes his claim for damages by reason of the improvement.

4. Guardian and ward—notice—presumption.

In a collateral proceeding, requisite notice to a ward to bind him by acts of his guardian in his behalf will be presumed to have been given.

5. Assessment district—inclusion of land—hearing.

A landowner is not entitled to a hearing upon the question whether or not his land shall be included in a district which shall bear the cost of a drainage improvement, if provision is made for a hearing as to the assessment.

6. Taxing district—boundaries.

The legislative power to fix the boundaries of taxing districts for the construction of local improvements may be delegated to minor municipalities.

7. Constitutional law—taxing district—review.

Refusing a judicial review of the action of the board of supervisors of a county in including land in a drainage district does not offend the constitutional provision forbidding deprivation of property without due process of law.

8. Assessment—time for.

The completion of a public improvement is not a prerequisite to the levying of an assessment to pay for it.

(July 13, 1905.)

APPEAL by plaintiff from a judgment of the District Court for Wright County dismissing a proceeding to annul proceedings which had been instituted for the construction of a drainage improvement. Affirmed.

Statement by Weaver, J.:

Certiorari proceedings to prevent the assessment and collection of the cost of constructing a ditch pursuant to the provisions of chapter 2, title 10, of the Code, and acts supplementary thereto. The district court found for the defendants, dismissed the petition, and plaintiff appeals.

Messrs. Nagle & Nagle, for appellant:

The whole statute was unconstitutional and void because of its failure to require notice to the owners of land sought to be taxed to pay the costs and expenses of the construction of the ditch.

Smith v. Peterson, 123 Iowa, 672, 99 N. W. 552; Beebe v. Magoun, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 986.

When an unconstitutional statute is amended, its effect or operation is limited 1 L.R.A. (N.S.)

to cases arising, or acts done, after the statute in its amended form takes effect.

State ex rel. Richards v. Cincinnati, 52 Ohio St. 419, 27 L. R. A. 737, 40 N. E. 508; Walsh v. State, 142 Ind. 357, 33 L. R. A. 392, 41 N. E. 65; Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91.

Jurisdiction of the minor could only be secured in one way, and that was by the service of a notice upon the minor and upon the guardian.

Greenman v. Harvey, 53 Ill. 386; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457.

Messrs. C. F. Peterson, D. C. Chase, and S. Flynn, for appellees:

The statutory defect was properly supplied by amendment.

Ferry v. Campbell, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604; Allison v. Coker, 67 N. J. L. 596, 60 L. R. A. 564, 52 Atl. 362; Butts v. Monona County, 100 Iowa, 74, 69 N. W. 284; Brady v. Hayward, 114 Mich. 326, 72 N. W. 233; Huff v. Cook, 44 Iowa, 639; State v. Squires, 26 Iowa, 340; Oliver v. Monona County, 117 Iowa, 44, 90 N. W. 510.

The state legislature has the power to pass retrospective or retroactive laws.

State v. Squires, 26 Iowa, 340; Boardman v. Beckwith, 18 Iowa, 292; Iowa Railroad Land Co. v. Soper, 39 Iowa, 112; Bennett v. Fisher, 26 Iowa, 497; Huff v. Cook, 44 Iowa, 639; Richman v. Muscatine County, 77 Iowa, 514, 4 L. R. A. 445, 14 Am. St. Rep. 308, 42 N. W. 422; Tuttle v. Polk, 84 Iowa, 12, 50 N. W. 38; Clinton v. Walliker, 98 Iowa, 655, 68 N. W. 431; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 43 L. R. A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050; Ferry v. Campbell, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604; Fair v. Buss, 117 Iowa, 164, 90 N. W. 527.

One who has been properly served with notice in proceedings to establish a drain cannot raise the objection of a defective service or want of service on others.

Wolpert v. Newcomb, 106 Mich. 357, 64 N. W. 326; Hauser v. Burbank, 117 Mich. 642, 76 N. W. 111; Brady v. Hayward, 114 Mich. 326, 72 N. W. 233; Carr v. Boone, 108 Ind. 241, 9 N. E. 110; Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Hurst v. Martinsburg, 80 Minn. 40, 82 N. W. 1099; Woodworth v. Spirit Mound Twp. 10 S. D. 504, 74 N. W. 443.

The act of the legislature or board of supervisors in fixing the limits of the taxing districts is conclusive.

Chambliss v. Johnson, 77 Iowa, 611, 42 N. W. 427; Teegarden v. Racine, 56 Wis. 545, 14 N. W. 614; Dickson v. Racine, 61 Wis. 545, 21 N. W. 620; Turnquist v. Cass County Drain Comrs. 11 N. D. 514, 92 N. W. 852; Erickson v. Cass County, 11 N. D.

494, 92 N. W. 841; *Lambert v. Mills County*, 58 Iowa, 686, 12 N. W. 715; *Allerton v. Monona County*, 111 Iowa, 560, 82 N. W. 922; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 286; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Ft. Wayne v. Cody*, 43 Ind. 197; *Topeka v. Huntton*, 46 Kan. 634, 26 Pac. 488; *Thomas v. Walker Twp. Board*, 116 Mich. 597, 74 N. W. 1048.

Weaver, J., delivered the opinion of the court:

Proceedings to procure the location and construction of the ditch were instituted by petition as required by the terms of the statute about March 13, 1903, and a bond to secure payment of costs and expenses was filed and approved. Thereupon the auditor placed a copy of the petition in the hands of an engineer, who made survey of the proposed improvement, and, on August 16, 1903, reported the same to the board of supervisors, with his estimate of the costs of construction. Beginning on March 9, 1903, notice of the proposed improvement was served personally or by publication upon the owners of the lands through which the ditch was to be constructed, that the matter would come up for hearing at the regular June, 1903, session of the board. Certain claims for damages having been filed, appraisers were appointed, who filed their report August 17, 1903. At the September, 1903, session of the board further consideration of the matter was postponed until November 12, 1903, at which time the ditch was established, and its construction ordered. Before any further proceedings were had in the matter, this court having held chapter 2 of title 10 of the Code to be unconstitutional, in that it undertook to provide for an assessment of the cost of the ditch in part against the lands in the vicinity not intersected by, or bordering upon such ditch, without any provision for notice to the owners of such lands (*Beebe v. Magoun*, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 986, and *Smith v. Peterson*, 123 Iowa, 672, 99 N. W. 552), the general assembly of the state undertook to remedy the defect thus disclosed. See chap. 67, p. 59, Laws 30th Gen. Assem., approved April 29, 1904. Thereafter the board of supervisors proceeded with the matter of the construction of the ditch in question, following with substantial accuracy the provisions of the statute as amended by the act of the thirtieth general assembly, and were about to assess the expense of such improvement upon the lands found to be benefited thereby, when this action was begun in certiorari 1 L.R.A. (N.S.)

to have the proceedings adjudged void. The foregoing history of the case is sufficiently full and specific to enable us to understand the force and effect of the points made by counsel in argument.

1. The first and principal contention on part of the appellant is that, the proceedings to secure the construction of the ditch having been begun under a void statute, the subsequent amendment, even though it had the effect to make the statute constitutional and valid, could have no effect to give life to the pending proceedings, or authorize an assessment of the cost of a ditch thus constructed upon lands supposed to be benefited thereby. Assuming, for present purposes, that it is competent for the legislature to provide for the construction of a ditch for drainage purposes and the apportionment of the cost thereof as a special assessment upon lands thereby benefited, we think this objection cannot be sustained. Referring to the statute as it stood prior to the amendment, we find that it provided for notice of the institution of the proceedings to the owners of lands intersected by, or abutting upon, the ditch. Code, § 1940. As to such owners, it has never been held that, when thus brought into the proceedings, they were entitled to any further notice of the succeeding steps of the statute in letting the contract, classifying the lands, or making the apportionment of the costs and expenses. On the contrary, it seems to be well settled that a statute which provides for notice to the property owner at some stage of the proceedings before the assessment is made is not open to the constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Voigt v. Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

The fatal objection to the proceedings under the statute in its original form was found in the further provision contained in Code, § 1946, whereby, when the construction had been determined upon, and an apportionment and assessment of the expense were to be made, it was provided that the same should be charged, not only upon the property through which the ditch was laid, and whose owners had been notified as aforesaid, but upon all other lands "in the vicinity" which a commission appointed for that purpose might find to be benefited by the improvement. No provision was made

for notice to the owners of the additional lands sought thus to be taxed, and this we held to constitute a taking of property without due process of law as to such persons, and therefore unconstitutional. *Smith v. Peterson*, 123 Iowa, 672, 99 N. W. 552; *Beebe v. Magoun*, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 986. In the *Smith Case* we further held the statute to be of no force or effect against the owners of lands intersected by the ditch, and upon whom the notice required by § 1940 had been served, not because it was unconstitutional as to such persons, but because the void provision as to "lands in the vicinity" appeared to be such an essential feature of the scheme or plan sought to be effected that its elimination would lead to results not contemplated by the legislature, and defeat the purposes which the statute was intended to promote. In other words, the methods of the statute were constitutional and valid up to the point where the report of the commissioners appointed to classify the benefited lands and apportion thereto the cost of the improvement was returned to the board; but the failure to provide for notice to all the owners of property thus affected before confirmation of such report rendered ineffectual and void any attempt to make and enforce a valid assessment. The proceedings relating to the ditch in controversy reached just this state of advancement before the amendment to the statute found in chap. 67, p. 59, Laws 30th Gen. Assem., was enacted. That amendment leaves the statute unchanged as to all the proceedings in such cases from the filing of the petition up to the return or report made by the commissioners appointed to classify the benefited lands and apportion the expenses, and provides that when this stage is reached a time shall be fixed for hearing objections thereto, and notice thereof shall be served personally upon residents and upon nonresidents by publication; and upon such hearing the board is empowered to determine all objections to the assessment, and may increase, diminish, annul, or affirm the apportionments made in the commissioners' report, or any part thereof, as shall be found just and equitable. By § 2 of the amending act this amendment was made to apply to all proceedings then pending before the boards of supervisors for the location and construction of drains. Was it competent for the legislature to thus provide and authorize the defendants, with other boards of supervisors having similar proceedings in hand, to cause proper notice to be served, and proceed thereon to make an apportionment and assessment of the cost of the ditch? In our judgment, this question must be answered in the affirmative. The Constitu-

tution of Iowa does not forbid the enactment of retroactive laws, and this court has frequently upheld the validity of such statutes. *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112; *Tilton v. Swift*, 40 Iowa, 78; *McMillen v. County Judge & Treasurer*, 6 Iowa, 391; *Huff v. Cook*, 44 Iowa, 639; *Sully v. Kuehl*, 30 Iowa, 275; *State v. Squires*, 26 Iowa, 340; *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512; *Iowa Sav. & L. Asso. v. Heidt*, 107 Iowa, 297, 43 L. R. A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050; *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476; *Ferry v. Campbell*, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604; *Fair v. Buss*, 117 Iowa, 164, 90 N. W. 527; *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431. That the legislature may, by amendment, cure a constitutional defect in a statute the main purpose of which is within the scope of legislative power, and give such amendment retroactive effect upon cases already begun and pending, is expressly held by this court in *Ferry v. Campbell*, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604. In that case proceedings had been begun to enforce a collateral inheritance tax under a law which was found to be unconstitutional for want of provision for notice to parties in interest. Pending the proceedings, the statute was amended providing for notice in such cases, and making the amendment applicable to cases there undetermined. Acts 27th Gen. Assem. chap. 37, § 2, p. 27. This we found to be a valid exercise of legislative power, so far, at least, as it related to personal estate; and, unless we propose to overrule that precedent,—which we are not prepared to do,—we see no way to avoid giving like effect to the amendment to the drainage act with which we are now dealing. The same principle is recognized and upheld in several of the Iowa cases above cited.

Appellant's claim that the amendatory act was not intended to have a curative effect upon proceedings then pending is clearly opposed to the language employed therein. It was the apparently studied purpose of the legislature to remove the objection based upon the failure of the law to provide for notice to the landowners, and to give legal force and effect to proceedings then pending and liable to be rendered nugatory if such defect was not cured. While the term "legalized" is not expressly applied to the preliminary proceedings already had, § 2 of the amendment hereinbefore quoted would be idle and meaningless if they are not to be considered valid and sufficient to sustain the assessment made pursuant to the notice for which the act provides. The principle which we here apply was affirmed by us in *Butts v. Monona*

County, 100 Iowa, 74, 69 N. W. 284. Perhaps no case can be found more nearly in point than *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. In that case, under a statute authorizing the same, a city ordered a work of local improvement to be made. The work was done and the tax levied. After the levy had been made, and part of the property owners had paid the tax, other owners resisted payment, and were successful in having the proceedings adjudged void because the statute failed to provide for any notice, and was therefore unconstitutional. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. After this adjudication was had, the legislature passed another act authorizing a relevy of such tax after due notice to the owners who had refused to pay their original apportionment. The validity of this legislation was affirmed by the court of appeals of New York (*Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682), and reaffirmed by the Supreme Court of the United States, as above cited. The arguments there used against the validity of the later statute followed the same lines pursued by counsel in the case at bar, and were held unsound by the highest court of New York and of the nation. We do not stop to quote from these opinions, but those who care to pursue the inquiry will find the question there fully and exhaustively considered.

2. At the time the ditch was located the records of the county indicated that one of the tracts of land intersected by it belonged to one Pratt, a resident of New York, and notice directed to him was served by publication. It appears, however, that Pratt had died before the proceedings were instituted, and a minor daughter, Helen Portia Pratt, was the real owner, and the person upon whom the notice should have been served. Later, however, and after the order of November 12, 1903, establishing the ditch, Helen Portia Pratt, by her guardian, appeared to the proceedings, and filed a claim for damages, which was allowed, and the allowance was thereafter approved by the district court having jurisdiction of the guardianship matter. Counsel for appellant now contends that, even if chap. 67, p. 59, Laws 30th Gen. Assem., be given retroactive effect, and made applicable to proceedings then pending, the failure to include Helen Portia Pratt in the notice pursuant to Code, § 1940, is a fatal defect, and the board of supervisors and county auditor never obtained jurisdiction to inaugurate the proceedings; and that each and all of the orders subsequently made are therefore wholly void. This position is sought to be supported by certain decisions of this court in cases relating to the establishment or vacation of public highways. See *Chicago, R. 1 L.R.A. (N.S.)*

I. & P. R. Co. v. Ellithorpe, 78 Iowa, 415, 43 N. W. 277, and *Moffit v. Brainard*, 92 Iowa, 122, 26 L. R. A. 821, 60 N. W. 226. But neither of these cases, nor any other which we have been able to discover, go to the extent claimed by counsel. The most that can be said as to this class of cases is that they apply the fundamental rule that no person's property can be taken from him by a court or other tribunal without notice and an opportunity to be heard. Generally speaking, at least, no one is entitled to raise the objection except the party entitled to the notice. Assume, for instance, that proceedings for the establishment of a highway several miles in length, and passing through the lands of many different persons, are instituted, carried through to the final order, and the road is established and opened to travel. If, a year or two later, it be discovered that a nonresident owner of a single small tract was by some mistake omitted from the notice for which the statute provides, we may concede that, as to such land and such owner, the order of establishment is voidable or void; but it would be a somewhat startling proposition to hold that failure to notify this one owner is a jurisdictional defect of which every other owner along the line may take advantage, even though he himself was duly and properly notified. Moreover, when the omitted owner voluntarily appeared to the proceedings, and procured an allowance of her claim for damages, we think it will be held to operate as a waiver by her of all objections based upon the failure to serve her with notice. The only interest the other landowners could have in her being properly made a party was that her property might be compelled to bear its share of the expense in case the ditch should be constructed, and, when she voluntarily appeared, the only possible ground of objection on their part was removed. *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191; *Hauser v. Burbank*, 117 Mich. 642, 76 N. W. 111; *Wolpert v. Newcomb*, 106 Mich. 357, 64 N. W. 326; *Hurst v. Martinsburg*, 80 Minn. 40, 82 N. W. 1099. Under the law of the cases here cited,—and we find none to the contrary,—it is entirely immaterial whether a guardian is authorized to waive service of notice upon his ward; and we need not here pass upon that question. Had the notice been served, the ward could have done no more than to appear by guardian for the protection of her rights. He did so appear, and brought the matter before the court for its consideration and approval. If notice to the ward was necessary to bind her by such approval, we must assume in this collateral proceeding that the court did not act without it.

3. The statute as amended provides, as

we have seen, for the appointment of commissioners who examine the lands with the view of determining what tracts are benefited by the improvement, classify them as "low," "wet," "swamp," and "dry," and fix their estimate of the proportion of the expense which each tract ought to bear. In effect, their report is a designation of the boundaries or territorial extent of the drainage district and a statement of the finding of the commissioners as to a just and equitable distribution of the cost upon the several tracts of land embraced in the territory so marked out by them. Appellant takes the position that the landowner is entitled to notice and hearing as to the extent of this district, and whether his land shall be included therein, and that the failure to provide for such notice and hearing renders the statute unconstitutional. In our opinion, the objection is unsound. The division of a state or lesser municipal territory into districts for the purposes of taxation or public improvement is a legislative matter, and the citizen affected thereby cannot complain because the power is exercised without notice to him. If, for instance, the legislature saw fit to divide the entire state into drainage districts, and make the lands in each district chargeable with the expense of such drains therein as the public welfare might demand, we apprehend that such legislation would be open to no serious constitutional objection on the ground that it deprives the landowner of property rights without due process of law. That such legislative power for local purposes may be delegated by the legislature to minor municipalities is a matter of universal recognition and constant practice. For example, a city may, by its council, divide its territory into sewer districts (Code, § 794), or the entire city may be declared a single district, and the cost of a sewer be made a general charge upon all the property within its boundaries; and the fact that an individual property owner has been given no hearing in the matter of the districting, or that he may believe that his property is in no manner benefited by the improvement, affords him no ground for impeaching the validity of the statute or ordinance by which the districting was accomplished. Other familiar instances of the exercise of this delegated legislative power will probably occur to the intelligent reader. *State v. King*, 37 Iowa, 462; *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; *Topeka v. Huntoon*, 46 Kan. 634, 26 Pac. 488; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Kinney v. Zimpleman*, 36 Tex. 554; *Stanfill v. County Revenue Court*, 80 Ala. 287; *Dunn v. County Revenues Court*, 85 Ala. 144, 4 So. 661; *Hyde Park* 1 L.R.A. (N.S.)

v. Spencer, 118 Ill. 446, 8 N. E. 846; *Turner v. Detroit*, 104 Mich. 326, 62 N. W. 405; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947. The very objection here raised by appellant was involved in *Voigt v. Detroit*, 123 Mich. 547, 82 N. W. 253. And see same case on appeal, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337. In the cited case the Michigan court says: "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. The statute provides for a hearing in relation to the proportion each piece of property shall bear to the whole cost of the improvement, and the proper notice of this hearing was given. It is claimed by counsel that complainant was entitled to notice of the hearing relating to the establishment of the assessment district and of the amount of the total assessment; and, because the statute does not provide for these notices, it is unconstitutional as taking property without due process of law. . . . We do not think this position of the counsel can be maintained. The right of the legislature to establish special assessment districts in which all the taxes necessary to be raised to pay for a local improvement may be assessed was for a long time questioned, but that right has been so often sustained by the courts that it is no longer open to question." After citing authorities, the court proceeds: "Under these authorities, it is very clear that the legislature itself might have established the special assessment district. Had it seen fit to do so, would it be claimed that its right to do so could be questioned as unconstitutional because no notice was given to the property holders affected thereby that it intended to establish such a district? If the answer to this question should be in the negative, why, when the legislature has delegated to the common council of the city the right to establish the special district, should it be said that the law delegating this power is unconstitutional because notice is not required? The establishment of the special assessment district, in the one instance, by the legislature, and, in the other instance, by the common council, is the exercise of a legislative power, with which the courts will not ordinarily interfere." Upon appeal to the United States Supreme Court, the judgment of the state court was affirmed. The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the

tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected. See also to the same effect, *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Rogers v. St. Paul*, 22 Minn. 494; *Kelly v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92, 47 Am. St. Rep. 605, 59 N. W. 304; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750. In the last-cited case the rule is thus stated: "It is settled that, if provision is made 'for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of the tax shall be assessed upon his land? there is no taking of his property without due process of law.'" In the case before us there is, under the statute, as amended, ample provision for notice to every landowner, and opportunity given for the hearing of all objections he may have to assert against the validity and justice of the proposed charge upon his property. This, under the law, is all he can rightfully ask. It is to be noted, moreover, that, upon the hearing which the statute gives the owner pursuant to the notice provided for by the amendment, the board of supervisors may not only increase or diminish the apportionment of the tax reported by the commissioners, but may "annul" it entirely. The action of the board at this meeting is the final and authoritative settlement of the boundaries of the taxing district; and this is done only after full opportunity is given to each landowner to show cause, if he has any, why his land should not be included therein. It is not denied that the notice required by the amended statute was given, and plaintiff given full opportunity to be heard; and the objection here made is not well taken.

4. The constitutionality of the act is further questioned because, by Code, § 1947, which allows an appeal from the assessment made by the board of supervisors, it is also provided that, upon the trial of the appeal, it shall not be competent for the owner to show that his land received no benefits from the improvement. Counsel seem to contend that the landowner is thus cut off from all opportunity to be heard on the question whether his land receives any benefit by reason of the ditch for the construction of which he is taxed. But, as noted in the concluding part of the preceding paragraph, this is a mistake. The landowner is given opportunity to appear before

the board of supervisors, which body is authorized to try all such objections, and, if it be found that any tract of land reported by the commissioners is not in fact benefited by the improvement, it may be relieved of the burden. The effect of the restrictive clause in Code, § 1947, is to deny the right of appeal from this finding of the board of supervisors, and confine all further review to the question whether the appellant's land has been assessed in equal and fair proportion, as compared with other property embraced in the district. That a statute making the finding of the board conclusive upon the question whether a given tract of land is properly included in the benefited district, and denying appeal therefrom, is not an unconstitutional deprivation of property without due process of law, is a rule which has been affirmed by the great weight, if not the universal current, of authority. The right to an appeal from one court or tribunal to another has never been held to be in itself a denial of due process of law. The power to make a final determination beyond which there is no appeal must rest somewhere, and, in the absence of express or clearly implied constitutional limitations upon its authority in this respect, the legislature may confide that power in any given proceeding to any court, board, or commission. Of course, the tribunal thus designated must observe due process of law,—that is, the party must be given notice and have opportunity to be heard; but, if the finding be against him, no constitutional guaranty is violated by denying him the right of appeal. Such is clearly the doctrine of our cases. *Chambliss v. Johnson*, 77 Iowa, 612, 42 N. W. 427; *Lambert v. Mills County*, 58 Iowa, 666, 12 N. W. 715; *Allerton v. Monona County*, 111 Iowa, 560, 82 N. W. 922; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 610. To the same point, see *State ex rel. Hughes v. District Court (Minn.)* 103 N. W. 744; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947; *Dickson v. Racine*, 61 Wis. 545, 21 N. W. 620; *Tee-garden v. Racine*, 56 Wis. 545, 14 N. W. 614; *Rogers v. St. Paul*, 22 Minn. 494; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144; *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Re Fowler*, 53 N. Y. 60; *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677;

Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129, 27 S. W. 406; Gillett v. McLaughlin, 69 Mich. 547, 37 N. W. 551; Bowersox v. Seneca County, 20 Ohio St. 496; People v. Hagar, 66 Cal. 59, 4 Pac. 951; State, Britton, Prosecutor, v. Blake, 35 N. J. L. 208, 36 N. J. L. 442; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616. "Due process of law" does not necessarily imply judicial procedure in a court of record or right of trial by jury. *Re Bradley*, 108 Iowa, 476, 79 N. W. 280; *Public Clearing House v. Coyne*, 104 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; *Weimer v. Bunbury*, 30 Mich. 201; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886; *Wulzen v. San Francisco*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; *Munson v. Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906; *McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 796, 6 N. E. 400; *Cooley, Const. Lim.* pp. 354, 355; *McKeever v. Jenks*, 59 Iowa, 300, 13 N. W. 295; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 27 Am. St. Rep. 106, 28 Pac. 272, 675; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. The holding of the trial court comes well within the law of the cited cases, and must be upheld.

5. Some other questions are suggested as to the details to be observed in carrying the statute into effect. Among other things, it is said that the tax should not be levied until the work is actually done. We see no reasonable ground for the objection. Certainly the statute seems to authorize the proceeding taken by the supervisors. When the contract is let, the amount for which the drainage district is to be made liable is approximately ascertained, and it is the dictate of business prudence that the board proceed at once to provide for the means with which to discharge the debt. Our attention is called to no precedent or rule of law in support of the proposition stated by counsel, and we think the objection must be overruled. If, as claimed, the board failed to fix the proportion of the tax to be paid yearly, we have to say that the petition in this action was filed September 21, 1904, interrupting the proceedings by the board before any assessment was made; and that the order distributing payment over a series of years pertains to a matter of detail which we may presume the supervisors will properly attend to when the termination of this litigation leaves them free to go on with the matter.

Other points made in argument are merely incidental to, or are governed by, those 1 L.R.A. (N.S.)

which we have already considered at length, and do not require further discussion.

The conclusion reached by the District Court is correct, and the decree appealed from is affirmed.

MINNESOTA SUPREME COURT.

Anna MOHR

v.

Cornelius WILLIAMS.

(.... Minn.)

1. Excessive verdict—correction—discretion.

Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced where excessive, rests in the sound judicial discretion of the trial court, in reviewing which this court will be guided by the general rule applicable to other discretionary orders.

2. Assault—liability for.

It is unnecessary to show, in a civil action for an assault and battery, that defendant intended by the act complained of to injure the plaintiff. It is sufficient if it appear that the act was unlawful.

3. Surgeon—unauthorized operation.

A surgical operation by a physician upon the body of his patient is wrongful and unlawful where performed without the express or implied consent of the patient. In the absence of such consent, the physician has no authority, implied or otherwise, to perform the same. Consent may be implied from circumstances.

4. Same.

Plaintiff consulted defendant concerning a difficulty with her right ear. Defendant

Headnotes by BROWN, J.

Subject Note.—Liability of physician performing surgical operation without consent.

In England the question as to the liability of a physician for performing a surgical operation upon a patient without consent seems to have arisen but once, and in the unreported case of *Beatty v. Cullingworth*, tried before the Queen's bench division, and criticised editorially in 44 Cent. L. J. 153. The defendant performed the operation of double ovariectomy on plaintiff, against her express direction. Just before the operation the plaintiff told the defendant that if both ovaries were found to be diseased he must remove neither. He replied, "You must leave that to me." The plaintiff denied hearing the remark. The surgeon and his assistant affirmed that the plaintiff's life and health would have been imperiled by failure to complete the double operation. The jury brought in a verdict for the defendant, the court practically di-

examined the organ and advised an operation, to which plaintiff consented. After being placed under the influence of anesthetics, and when plaintiff was unconscious therefrom, defendant examined her left ear, and found it in a more serious condition than her right, and in greater need of an operation. He called the attention of plaintiff's family physician to the conditions he had discovered, who attended the operation at plaintiff's request, and finally concluded that the operation should be performed upon the left instead of the right ear, to which the family physician made no objection. Plaintiff had not previously experienced any difficulty with her left ear, and was not informed, prior to the time she was placed under the influence of anesthetics, that any difficulty existed with reference to it, and she did not consent to an operation thereon. Subsequently, on the claim that

the operation seriously impaired her sense of hearing and was wrongful and unlawful, she brought this action to recover damages for an assault and battery. It is held:

(a) That defendant had no authority to perform the operation without plaintiff's consent, express or implied.

(b) That her consent was not expressly given, and whether it should be implied from the circumstances of the case was a question for the jury to determine.

(c) That, if the operation was not authorized by the express or implied consent of plaintiff, it was wrongful and unlawful and constituted, in law, an assault and battery.

(June 23, 1905.)

CROSS-APPEALS from orders of the District Court for Ramsey County, made

recting that there was tacit consent to the operation.

In the United States, also, the authorities on the question are few. In *Cuthrell v. Protestant Hospital* (Ohio C. P.), another unreported case, cited in note to § 375, *Kinhead on Torts*, the plaintiff brought an action against the defendants to recover damages for performing an operation upon her without her consent. The plaintiff claimed the operation performed was different from that she had submitted to. The court, in charging the jury, said: "The consent of a person submitting to an operation is presumed, unless he was the victim of a false and fraudulent misrepresentation. . . . The consent of the plaintiff was necessary before the defendants . . . could lawfully perform the operation which it is claimed was performed. If such consent was not given, then said defendants had no right to operate in the manner complained of."

The court then said that, if the plaintiff had placed herself in the care of the defendants, authorizing them to do whatever seemed reasonable, from their knowledge and skill as physicians and surgeons, to save her life, or to protect her from continued and serious illness, such acts might be taken as her consent to the performance of such an operation as was, in the exercise of ordinary surgical care and skill, considered reasonably necessary; and that in such a case express consent was unnecessary. Continuing, the court said: "If you find that the consent of plaintiff was given for an operation, which was termed the scraping of the womb, and that she did not consent to the operation which is claimed to have been performed, then the consent to the scraping of the womb cannot be interposed to excuse said defendants, or to justify them in the performing of some other different operation."

Except in cases where the consent of the patient is express, or implied by circumstances and occasions other than a mere general retainer for medical examination and

treatment; and except, also, where there is a superior authority which can legally and rightfully dispose of the person of the patient, and which gives consent,—a surgeon has no right to violate the person of the patient by a serious major operation, or one removing an important part of the body. *Pratt v. Davis* (Ill. App.) 37 *Chicago Legal News*, 213.

In the last-named case the patient was deceived as to the nature of the operation she was to undergo, and the surgeon was held liable to respond to her in damages. As illustrations of superior authority which would justify an operation without the consent of the patient, the court mentioned the control which the state takes of persons under sentence for crime, the power which is vested in parents over minor children of tender age, and the authority given to legally constituted guardians of the person of those who are insane or imbecile, and, in a more restricted sense, in the marriage relation which makes the husband the head of the family; although this last-named authority was not instanced as supreme in the matter of surgical operations.

But a physician cannot be held liable for performing an operation upon a patient without consent upon a pleading based on the theory of negligence.

The question of plaintiff's lack of consent to an operation in an action against a surgeon for malpractice is immaterial, under a declaration averring that he was negligent in operating upon the left, instead of the right, leg, as directed to do by plaintiff: the liability depending solely upon the question of negligence. *Sullivan v. McGraw*, 118 *Mich.* 39, 76 *N. W.* 149.

In an action against a surgeon for damages for negligent and unskillful surgical treatment causing the death of an infant, where the complaint, in addition to various allegations of negligence, charged that the defendants performed an unnecessary operation upon the infant without the consent of the infant or his custodian, the court was held properly to have required plaintiff

during the trial of an action brought to recover damages for alleged assault and battery in performing an unauthorized operation upon plaintiff; defendant appealing from an order denying a motion for judgment notwithstanding a verdict in plaintiff's favor; and plaintiff appealing from an order granting a new trial. Affirmed.

The facts are stated in the opinion.

Messrs. H. A. Loughran and S. C. Olmstead, for plaintiff:

Consent was necessary.

Pratt v. Davis (Ill. App.) 37 Chicago Legal News, 213; 1 Kinkead, Torts, § 375.

The fact that the consent had been given for a purpose different from the act performed does not justify any departure from the acts as consented to.

Reg. v. Bennett, 4 Fost. & F. 1105; Reg.

to elect whether he would try the case as an action for performing an operation without authority, or as a suit for negligence. Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. Supp. 360.

A physician is not liable for failure to procure the consent of a husband to a surgical operation upon his wife, if the wife herself consents to it. State use of Janney v. Housekeeper, 70 Md. 162, 2 L. R. A. 587, 14 Am. St. Rep. 340, 16 Atl. 382.

And, assuming that a husband, as the head of the family, is naturally the protector and guardian of an insane wife's interests, where his consent alone is asserted in justification of an operation upon his wife, the defendant must show two things affirmatively: First, that the patient was not mentally in a condition to be in control of her own body; and, secondly, that her husband consented to the operation. Pratt v. Davis (Ill. App.) 37 Chicago Legal News, 213.

A surgeon cannot be convicted of the crime of manslaughter for performing an operation upon the deceased without his consent if the operation did not result in his death. State v. Gile, 8 Wash. 12, 35 Pac. 417.

In the last-named action it was a strongly contested question whether the operation was not performed without the consent or knowledge of the deceased. The court held, in effect, that the question of consent was immaterial as a defense, unless it appeared that the operation had been performed with due care and skill.

Implied consent.

If a woman voluntarily submits to a dangerous surgical operation, her consent will be presumed, unless she is the victim of a false and fraudulent representation; and the burden of proof upon the question of consent is not, therefore, upon the surgeon performing the operation. State use of Janney v. Housekeeper, 70 Md. 162, 2 L. R. A. 587, 14 Am. St. Rep. 340, 16 Atl. 382; 1 L.R.A. (N.S.)

v. Sinclair, 13 Cox, C. C. 28; Richie v. State, 58 Ind. 355; State v. Long, 93 N. C. 542.

In doing an unlawful act, one becomes liable for its consequences, no matter what his intentions are.

Addison, Torts, 689; Bullock v. Babcock, 3 Wend. 391; Johnson v. McConnell, 15 Hun, 293; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 14 L. R. A. 226, 27 Am. St. Rep. 47, 50 N. W. 403.

Messrs. Keith, Evans, Thompson & Fairchild and John D. O'Brien, for defendant:

Appellant had respondent's implied consent to the operation which he performed.

M'Clallen v. Adams, 19 Pick. 333, 31 Am. Dec. 140; O'Brien v. Cunard S. S. Co. 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266.

Cuthreil v. Protestant Hospital (Ohio C. P.) Kinkead, Torts, § 375, note.

An allegation, in a complaint against defendants for wrongfully performing a surgical operation upon an infant, that the defendants were employed by the infant to attend him and cure him, imports that such parental consent had been given as was necessary to authorize the doctors to do whatever might be proper in the treatment of the patient for the purpose of bringing about the desired cure; and, under such an allegation, it is unnecessary for the surgeon to prove any further consent to a necessary and proper operation. Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. Supp. 360.

In Pratt v. Davis (Ill. App.) 37 Chicago Legal News, 213, the court said that, if a soldier goes into battle with a knowledge beforehand that surgeons attached to the army are to have charge of the wounded, it might perhaps be considered as an implied license for such operations as the surgeon afterwards, in good faith, performed. "Perhaps, too," added the court, "the various cases which might be supposed of sudden and critical emergency, in which the surgeon would be held justified in a major or capital operation without express consent of the patient, might be referred to the same principle of an implied license."

In Boydston v. Giltner, 3 Or. 118, a case in which a surgeon was employed to set a broken or fractured arm, the court charged the jury that, if the defendant refracted the arm without informing the plaintiff what he was doing or about to do, it did not follow from that fact alone that he was guilty of bad surgery. Continuing, the court said: "But, unless you do find from the evidence, both that the defendant refracted the arm, and that it was the result of a lack of ordinary skill or care, there is no blame to be attributed in consequence of that act, and your inquiries should be directed to other branches of the case." The jury returned a verdict for the defendant.

H. C. S.

The physician who, under such circumstances as exist in this case, performs successfully an operation, which is the best thing to do to arrest disease and save life, should be held to be fully justified in what he has done.

Pollock, Torts, 146.

Appellant cannot be held liable for assault and battery, and it appears conclusively that there was no negligence on his part.

Bigelow, Lead. Cas. in Torts, 230; Hoffman v. Eppers, 41 Wis. 251; Addison, Torts, 692; Cooley, Torts, 162; 3 Cyc. Law & Proc. p. 1068; Jaggard, Torts, 437, 438; 2 Greenl. Ev. §§ 84, 85.

The verdict being so excessive, it was the duty of the court to set it aside altogether.

Plaunt v. Railway Transfer Co. 90 Minn. 499, 97 N. W. 433; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446; Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68; Kennedy v. Chicago, M. & St. P. R. Co. 57 Minn. 227, 58 N. W. 878.

Brown, J., delivered the opinion of the court:

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anæsthetics; and after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the

bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis,—plaintiff's family physician, who attended the operation at her request,—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successfully and skilfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor. The trial in the court below resulted in a verdict for plaintiff for \$14,322.50. Defendant thereafter moved the court for judgment, notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive; appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the damages were excessive. Defendant appealed from the order denying the motion for judgment, and plaintiff appealed from the order granting a new trial.

1. It is contended on plaintiff's appeal that the trial court erred in granting a new trial of the action; that the order should be reversed and the verdict reinstated. The new trial was granted, as already stated, on the ground that the verdict was excessive, appearing to have been given under the influence of passion and prejudice; and the point made is that the evidence, as contained in the record, does not sustain this conclusion, within the limits of the rule applicable to motions for a new trial based upon that ground. Considerable confusion has existed with reference to the proper rule guiding this court in reviewing orders of this kind ever since the decision in *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. 149, wherein it was said that the rule of *Hicks v. Stone*, 13 Minn. 434, Gil. 398, did not apply. Several decisions involving the same question have since been filed, and the bar is apparently in some doubt as to the true rule upon the subject. We are not disposed to review the

former decisions of the court, but, for future guidance, take this occasion to say (that there may be no further controversy in the matter) that in actions to recover unliquidated damages, such as actions for personal injuries, libel, and slander, and similar actions, where the plaintiff's damages cannot be computed by mathematical calculation, and are not susceptible to proof by opinion evidence, and are within the discretion of the jury, the motion for new trial on the ground of excessive or inadequate damages should be made under the fourth subdivision of § 5398, Gen. Stat. 1894; and in such cases the court will not interfere with the verdict unless the damages awarded appear clearly to be excessive or inadequate, as the case may be, and to have been given under the influence of passion or prejudice. On the other hand, in all actions, whether sounding in tort or contract, where the amount of damages depends upon opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion for new trial should be made under the 5th subdivision of the statute referred to; and in cases of doubt, or where both elements of damages are involved, under both subdivisions. *State v. Shevlin-Carpenter Co.* 66 Minn. 217, 68 N. W. 973. But in any case, whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court (*Craig v. Cook*, 28 Minn. 232, 9 N. W. 712; *Pratt v. Pioneer Press Co.* 32 Minn. 217, 18 N. W. 836, 20 N. W. 87), in reviewing which this court will be guided by the general rule applicable to other discretionary orders. We applied this rule at the present term in *Epstein v. Chicago G. W. R. Co.* 104 N. W. 12. Where the damages are susceptible of ascertainment by calculation, and the jury return either an inadequate or excessive amount, it is the duty of the court to grant unconditionally a new trial for the inadequacy of the verdict, or, if excessive, a new trial unless plaintiff will consent to a reduction of the amount given by the jury. Applying the rule stated to the case at bar, we are clear the trial court did not abuse its discretion in granting defendant's motion for a new trial, and its order on plaintiff's appeal is affirmed. We cannot adopt the suggestion of counsel for plaintiff that this court now reduce the verdict to a proper amount, for there is no verdict upon which such an order could act. It was set aside by the trial court.

2. We come, then, to a consideration of the questions presented by defendant's appeal from the order denying his motion for

judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing, or tending to show, malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skilfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary. The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. It was said in the case of *Pratt v. Davis*, 37 Chicago Legal News, 213, referred to and commented on in 60 Cent. L. J. 452: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others,—the right to the inviolability of his person; in other words, the right to himself,—is the subject of universal acquiescence, and this right necessarily forbids a surgeon or physician, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anæsthetic for that

purpose, and operating upon him without his consent or knowledge." 1 Kinkead, Torts, § 375, states the general rule on this subject as follows: "The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further. It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care, and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation

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of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

3. The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

4. The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and

threatening to her health, the operation was necessary, and, having been skilfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1 Addison, Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 14 L. R. A. 226, 27 Am. St. Rep. 47, 50 N. W. 403.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation 1 L.R.A. (N.S.)

should be taken into consideration, as well as the good faith of the defendant.
Order affirmed.

Jaggard, J., took no part

MINNESOTA SUPREME COURT.

CAREY EMERSON et al., Respts.,
v.

PACIFIC COAST & NORWAY PACKING
COMPANY, Appt.

(.... Minn.)

1. Contract—mutuality.

A written contract, signed by both parties, whereby defendant appointed plaintiffs its exclusive agents for a definite term to sell 85 per cent of its pack of fish, at an agreed commission, and plaintiffs obligated themselves to use their best efforts to sell such pack, in pursuance of which plaintiffs in fact performed services and incurred expenses in introducing and vending such pack, is not invalid for want of mutuality of obligation. An action for damages will lie upon breach of that contract without cause.

2. Damages—loss of profits.

The damages recoverable upon such breach are not merely discretionary with the jury. They include such loss of profits, past and future, as are shown by the evidence to have proximately resulted from a

Headnotes by JAGGARD, J.

Case Note.—In the above case of EMERSON v. PACIFIC COAST & N. PACKING CO. the court held that the facts of the case did not bring it within the rule declaring contracts not binding where they lack in mutuality. The difficulty in cases of this kind is in applying the rule to the facts. The existence of the general rule that contracts do not bind either party unless both parties are bound is unquestioned.

As said in 1 Parsons on Contracts, 9th ed. p. 486, note: "One party to a contract is not bound thereby when it does not bind the other party; when there is no liability there is no obligation."

In Page on Contracts, vol. 1, p. 452, we read: "Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise. This is what is often meant by saying that promises must be mutual."

And in Hammon on Contracts, p. 682, it says: "When the only consideration for a contract is that which arises from an exchange of promises, there must be mutuality of obligation, else the consideration is not sufficient. Both parties must be bound, so that, in case of breach by either, the other would have a right of action therefor."

breach of the contract, excluding from the award all uncertain and conjectural profits.

3. Evidence—damages—proof of sales.

Evidence of sales made subsequently to breach and during the pendency of the contract term, although made by the principal, through other agents than the plaintiffs, are admissible in evidence, and, under proper direction by the court, may be weighed by the jury in estimating prevented gains.

(September 22, 1905.)

APPPEAL by defendant from an order of the District Court for Hennepin County denying a motion for new trial after verdict in plaintiffs' favor in an action brought to recover damages for breach of contract. **Affirmed.**

The facts are stated in the opinion.

Messrs. Gjertson, Rand, & Lund, John Lind, and A. Ueland, for appellant:

Unless the evidence is such that the jury can compute the profits with reference to recognized values, they are too speculative and uncertain to justify a verdict.

Griffin v. Colver, 16 N. Y. 494, 69 Am. Dec. 718.

Where it appears that future profits depend upon elements of chance, such as the chances incident to trade, the damages are too speculative and uncertain.

The court, in support of its holding that there was a mutuality of obligation, cited the following cases: Ames-Brooks Co. v. Etna Ins. Co. 83 Minn. 346, 86 N. W. 344, and Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015. An examination of these cases shows that the Ames-Brooks Co. Case involved a contract to insure, at stipulated rates, plaintiff's grain cargoes for the coming season. The defendant contended that the plaintiff did not bind itself to have any cargoes to be insured during the season involved, and was at liberty, if it did have any, to insure them or not, as it pleased. To this the court answered that the plaintiff absolutely promised the defendant that they should have such insurance for the year 1899 on all of its cargoes to specified places, and they in turn promised to write the insurance upon the terms of the 1898 contract, and that this presupposed the continuance of the plaintiff in the business for the year 1899, and included, by necessary intentment, a promise on its part not to give such insurance to any other party. In the Fontaine Case it was held that a contract was not lacking in mutuality which stipulated that one party should go to a distant city and open and conduct its business for the sale of a commodity which the other party agreed to sell and deliver to him at a specified price, in such monthly quantities as he should sell, where there had been a part performance by such party going to the city and opening business, pursuant to the contract.

As said above, the difficulty lies in determining whether, under the facts of the case, 1 L.R.A. (N.S.)

Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Casper v. Klippen, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; Simmer v. St. Paul, 23 Minn. 408; Cushing v. Seymour, 30 Minn. 301, 15 N. W. 249; Hubbard Specialty Mfg. Co. v. Minneapolis Wood Designing Co. 47 Minn. 393, 50 N. W. 349; Doud, Sons & Co. v. Duluth Mill Co. 55 Minn. 53, 56 N. W. 463; Williams v. Wood 55 Minn. 323, 56 N. W. 1066; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co. 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523.

Agency contracts are too speculative and uncertain to warrant a judgment for lost profits.

8 Am. & Eng. Enc. Law, 2d ed. p. 624; Union Ref. Co. v. Barton, 77 Ala. 148; Bringham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Beck v. West, 87 Ala. 213, 6 So. 70; Hair v. Barnes, 26 Ill. App. 580; Howe Mach. Co. v. Bryson, 44 Iowa, 159, 24 Am. Rep. 735.

Messrs. Welch, Hayne, & Hubachek, for respondents:

Damages may be recovered in the form of lost profits of a business which is regular and established, or where the profits can be ascertained with reasonable (not absolute) certainty, and where the parties, when

both parties are bound by its terms. The court in the EMERSON CASE places its decision on the ground that the plaintiffs accepted the contract, and obligated themselves during the whole period of the contract to comply with its terms, and did actually enter upon its performance, and incurred expenses thereunder.

The EMERSON CASE is closely resembled in its facts by the case of W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918, where it was held that a contract signed by both parties, wherein one party appointed the other as its exclusive agent for a certain territory for the sale of its product at stipulated prices, was not void for want of mutuality on the ground that the agent did not bind itself to do anything under the contract. The court held that the signing of the contract by the agent raised a presumption of acceptance, and that an acceptance bound the agent to perform all acts necessarily implied, either from the things which the principal was bound to do, or from the situation created by the contract.

A similar case is that of Mueller v. Bethesda Mineral Spring Co. 88 Mich. 390, 50 N. W. 319, where it was held that a contract by which the plaintiff was made sole agent in a certain territory for the sale of mineral water was not void for want of mutuality. Defendant contended that by the terms of the contract the plaintiff had not agreed to do anything. The court disposed of this by saying that the plaintiff agreed to act, as sole agent of the company, and that by acceptance there was

contracting, may reasonably be supposed to have contemplated the loss of profits as the probable result of a breach.

Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Mississippi & R. River Boom Co. v. Prince, 34 Minn. 71, 24 N. W. 344; Cargill v. Thompson, 57 Minn. 534, 59 N. W. 638.

The question is whether the profits sought to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Ennis v. Buckeye Pub. Co. 44 Minn. 105, 46 N. W. 314; Pittsburg Gauge Co. v. Ashton Valve Co. 184 Pa. 36, 39 Atl. 223; Mueller v. Bethesda Mineral Spring Co. 88 Mich. 390, 50 N. W. 319; Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 234; Mauran v. Warren, 2 Low. Dec. 53, Fed. Cas. No. 9,310; Rio Grande Western R. Co. v. Reubenstein, 5 Colo. App. 121, 38 Pac. 76; Cranmer v. Kohn, 7 S. D. 247, 64 N. W. 125.

Jaggard, J., delivered the opinion of the court:

The plaintiffs and respondents were brokers in groceries, operating between the producers or manufacturers and the wholesale

grocers. They had offices at various places, in this state and elsewhere, from which they sold goods, both by personal solicitation and correspondence. The defendant and appellant, a Minnesota corporation, with its principal office in Minneapolis, had just engaged in the business of catching and packing fish, especially salmon, on the coast of Alaska, and shipping the same into the United States to be sold. This product was handled exclusively by the grocery trade. The packers sold to the wholesale grocers solely, through the medium of brokers, in advance of the catch and subject to pack. According to the contention of the plaintiffs, they entered into a written contract with the defendant, whereby they were constituted its sole agents for the sale of at least 85 per cent of its entire pack of fish of all kinds, upon a brokerage of 5 per cent for a period of two years, at a selling price to be agreed upon between the parties. Thereafter plaintiffs designed labels, advertised the merchandise, and proceeded with the execution of the contract. At the end of the first year of defendant's experience, the plaintiffs had sold a considerable quantity of fish, but not the entire pack. Thereupon defendant repudiated the contract, and before the end of another year sold a large

an implied agreement sufficient to support the promise and contract that he would hold out the goods to the public and further the interests of the principal.

In the following cases it was held that the facts of each case brought it within the rule, and that the contract involved was void:

In Benjamin v. Bruce, 87 Md. 240, 39 Atl. 810, it was held that a contract between a manufacturer and a general storekeeper, whereby the manufacturer agreed that all goods made by him should be sold through the storekeeper in a specified territory, the goods to be shipped upon the storekeeper's order, at bottom prices, the latter to receive a commission, was void for want of mutuality, since it imposed no obligation upon the storekeeper to order any goods. The court distinguished the case from another in the same jurisdiction,—that of Baltimore Breweries Co. v. Callahan, 82 Md. 106, 33 Atl. 460,—on the ground that there a definite employment of the appellee as salesman, at a fixed salary, for a specified term, existed, and, though there were no formal words imposing the obligation to discharge the duties of a salesman, the necessary implication to that effect arose. It will be noted that the storekeeper was a general storekeeper; the acceptance of the contract did not change the nature of his business, or impose any duties or obligations upon him; which is clearly distinguishable from a general agency for a specified period, as in the EMERSON CASE.

In Hirschhorn v. Nelden-Judson Drug Co. 26 Utah, 110, 72 Pac. 386, where the plaintiff L.R.A. (N.S.)

tiffs had agreed that the defendants, who were general dealers in the commodity involved, should have the exclusive right to sell their goods in a particular territory, and that they would fill all orders by the defendants therefor, the contract was held lacking in mutuality, on the ground that it did not bind the defendants to do anything.

In Fallon v. Chronicle Pub. Co. 1 Mac-Arth. 485, it was held that an agreement by the defendant to give the plaintiff the exclusive right to sell and deliver the defendant's paper on a certain route, in consideration of a specified sum, and the further consideration that the plaintiff would faithfully deliver the papers and solicit subscribers, was void for want of mutuality.

A contract under which the defendant agreed, in consideration of the plaintiff's purchase and sale of a certain cigarette manufactured by it, to pay him a compensation or commission, was held to be wanting in mutuality, on the ground that there was no promise on the part of the plaintiff to purchase cigarettes, which was enforceable by defendant. Rafolovitz v. American Tobacco Co. 73 Hun, 87, 25 N. Y. Supp. 1036.

A contract by which one of the parties agrees to sell the goods of the other on commission is not mutual and binding on either of the parties where it contains a provision relieving the party who is to furnish the goods from liability for failure to do so, although the contract becomes binding upon such party actually furnishing the goods on the order of the other party. Harvester King Co. v. Mitchell, L. & S. Co. 89 Fed. 173.

quantity of fish through a broker in Chicago. This action was brought to recover damages for the alleged breach of contract, including future profits. The jury returned a verdict of \$3,000 for plaintiffs.

1. Whether or not the defendant ever entered into the contract with the plaintiffs for the breach of which this action was brought, was fairly a question for the jury upon the testimony. The written agreement produced in evidence was under the corporate seal of the defendant, and was therefore *prima facie* its contract. *Emerson v. Pacific Coast & N. Packing Co.* 92 Minn. 523, 100 N. W. 305. Moreover, the record discloses conflict in the testimony as to whether or not its execution was in fact without previous authority by its board of directors; and there was considerable evidence as to the ratification of the agreement by the defendant. Upon the record the trial court also properly submitted to the jury the question of the breach of contract by the defendant.

2. The contract was not so peculiar in its nature as to deprive the plaintiffs of all damages upon proof of its breach. The facts in this case do not bring it within the rule that where a contract is optional on one side, and not mutual, it wants of sufficient consideration, and is not binding. *Bailey v. Austrian*, 19 Minn. 535, Gil. 465; *Tarbox v. Gotzian*, 20 Minn. 139, Gil. 122; *Stensgaard v. Smith*, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669. The contract at bar was not, properly speaking, unilateral. It was signed by both parties. Defendant agreed to pay a commission to the plaintiffs on sales. The plaintiffs accepted the contract, and obligated themselves, during the whole period named, to use their best efforts to sell defendant's merchandise, and actually performed services in introducing and vending defendant's stock, and incurred and defrayed expenses thereunder. The promises were therefore not all on one side,—there was mutuality of obligation; and an action for damages would lie upon its breach without cause. *Ames Brooks Co. v. Aetna Ins. Co.* 83 Minn. 346, 86 N. W. 344; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015. The cases which will be hereinafter referred to also fully sustain the trial court on this point.

3. The real question in this case concerns the rulings of the trial court upon profits as damages. The defendant's principal contentions in this connection are, first, that profits are not recoverable as damages upon a breach of a contract to sell upon commission; and, second, that evidence of sales made by the principal after the breach of the contract by its repudiation or the discharge of the salesman is not admissible to

show the extent of gains prevented. The subject of profits as damages is a vexed and confused one in the current law. The decisions and text-books abound in loose generalizations that, as a rule, future profits are not proper basis for a judgment in damages for an admitted legal wrong, but that in certain cases there are exceptions to the rule, and profits may be recovered as damages. Even a casual examination of the authorities as a whole satisfies that it is exceedingly difficult to determine as between the allowance and denial of profits as damages, which is the rule and which is the exception. Nor is it especially significant which conclusion on this point be reached. No presumption for or against the award has been established. It is also doubtful whether the current general formula of the courts is not too indefinite and uncertain to be of much practical avail. A frequently quoted statement of the rule is that of Mr. Justice Lamar, in *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 206, 35 L. ed. 147, 150, 11 Sup. Ct. Rep. 501, 503; "Profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

Four principal considerations have been recognized and applied by the courts in determining when future profits are to be allowed as damages and when they are to be denied, namely: First, how far the contract under consideration specifically provides for the award of damages for prevented gains upon its breach, or reasonably implies such an award as a necessary effect of a natural construction of its terms; second, the degree of certainty with which the harm can be traced to the wrongful conduct complained of as its legal cause; third, the extent to which the inherent difficulties and uncertainties of calculation of amount of prevented gains render the measure of damages speculative and untrustworthy; fourth, the possibility of applying to the controversy some more satisfactory standard of compensation. In the light of these considerations, the courts have weighed the evidence adduced in fact and possible in the nature of things to be proved. A fruitful source of at least apparent judicial inconsistency on this subject is the failure to note and apply the obvious distinction be-

tween cases of torts and cases of contracts. In the former the damages are not the results of a violation of an agreement. They are, logically, irrespective of any actual or of any implied contemplation of the parties. In the latter they are in a measure based upon mutual consent, expressed or implied. Moreover, there is often a radical difference in the remedies which are available to parties to an agreement, as distinguished from parties to a tort. There may be instances in which the actual damages may be substantially the same in both cases. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523. But the difficulty is as conspicuous as it is important in legal effect, when profits are the very object of the contract itself, and are clearly within the necessary purview of the parties making the agreement. A number of the cases cited by appellant denying the right to recover profits involve such actions *ex delicto* as to have little bearing on the present controversy. It would be naturally consistent to allow damages for prevented gains in this case, as the trial court has done here, and deny them, as this court did, in cases of wrongful seizure by an attachment (*Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406), or by replevin (*Williams v. Wood*, 55 Minn. 323, 56 N. W. 1066), or in cases of conversion generally (*Cushing v. Seymour & S. Co.* 30 Minn. 301, 15 N. W. 249), or in cases of actionable negligence (*Simmer v. St. Paul*, 23 Minn. 408). Confusion has arisen also because, in the early discussions of the subject, before the multiplication of authorities upon particular classes of cases, decisions just as applied to the state of facts presented by the respective records became unjust when distorted by application to different circumstances involving different issues and considerations. Adjudications that no sufficient evidence of profits was in point of fact adduced have been treated as cases holding that there could be no recovery upon any state of proof. In view of the superabundance of specific cases applying admitted general principles to particular and similar states of facts, it would seem to be a work of supererogation, as well as a source of misconception, to undertake to consider or reconcile or deduce much from the enormous number of cases on the general subject of profits as damages. An excellent collection and classification of authorities on the general subject will be found in a note to *Wells v. National Life Asso.* 53 L. R. A. 33.

The leading cases denying the right to
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recover as damages profits on sales made after the discharge of an agent selling upon commission, or after repudiation of the contract and before expiration of the term of employment, are to be found in the Alabama Reports. In *Union Ref. Co. v. Barton*, 77 Ala. 156, Stone, Ch. J., said: "In fact, the success of such enterprise (the sale of refined cotton seed oil) depends on so many contingencies that we can conceive of no means of making the necessary proof on which to found a verdict. No rule for such ascertainment can be predicated. Past successes in the same or a similar enterprise will not do. Conditions may not always remain the same." And see *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Beck v. West*, 87 Ala. 213, 219, 6 So. 70; *Hair v. Barnes*, 26 Ill. App. 580; *Stern v. Rosenheim*, 67 Md. 503, 10 Atl. 221, 307. And there is authority to the effect that where the employer discontinues his business, and thereby loses his agent profit of sales upon commission, there can be no recovery, because it was within contemplation of the parties that "the employee took the chances of his employer finding his business profitable and carrying it on." *Re English & S. Marine Ins. Co. L. R. 5 Ch. 737*; *Pellet v. Manufacturers' & M. Ins. Co.* 43 C. C. A. 669, 104 Fed. 502. But see *Re Patent Floor Cloth Co.* 41 L. J. Ch. N. S. 476. There can be no doubt, however, that the trend of authority and the weight of reason have established that an agent selling on commission, upon breach of his contract by his employer without just cause, is entitled to the profits, past and future, he would have realized if the defendant had performed his contract, and that evidence of sales made by the defendant within the unexpired period is admissible, and should be considered by the jury, upon proper caution by the court to avoid excess or speculation, to show the proper extent of plaintiff's recovery.

The transition of opinion on this subject from the Alabama and some of the earlier cases in other courts to the present rule is well illustrated in Iowa. In *Howe Mach. Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735, the measure of damages was determined to be, not loss of profits, but the loss of time. The majority of the court held that few cases could be found in which profits have been disallowed as speculative in which the uncertainty is greater than in such a case. There were, however, two dissenting opinions. In *Hichborn v. Bradley*, 117 Iowa, 130, 90 N. W. 592, a manufacturer revoked a contract of a jobber which had been appointed its agent for the introduction of a particular brand of cigars in certain territory before the expi-

ration of the contract term. In course of a learned review of the specific and related authorities, McClain, J., said: "If the question considered in *Howe Mach. Co. v. Bryson* were now before us for the first time, we might, in view of the later authorities, incline to the view expressed in the dissenting opinion." It was accordingly held that there was no other measure of damages than the loss of profits, and that the evidence of the amount of sales of such cigars made after the breach was not objectionable on the ground that it authorized uncertain and speculative damages. In *New York (Washburn v. Hubbard, 6 Lans. 11)* estimates of probable sales during the unexpired term were held inadmissible as evidence of future profits. The case did not lay down the rule, as seems to have been thought in *Union Ref. Co. v. Barton, 77 Ala. 148, 156*, that under no circumstances could future profits be recovered. The leading case of *Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264*, held that the gains prevented by sales on commission are proper elements of damage, and that sales made by the employer after breach of the contract to sell on commission are admissible in evidence as evidence of the damages recoverable. And see *Beeman v. Banta, 118 N. Y. 542, 16 Am. St. Rep. 779, 23 N. E. 887*; *Warren Chemical & Mfg. Co. v. Holbrook, 118 N. Y. 594, 16 Am. St. Rep. 788, 23 N. E. 908*; *Bannatyne v. Florence Mill & Min. Co. 77 Hun, 289, 28 N. Y. Supp. 334*. The rule in the Federal court corresponds. In *Wells v. National Life Asso. 53 L. R. A. 33, 39 C. C. A. 476, 99 Fed. 222*, it was held that a life insurance agent, discharged before the expiration of his term without just cause, was entitled to have the jury consider, as an element of his damages, his commissions upon the amount of new business written by the defendant within this period through a new agent for the unexpired term. And see *Taylor Mfg. Co. v. Hatcher, 3 L. R. A. 587, 39 Fed. 440*; *Moore v. Lawrence, 16 Fed. 87*; *Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876*. The letter and spirit of many other authorities are to the same effect. *Mueller v. Bethesda Mineral Spring Co. 88 Mich. 390, 50 N. W. 319*; *Loud v. Campbell, 26 Mich. 239*; *Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88*; *Pittsburg Gauge Co. v. Ashton Valve Co. 184 Pa. 36, 39 Atl. 223*; *Dennis v. Maxfield, 10 Allen, 138*; *Blair v. Laffin, 127 Mass. 518*; *Martin v. Minnekahta State Bank, 7 S. D. 263, 64 N. W. 127*; *Haven v. Hudson, 12 La. Ann. 660*; *Stevenson v. Morris Mach. Works. 69 Miss. 232, 13 So. 834*; *Green v. Cole, 127 Mo. 587, 30 S. W. 135*; *Russell v. Horn, B. & F. Mfg. Co. 41 1 L.R.A. (N.S.)*

Neb. 567, 59 N. W. 901 (approving *Mueller v. Bethesda Mineral Spring Co.*); *Wiley v. California Hosiery Co. (Cal.) 32 Pac. 522*; *Treat v. Hiles, 81 Wis. 280, 50 N. W. 896*; *Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785*. This rule, allowing future profits upon proper proof, accords alike with the general spirit of the earlier decisions in this state. *Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191*. And see *Goebel v. Hough, 26 Minn. 252, 2 N. W. 847*, and the express holding of this court on the former appeal of this case in *92 Minn. 526, 100 N. W. 365*.

The reasoning by which this conclusion is reached is sound. The measure of damages must have relation to the contract itself. Such a contract as the one here under consideration furnishes the measure of damages; namely, profits. Profits were necessarily within the actual contemplation of the parties. They are, therefore, proper basis for the award of damages. *8 Am. & Eng. Enc. Law, 2d ed. p. 622, subdiv. b*. No question has been raised, nor, it would seem, could well be raised, as to the connection of the loss of profits as the proximate result of defendant's breach. The principal contention of the defendant is that the damages are conjectural and speculative. The uncertainty does not reside in the nature of the business. Deep sea fishing is not more speculative than mining, for breach of contract with respect to which future profits have been allowed as damages. *Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876*. And see *Dennis v. Maxfield, 10 Allen, 138*. Nor is there any uncertainty as to the existence, but only as to the extent, of the profits. See *Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415*, and brief of counsel in *Treat v. Hiles, 81 Wis. 283, 50 N. W. 896*. It is no exoneration to defendant that his misconduct, which has made inquiry as to the quantum of harm necessary, renders that inquiry difficult. *Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274*; *Dart v. Laimbeer, 107 N. Y. 669, 14 N. E. 291*. The best the law can do is to award approximate compensation. Its failure to do even and exact justice in such cases is not more conspicuous than in many others. No other remedy is available. To allow only for loss of time and expenses would put a premium upon breaking contracts, and deny substantial justice.

The precise question as to the admissibility of evidence of sales made by the defendant through another agent subsequent to the breach of the contract, and within the period covered by agreement with the plaintiffs, has not been before fully decided by this court. It is the rule of this court that the damages are not a mere matter of

discretion of the jury. *Emerson v. Pacific Coast & N. Packing Co.* 92 Minn. 526, 100 N. W. 365. The decisions of other courts, which have been discussed, determine that evidence of such sales should be received and considered by the jury. In this case the trial court very properly cautioned the jury to avoid speculation and excess, and to be careful not to give undue weight to the conjectural features of the case. When the jury was put in possession of all the facts as to the business transacted before and after the breach and within the term of the contract, it was given the best and natural means of forming as sound a judgment as could be predicated under the very difficult conditions. The plaintiff was entitled to the profit he would have made on his contract, had he been permitted to perform the same, including the profits both before and after the breach.

4. There were other assignments of error in the admission of evidence, the merits of which it is unnecessary to determine. We do not regard them as being of sufficient importance to invalidate the verdict, if it be conceded that they involve erroneous rulings.

Order appealed from is affirmed.

MAINE SUPREME JUDICIAL COURT.

CHARLES C. BURRILL

v.

HOWARD F. WHITCOMB.

(... Me.)

1. Chattel mortgage—after-acquired property—possession.

Taking possession of after-acquired stock in trade covered by a chattel mortgage, according to its provisions, will give the mortgagee precedence on a subsequent attach-

ment, although the property was not purchased with the proceeds of stock sold, and the mortgagor did not expressly assent to such possession after acquiring the property.

2. Same—effect of statute.

The doctrine that taking possession of after-acquired chattels according to the provisions of a mortgage covering them gives precedence of liens over a subsequent attachment is not affected by a statute providing that no mortgage of chattels is valid against strangers, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded.

(June 27, 1905.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Hancock County made during the trial of an action brought to recover the value of certain teas attached by defendant as sheriff, which resulted in a judgment in defendant's favor. Sustained.

The facts are stated in the opinion.

Messrs. F. C. Burrill and L. B. Deasy, for plaintiff:

The executory agreement of the owner is a continuing agreement, so that, when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power; and this makes the lien good.

Moody v. Wright, 13 Met. 29, 46 Am. Dec. 706; *Jones, Chat. Mortg.* § 164; *Chase v. Denny*, 130 Mass. 568; *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83; *Rowan v. Sharp's Rifle Mfg. Co.* 29 Conn. 283; *Walker v. Vaughn*, 33 Conn. 583; *Williams v. Briggs*, 11 R. I. 476, 26 Am. Rep. 518; *McLoud v. Wakefield*, 70 Vt. 560, 43 Atl. 179; *McCaffrey v. Woodin*, 65 N. Y. 463, 22 Am. Rep. 644; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306; *Burford v. First Nat. Bank*, 30 Ind. App. 384, 66 N. E. 78; *Quirique v. Dennis*, 24 Cal. 154; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Tennis v. Midkiff*, 55 Ill. App. 642;

Case Note.—The general rule in relation to the validity of chattel mortgages covering property thereafter to be acquired is stated in *Jones, Chattel Mortgages*, § 170, as follows: "A mortgage of future property is void, at law, as against others acquiring an interest in it, except in case the mortgagee takes possession of such property before any adverse interests have been acquired. A different rule, however, prevails in equity. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is that the mortgage, though inoperative as a conveyance, is oper-

ative as an executory agreement, which attaches to the property when acquired, and, in equity, transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done." See also *Pingrey, Chat. Mortg.* §§ 213, 248; 6 Cyc. Law & Proc. pp. 1041, 1052.

Such a mortgage creates no lien as against judgment creditors of the mortgagor. *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, 59 N. W. 361; *Patterson v. Louisville Trust Co.* 17 Ky. L. Rep. 234, 30 S. W. 872.

That possession is necessary to make such mortgage effectual as against third parties is held, among others, by the following cases: *New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 307, 60 L. R. A.

Francisco v. Ryan, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045.

The equitable title to after-acquired property passes to the vendee when the vendor acquires it.

Holroyd v. Marshall, 10 H. L. Cas. 191; McCaffrey v. Woodin, 65 N. Y. 466, 22 Am. Rep. 644; Smithurst v. Edmunds, 14 N. J. Eq. 417.

Mr. A. W. King for defendant.

Whitehouse, J., delivered the opinion of the court:

This is an action of trover, brought against the defendant, as sheriff of Hancock county, to recover the value of a quantity of tea attached by him on a writ in favor of M. Gallert and against M. M. & E. E. Davis.

The plaintiff claims title to the attached property by virtue of a mortgage from the

Davises to him, duly recorded, in which the property is described as follows:

"All the stock in trade, consisting principally of teas, coffees, spices, crockery, and small wares, store furnishings and fixtures, present and future book accounts, now contained in the store situated on the north side of Main street, in Ellsworth, Maine, occupied by us and where we now carry on business, and also all stock in trade, furniture, and fixtures that may be hereafter acquired."

The mortgage also contains the following provisions and agreements:

"Provided, however, that it shall and may be lawful for the said grantors, said M. M. & E. E. Davis, to continue in possession of the property herein mortgaged until such time as said Burrill . . . shall consider it for his or their interest to take possession under this mortgage for the enforcement of

256, 71 S. W. 191; Stowell v. Bair, 5 Ill. App. 104; Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632; Re Allen, 65 Vt. 392, 26 Atl. 591; American Surety Co. v. Worcester Cycle Mfg. Co. 100 Fed. 40. But this is not the case where a mortgage of a stock of merchandise covering goods bought to replace sales is authorized by statute. See McCord v. Albany County Nat. Bank, 6 Wyo. 507, 46 Pac. 1093.

In Cameron v. Marvin, 26 Kan. 612, it is said: "When a mortgagee takes possession of the future-acquired property under such a stipulation in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property."

The principle that such a mortgage is good in equity has considerably modified the application of the rule above stated. Thus, it has been held in Parker v. Jacobs, 14 S. C. 112, 37 Am. Rep. 724, that the equitable lien of a mortgage of after-acquired property will prevail against an execution issued on the judgment of an antecedent creditor, though the mortgagee has never taken possession.

And a lien retained upon a stock of goods sold, and on additions thereto, is good as to antecedent creditors, in the absence of fraud. Zaring v. Cox, 78 Ky. 527.

A lien acquired by levy is subordinate to the lien of a mortgage covering after-acquired chattels. Stoll v. Sibson, 65 N. J. Eq. 552, 66 Atl. 710.

Equity will protect, by injunction, the rights of a lessor under a lease providing for collateral security for rent upon furniture thereafter to be purchased, as against a subsequent execution creditor of the lessee. Smithurst v. Edmunds, 14 N. J. Eq. 415.

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But equity will not, to protect the mortgagee of property thereafter to be acquired, enjoin the enforcement against such property of a judgment for its purchase price. Farmers' Loan & T. Co. v. Long Beach Improv. Co. 27 Hun, 89.

The title of the mortgagee is perfected where the mortgagor gives him possession of the after-acquired chattels. Rowley v. Rice, 11 Met. 333; Chapman v. Weimer, 4 Ohio St. 481.

That possession taken by the mortgagee, by virtue of a power given in the mortgage, without further act by the mortgagor, is equally effective, as held in BURRILL v. WHITCOMB, is fully sustained by the authorities. See, in addition to the cases cited and discussed in the BURRILL CASE, Jones, Chat. Mortg. § 164a; Cobbe, Chat. Mortg. § 358; Gregg v. Sanford, 24 Ill. 17, 76 Am. Dec. 719; Allen v. Windham Cotton Mfg. Co. 87 Fed. 786; Ayers, W. & R. Co. v. Sundback, 5 S. D. 31, 58 N.W. 4; Perkins v. Batterson, 66 Hun, 583, 21 N. Y. Supp. 815.

In Harriman v. Woburn Electric Light Co. 163 Mass. 85, 39 N. E. 1004, it was said, regarding a covenant in a mortgage in regard to after-acquired property: "Formerly it was thought that such a covenant would take effect only if the mortgagor, as well as the mortgagee, acted under it. Under the more liberal doctrine of later cases, which does not require the delivery of the property by the mortgagor, it is well settled that, as against attaching creditors or assignees in insolvency, the title does not pass nor the mortgage take effect, upon the after-acquired property, either at law or in equity, unless possession is taken under it."

The taking possession of after-acquired property by a receiver appointed in a suit to foreclose does not constitute a reduction to possession by the mortgagee which will defeat the claims of general creditors. Central Trust Co. v. Worcester Cycle Mfg. Co. 110 Fed. 491.

any and all rights given to said Burrill under this mortgage; the said grantee, said Burrill, by the acceptance of this conveyance, hereby expressly constituting the said grantors, said M. M. & E. E. Davis, his trustees to continue in possession of the property herein mortgaged until such time as said grantee shall deem it for his interest to take possession of the same for any of the purposes in this mortgage specified, or for the purpose of enforcing his legal or equitable rights hereunder.

"And the said grantors, said M. M. & E. E. Davis, further hereby agree and declare that all stock in trade, general merchandise, book accounts, and debts due, of every name and description, which they may from time to time hereafter during the continuance of this mortgage add, or supplement, or incorporate, with stock in trade, general merchandise, book accounts, and debts due, and personal property herein mortgaged, for the purpose of carrying on the said business, shall be subject to and included in this mortgage, and the provisions herein contained to be applicable to them also.

"And the said grantors hereby further agree that if at any time during the continuance of this mortgage the said Charles C. Burrill, his executors, administrators, or assigns, shall deem it for their interest to take possession of the property herein mortgaged, or of any additions thereto that may be made, the said Burrill, his executors, administrators, or assigns, shall thereupon have the right to take such possession peaceably and quietly; and that thereupon and so soon as said Burrill, his executors, administrators, and assigns, take such possession, the whole debt secured by this mortgage shall be due and payable, whether the time for its payment has elapsed or not, anything in this mortgage to the contrary notwithstanding, and the said Burrill, his executors, administrators, or assigns, shall thereupon have the right to foreclose this mortgage by any of the methods provided by the law of the state of Maine for the foreclosure of mortgage of personal property. . . . Said Burrill may also have the right to move the goods to any place that he may deem for his best interest."

At the time of the execution and delivery of the mortgage, the tea, for the conversion of which this suit is brought, had not been bought by the mortgagors, and was not in their possession. Between the date of the mortgage and February 19, 1904, the tea was bought by the mortgagors and placed in their store as a part of their stock for the purpose of carrying on their business. It was not paid for by the proceeds of any of the mortgaged stock.

On February 19, 1904, the plaintiff, deemed 1 L.R.A. (N.S.)

ing it for his interest to do so, took possession of all the stock in the store, including the tea, for the purpose of enforcing his rights under the mortgage, and removed the same to another store, and retained possession of it until February 20, 1904, when the tea was attached and taken away by the defendant, as sheriff of Hancock county, as above stated.

There was no act of delivery of the tea in question on the part of the mortgagors at any time after it was purchased by them, and the taking possession of the tea by the plaintiff with the rest of the stock was without any other consent of the mortgagors than that contained in the agreement found in the mortgage.

By agreement of the parties the case was heard by the presiding judge, without the aid of a jury, with leave to except in matters of law. The court found as matters of fact, that the mortgage had been foreclosed, and the foreclosure completed, more than forty-eight hours before the bringing of this action, and also that the written notice provided by Rev. Stat. chap. 83, § 45, had been seasonably given by the plaintiff to the defendant.

But the presiding judge also ruled, as a matter of law, that the mortgage of future-acquired chattels was void against attaching creditors without some new act on the part of the mortgagor; and that possession taken without the consent of the mortgagor, and retained by the mortgagee before and until the attachment, was not sufficient to make the mortgage good. Judgment was accordingly rendered for the defendant, and the case comes to this court on exceptions to this ruling.

The case thus stated presents for the determination of the court the single question of law whether a mortgagee in a chattel mortgage duly recorded, who has taken and retained possession of after-acquired stock in trade as a part of the property described in the mortgage, by virtue of an explicit agreement in the mortgage authorizing him so to do, is entitled to hold such after-acquired property, not purchased with the proceeds of any of the stock sold, as against a creditor who attaches it after possession taken by the mortgagee.

The defendant contends that, inasmuch as the tea in question was not owned or possessed by the mortgagors at the date of the mortgage, the mortgage itself was not operative to transfer the title to the plaintiff; and, as there was no subsequent act of delivery on their part, and no voluntary transfer of it to the plaintiff, or consent that the plaintiff should take possession of it, given after they acquired title to it, the possession taken and retained by the plaintiff by virtue

of the consent in the mortgage was not sufficient to entitle him to hold it against a creditor who did not attach it until after possession taken by the mortgagee.

The plaintiff does not controvert the well-settled general rule that a mortgagee of after-acquired chattels obtains no title or right to them as against a creditor of the mortgagor who attaches them in the hands of a mortgagor before the mortgagee has taken possession. The exceptions to this rule respecting chattels of which the mortgagor had potential ownership, at the time the mortgage was given, and chattels purchased with the proceeds of those sold and substituted for them in accordance with the terms of the mortgage, as already seen, are not involved in the present case. It is not questioned that the defendant's attachment would have been good if it had been made while the tea was in possession of the mortgagor. But the plaintiff contends that, in case of mortgages like the one at bar, the executory agreement of the mortgagor is a continuing agreement, and that the taking of possession, by the mortgagee, of after-acquired property by virtue of the previous consent of the mortgagor, given in the mortgage, is equivalent to a delivery of possession by the mortgagor; and that the mortgagee's equitable lien is thereby made good, without any new act or consent on the part of the mortgagor.

The respective rights of mortgagee and attaching creditors or other third parties in regard to after-acquired property claimed under chattel mortgages upon facts analogous to those at bar have frequently received the attention of this court, and *obiter dicta* may be found, and some early authorities are cited in several Maine cases, tending to support the defendant's position, and, on the other hand, recent decisions from other states have been cited with approval tending to support the plaintiff's contention; but the precise question now presented does not appear to have been necessarily involved and directly determined in any reported case in this state. It has often been decided, however, in other jurisdictions, by courts of great respectability and high authority; and this court is now at liberty to adopt the view which is most in accord with the principles of equity and sound reason, and at the time best supported by the weight of judicial opinion in other American states.

It is a well-settled principle in equity, requiring no citation of authorities in its support, that "an agreement to . . . give security upon . . . property not yet in existence or in the ownership of the party making the contract, or property to be acquired by him in the future, although, with

the exception of . . . [chattels having 'potential existence'] it creates no legal estate . . . in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract." 3 Pom. Eq. Jur. § 1236. So in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, it is said by Judge Story "that wherever the parties by their contract intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy."

In *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395, relied upon by the defendant as an authority to support his contention, this doctrine of equitable lien is recognized by our court. In the opinion the court says: "While, at common law, the mortgage covers the existent property of the mortgagor, and does not transfer any right to after-acquired property, it is otherwise in equity. Though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement, binding on the property when acquired. The mortgagor holds the property as trustee, and equity enforces the trust. In some cases the decision rests upon the grounds of an equitable lien." And *Mitchell v. Winslow*, *supra*, is cited in support of this principle.

In *Griffith v. Douglass*, *supra*, the mortgaged property consisted of hotel furniture, and the mortgage contained a provision that it should be lawful for the mortgagors to continue in the possession of the property, "without denial or interruption" by the mortgagee, until condition broken. There was a formal delivery of the subsequently purchased goods to the mortgagee, but possession of them was not retained by him. The mortgagee's possession was only instantaneous. It was immediately resumed by the mortgagor. This was the decisive fact in that case. The court says: "The authorities are uniform in requiring, not merely delivery, but retention of the property delivered, as indispensable to the perfection of the mortgagee's title."

The question now before the court was not raised by the facts disclosed in that case,

and consequently it was not there adjudicated. The elaborate discussion in the opinion of the rights of mortgagees in chattel mortgages covering after-acquired property must be understood to apply only to the facts of that case. The early cases of *Head v. Goodwin*, 37 Me. 181, and *Jones v. Richardson*, 10 Met. 481, cited by the defendant, are there adopted by the court as leading authorities upon the question discussed in the opinion. In *Jones v. Richardson*, it is true, evidence that the mortgagee had taken possession of after-acquired property for the purpose of foreclosure was said to be immaterial, and some new act on the part of the mortgagor was held to be necessary; thus apparently supporting the defendant's contention. But in that case the mortgage contained no express agreement that the mortgagee should take possession. Furthermore, the doctrine in that case has been repudiated in four subsequent cases in that state, and thus the authority upon which the decision in *Head v. Goodwin*, *supra*, is founded, is seen to have been denied by the court from which it emanated. Besides, the facts in *Head v. Goodwin* differ *toto cælo* from those in the case at bar, and the decision is in no respect an authority for the defendant. There a vendor sold one half of a chaise to which he had no title, and afterwards purchased the chaise and delivered it at a certain stable into the custody of the person to whom he had sold one half of it; but the court found no satisfactory evidence that this delivery was made for the purpose of effectuating the former sale, and held that it was not such a new act as to transfer the property.

In *Sawyer v. Long*, 86 Me. 542, 30 Atl. 111, possession of the stock was not taken by the mortgagee, but was retained by the mortgagor, and the property passed to the assignee, who transferred it to the defendant as purchaser of the assignee's interest. In *Dexter v. Curtis*, 81 Me. 505, 64 Am. St. Rep. 266, 40 Atl. 549, it was held that, while the mortgagor, by the terms of the mortgage, had the right to sell or exchange any portion of his stock, he did not have the right to sell those goods to his creditors in payment of part indebtedness. The question now before the court was not involved in either of these cases.

On the other hand, in *Deering v. Cobb*, 74 Me. 332, 43 Am. Rep. 596, the facts more clearly resemble those in the case at bar, except that the rights of an attaching creditor were not involved. In the opinion the court says: "It seems, also, that when, as in this case, a mortgage is effective between the parties as a transfer of title to property to be subsequently acquired by the use of the proceeds of the original stock, and the

mortgage contains a power to the mortgagee to enter and take possession of such future property when acquired, possession taken and retained in the exercise of that power makes the mortgage effective, without any new act of the mortgagor, against third persons claiming under him by later attachment or conveyance. A proposition at least as strong as this is sustained in *Jones, Chat. Mortg.* §§ 160, 167, by a full citation of authorities, English and American, which there is no occasion here to examine more minutely. *Hope v. Hayley*, 5 El. & Bl. 830; *Moody v. Wright*, 13 Met. 17, 32, 46 Am. Dec. 706; *Cook v. Cortbell*, 11 R. I. 483, 23 Am. Rep. 518; *Walker v. Vaughn*, 33 Conn. 577, 583."

But in a more recent case in Massachusetts, which has been one of the states to hold most closely to common-law doctrine in regard to mortgages of this kind, it has been held that "if, however, the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. . . . Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other." *Chase v. Denny*, 130 Mass. 566.

In this case the court plainly recognizes the progressive development of the law upon this subject, although the precise question under discussion was not then presented for decision. It shows a strong tendency to reject the narrow interpretation of the common-law rule found in some of the earlier decisions, and a readiness to adopt the more reasonable and equitable doctrine, which simply requires the mortgagor to observe the obligation of his express agreement in the mortgage. The common-law dogma, which is said to require some new act on the part of the mortgagor to protect the mortgagee's lien, appears to have been founded mainly upon one of Lord Bacon's Latin maxims, which declares that, "though the grant of a future interest is invalid, yet a declaration may be made which will take effect on the intervention of some new act—*interveniente novo actu*." As one of the first instances stated by Lord Bacon to illustrate the maxim had reference to a "new act" on the part of a grantor, it appears to have been assumed by some of the courts that no

other act would suffice to effectuate the prior agreement. But such a restricted meaning was not required by the text of the maxim, and it was expressly repudiated in subsequent cases. In the bill of sale in that case it was agreed that the plaintiff might take possession of the crops and other effects which might from time to time be substituted in lieu of the crops, or which should be found on the farm. The plaintiffs seized and took possession of some of the crops which had been sown after the indenture was made. In delivering the judgment of the court, Parke, B., said: "If the authority given by the bill of sale had not been executed, it would have been of no avail against the execution; . . . but, when executed to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." See also *Carr v. Allatt*, 3 Hurlst. & N. 964. It is uniformly conceded that, if the mortgagee takes possession of after-acquired property, in accordance with an express agreement in the mortgage, with the consent of the mortgagor, given after he acquired title, it will be sufficient to perfect the mortgagee's lien. But a stipulation in the mortgage authorizing the mortgagee to take possession at any time is not a mere license, revocable at the pleasure of the mortgagor, but a valid and binding contract, which continues in force until performed. It is therefore difficult to understand upon what principle of justice or conception of common right a mortgagor can be permitted to defeat the acknowledged equitable rights of the mortgagee by simply withholding his consent, in violation of his express stipulation in the mortgage. According to this doctrine, if the mortgagee seeks to exercise his right to take possession of the property under the mortgage, and the mortgagor gives an express assent, not required by the terms of the mortgage, the mortgagee's equitable rights are preserved. On the other hand, if the mortgagor objects, in violation of his agreement, or stands mute, the mortgagee's possession, though expressly authorized by the contract of the parties, will not suffice, and his rights are lost. Such a rule cannot be founded on principles of right and justice.

And it will now be seen that such a rule has no stronger support in authority than it has in reason and equity.

In *Moody v. Wright*, 13 Met. 32, 46 Am. Dec. 708, the reasons for the contrary rule are thus stated: "A stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement, of such a character that the creditor with whom it is made may, under it, take the property into his possession, when

it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same, and that, such act being done and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that, when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good."

Although this reasoning was not essential to the conclusion in that case, it has been accepted by that court as the law of that state, and applied in all subsequent cases. A copious extract from the opinion in *Chase v. Denny*, 130 Mass. 568, was made by this court in *Deering v. Cobb*, *supra*.

In *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83, the court says: "The only apparent change in our decisions is that by the recent cases possession of after-acquired chattels rightfully taken by a mortgagee under the power contained in the mortgage, if the possession is retained, vests the title in the mortgagee as against third persons; and a delivery by the mortgagor is no longer held to be essential. . . . Our recent decisions have therefore proceeded upon the theory, which, by a *dictum* in *Jones v. Richardson*, 10 Met. 481, was denied, that when the chattels are acquired, and are identified by the terms of the mortgage, the title passes as between the parties, and a possession rightfully obtained by the mortgagee, and retained by him, vests the title in him as against third persons whose rights have not attached before the possession is taken, and that delivery by the mortgagor is not necessary." In *Bennett v. Bailey*, 150 Mass. 259, 22 N. E. 916, it was ruled at the trial that the taking of possession of such after-acquired property by the defendant without any delivery to him by the plaintiff was insufficient, but exceptions to this ruling were sustained. In the opinion the court says: "It was settled in *Blanchard v. Cooke*, *supra*, after a careful review and a full consideration of the authorities, that possession of after-acquired personal property, rightfully taken and maintained by a mortgagee under a mortgage purporting to cover it, gives him a title good, not only against the mortgagor, but even against an assignee in insolvency or an attaching creditor. That principle is applicable to the present case."

In *Rowan v. Sharps' Rifle Mfg. Co.* 29 Conn. 283, where a mortgage of a factory and its equipments embraced in its terms such machinery and stock as should be afterwards purchased and placed upon the premises, and the mortgagee had afterwards taken possession of the factory with such after-acquired property, it was held that, whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee. This was reaffirmed in *Walker v. Vaughn*, 33 Conn. 577. See also *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518; *McLoud v. Wakefield*, 70 Vt. 560. 43 Atl. 179; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. 62; and *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306.

It may be deemed worthy of observation that the rights of attaching creditors were not directly involved in any of the cases hereinbefore cited from other states; and, if any authority is required to establish the proposition that an attaching creditor cannot acquire any rights, either statutory or equitable, superior to those of a mortgagee who has taken and retained possession of the property by virtue of an express contract in the mortgage authorizing him so to do, it will be furnished by the following well-reasoned decisions from courts of eminent respectability:

In *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045, the mortgage contained a stipulation like that in the case at bar, authorizing the mortgagee to take possession of the property; and the court thus discussed the question in the opinion: "The contention of the plaintiffs in error on this point is that it is essential to the acquisition of a valid lien on the after-acquired property under such a mortgage that the mortgagor voluntarily deliver the property to the mortgagee, or give his consent to the mortgagee's possession when taken; and that the lien does not arise if, as in this case, the mortgagee of his own accord take the possession. . . . Acting under this contractual authority in obtaining the possession of the property, the consent of the mortgagor thereto at the time can neither be necessary to the legality of the possession, nor can it in any way add to the rights of the mortgagee. Certainly, after possession so taken, the mortgagor could not successfully assert any claim to the property, for his contract would prevent him; and, as whatever title he theretofore had to the property is thereby extinguished, nothing remains to be reached by his attaching or other creditors, unless it be such surplus as should remain after satisfying the mortgagee's debt."

In *Barton v. Sitlington*, 128 Mo. 164, 30 S. 1 L.R.A. (N.S.)

W. 514, a chattel mortgage contained an agreement that it should cover all merchandise that might subsequently be added to the mortgagor's stock, and it was held that the mortgagee acquired a valid lien by taking possession under the mortgage before the rights of other creditors intervened. In the opinion the court says: "By the express terms of the mortgages it was provided that, . . . if the mortgagees should consider themselves unsecured, they might take possession of any part or all of said merchandise, and the taking possession under an order of delivery, issued in the action of replevin instituted by the plaintiffs to obtain possession under the mortgages, was but a taking by and with an agreement entered into by the mortgagor, and was all that was necessary. . . . The taking of possession of such property by the mortgagees under the authority given in the mortgages before the rights of other creditors had intervened created a valid lien on such property. *Jones, Chat. Mortg.* §§ 164-168; *Keating v. Hanenkamp*, 100 Mo. 161, 13 S. W. 89; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706."

So, also, in *Tennis v. Midkiff*, 55 Ill. App. 642, and *Quirique v. Dennis*, 24 Cal. 154, it was held that, where a mortgage provides that it shall cover after-acquired property and the mortgagee takes possession of such property, his claim is prior to that of a subsequent attaching creditor.

In 6 Cyc. Law & Proc. p. 1051, the result of all the authorities is stated as a settled and unquestioned rule that, with respect to after-acquired property, "an actual transfer of possession to the mortgagee, either by voluntary delivery from the mortgagor, or by the exercise of a power to take possession, contained in the mortgage, is such a new act as will constitute a ratification of the mortgage." To the same effect is the rule formulated in 5 Am. & Eng. Enc. Law, p. 980.

But it is suggested that, by § 1, chap. 91, Rev. Stat., "no mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded," etc. In this case it has been seen the mortgage was duly recorded, and possession of the goods therein described, including the after-acquired property, was rightfully taken and retained by the mortgagee by virtue of the consent of the mortgagor previously granted on the stipulation of the mortgage. It is universally conceded, as before stated, that possession taken by the mortgagee, by virtue of the mortgagor's consent given after the property is acquired, is to be deemed equivalent to a voluntary delivery by the mortgagor, and such a "new

act" as will effectuate the previous agreement. It has now been shown by a uniform current of modern decisions that the law has advanced another step, and now holds that actual possession of such property, taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is also equivalent to a voluntary delivery by the mortgagor; and, if such possession is retained, it makes the mortgagee's lien as against an attaching creditor. Statutory provisions for the registration of chattel mortgages, in effect precisely like our own, existed in all the states from which the foregoing decisions have been cited; but in no case directly involving the question now before the court have they been held to be in conflict with the equitable doctrine above stated.

Nor is it apparent that such a contract respecting after-acquired property is a contravention of any established rules of public policy. Indeed, it would seem to be more in obedience to the principles of sound morality and consideration of public duty to sanction the act of the mortgagee in taking and holding the property in accordance with the express terms of the contract, rather than the act of the mortgagor or an attaching creditor in taking it away from him in violation of the agreement.

It is accordingly the opinion of the court that the action is maintainable, and the entry must be:

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CITY OF LOWELL

v.

AMEDEE ARCHAMBAULT, Appt.

(.... Mass.)

Stable—license—revocation.

A license granted by the board of health, under statutory authority, for the erection of a stable without any limit as to time, cannot be revoked by such board in the

absence of statutory authority, existing regulations of the board, or some provision in the license itself for its revocation.

(September 8, 1905.)

A PPEAL by defendant from a decree of the Superior Court for Middlesex County enjoining him from occupying and using a stable. Reversed.

The facts are stated in the opinion.

Messrs. F. W. Qua and S. E. Qua, for appellant:

Authority to grant licenses does not include, by implication, a power of revocation.

State ex rel. Heise v. Columbia, 6 Rich. L. 404.

Without express power to revoke, or express reservation in the license itself, the license would not be revocable.

Com. v. Kinsley, 133 Mass. 578; Sullivan v. Borden, 163 Mass. 470, 40 N. E. 859; State ex rel. Shaw v. Baker, 32 Mo. App. 98; Schwuchow v. Chicago, 68 Ill. 444; Hirn v. State, 1 Ohio St. 15; Grand Rapids v. Braudy, 105 Mich. 670, 32 L. R. A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; State v. Dwyer, 21 Minn. 512; State ex rel. Mansfield v. St. Paul, 34 Minn. 250, 25 N. W. 449.

Mr. James Gilbert Hill, for appellee:

A license from the board of health is not a contract.

Calder v. Kurby, 5 Gray, 597; Emery v. Lowell, 127 Mass. 138; Com. v. Kinsley, 133 Mass. 578; Sullivan v. Borden, 163 Mass. 470, 40 N. E. 859; People v. Raims, 20 Colo. 489, 39 Pac. 341.

It can be revoked at any time by the authority which granted it, in the exercise of the police power.

Sullivan v. Borden, 163 Mass. 470, 40 N. E. 859; Schwuchow v. Chicago, 68 Ill. 444; St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884.

The final determination of the question of what will be the natural and probable effect of the erection and use of a building for a stable rests with the board of health.

White v. Kenney, 157 Mass. 12, 31 N. E. 654.

Case Note.—The holding in the above case is supported by the following authorities:

Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443, holds that one who obtains from the common council permission to erect wooden buildings within the fire limits of a city whose charter prohibits the erection of such buildings without such permission, and enters upon their construction thereunder, acquires a vested right to proceed with their construction and enjoyment, which the common council cannot deprive him of by rescinding their permission. This case affirms 7 N. Y. Supp. 501, which is cited in McQuil-
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lin on Municipal Ordinances, § 420, as authority for the statement that, after a permit to erect a frame building has been duly granted, and the work of construction has begun, and material therefor has been purchased, a revocation of the permit without notice and public necessity will not be sustained.

And Dainese v. Cooke (Dainese v. Public Works) 91 U. S. 580, 23 L. ed. 251, holds that, where the proper officer gives a permit for the erection of a building contemplated by a contract shown him, a clear case of departure from the permit, or of danger to the

Braley, J., delivered the opinion of the court:

This is a bill in equity, brought under Rev. Laws, chap. 102, § 71, to enjoin the defendant from occupying and using a stable, in violation of the provisions of § 69 of the same chapter. In the superior court the case was submitted on agreed facts, and, after a decree had been entered in favor of the plaintiff, it comes before us on the defendant's appeal.

It appears that the defendant, who is engaged in the business of an undertaker, desiring to erect on his land a stable to be used in connection therewith, applied to the board of health for a license to permit him to occupy and use the building, when completed, for the stabling of eight horses. This petition was granted, and a license duly issued to him, permitting the exercise of this privilege. Upon receiving it, he at once had plans prepared, and began the erection of a stable on a site from which he had, at a pecuniary loss, removed another building. After the work had been begun, but before its completion, the board of health, acting on the petition of residents in the immediate vicinity, rescinded their former vote, and canceled the license. Since the completion of the building the defendant has used it for the keeping of two horses, claiming this right under the license, which he contends never has been legally annulled. If the revocation was invalid, such use was not in violation of the statutory provision on which the plaintiff relies, and the bill cannot be maintained. The license granted under the

police power of the commonwealth, as administered through the agency of the board of health, did not constitute a contract between him and the city, or confer upon him any vested right of property. Neither did its abrogation, if lawful, deprive him of any immunity or privilege conferred upon him by our Constitution. *Calder v. Kurby*, 5 Gray, 597; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Young v. Blaisdell*, 138 Mass. 344. The Statutes of 1895 (chap. 213, p. 219), now Rev. Laws, chap. 102, §§ 69, 71, under the authority of which the board acted and the license was issued, contained no provisions for its recall when once granted. It evidently was the purpose of § 1 of the original act that the license itself should specify the extent of the right conferred, by setting out the conditions under which the building could be built and used; for, by § 2 the board may make regulations respecting the occupation and use of stables in existence at the date of its passage; while the last section provided a penalty for the violation of the act itself, or of any order or regulation made pursuant to its requirements. Whether a stable was in existence and its use was to be continued, or permission was to be given to erect a stable and then use it, the right in each instance was subject to such reasonable regulations as might be made by the board of health. It undoubtedly was presumed that the board would make proper inquiries before judicially determining whether a license should or should not be refused, and, if granted, to prescribe by its terms how far the privilege

public interests, must be shown before the one obtaining it can be arrested midway in the construction of the building, and required to remove it.

And *St. Louis v. Dorr*, 136 Mo. 370, 37 S. W. 1108, holds that, where a permit for the erection of a brick building in St. Louis, "to be used as a dwelling house," has been granted, a part of which is used for a business house during the process of its erection, in accordance with specifications submitted to the commissioner of public buildings, whereupon the commissioner revokes his license, after which the owner continues work on the building, an action against him for a penalty on a charge that he has erected a building without having first obtained written permission cannot be sustained. This case is cited in *McQuillin on Municipal Ordinances*, § 471, as authority for the statement that, under the St. Louis charter and ordinances, the commissioner of public buildings has not the power to restrict the use of a building for which a permit has been issued.

And *Gallagher v. Flury*, 99 Md. 181, 57 Atl. 672, holds that a permit for the erection of a stable, granted by the proper officer in accordance with an ordinance generally

applicable, authorizing the granting of such a permit, cannot be canceled by the city council by a resolution; as it would deprive him of rights given to all other property holders.

But *Brooklyn v. Furey*, 9 Misc. 193, 30 N. Y. Supp. 349, holds that a permit for the erection of a wooden building within the fire limits of a city, which the common council had no authority under the city charter to grant, can be revoked, and the removal of the building ordered, at any time; as no rights can vest under an invalid permit.

And *Harper v. Jonesboro*, 94 Ga. 801, 22 S. E. 138, cited in *McQuillin on Municipal Ordinances*, § 420, as authority for the statement that a permit for the erection of a wooden building may usually be legally revoked on breach of condition by the contractor, holds that one who, after the establishment of fire limits, obtains from the municipal authorities, by mere resolution, a permit to tear down an existing wooden building and erect a new one within the fire limits, cannot complain of the revocation of his permit on his failure, without sufficient reason, to subscribe, as required by the permit, to a condition therein against obstructing the sidewalk.

might be exercised. In any instance, if the granting of a license would be detrimental to the public health, or contrary to regulations already established, then it would not be issued. If the statute had given to the boards of health of cities a general authority similar to that conferred by Pub. Stat. 1882, chap. 80, § 10, it might be that they lawfully could make the violation of their regulations a sufficient ground for revoking the privilege, and could issue it upon such a condition. *Young v. Blaisdell, supra*; *Grand Rapids v. Brady*, 105 Mich. 670, 677, 678, 32 L. R. A. 116, 55 Am. St. Rep. 472, 64 N. W. 29. At least, it could be said that the licensee then would take it subject to this reservation; and, having agreed to its terms, no injustice would be done by a subsequent cancellation. Generally, under statutes regulating the conduct of certain kinds of employment or of business which require the protection of a license before they can be lawfully prosecuted, the penalty of forfeiture is dealt with either by conferring express authority to revoke for violations upon the licensing board or some other tribunal, or else a general power is delegated, under which such a clause may be inserted in the license itself. Rev. Laws, chap. 100, §§ 15, 47, 89, chap. 102, §§ 9, 28, 29, 33, 58, 72; *Grand Rapids v. Brady, supra*. Upon application for permission to erect a stable, which, in the absence of a restricting statute, would be a legitimate improvement in the enjoyment of his property, the applicant is entitled to know the full measure of immunity that can be granted to him before making the expenditure of money required to carry out his purpose. A resort to the general laws relating to the subject, or to ordinances or regulations made pursuant to them, should furnish him with the required information. When this has been obtained, he has a right to infer that he can safely act, with the assurance that, so long as he complies with the requirements under which it is proposed to grant the privilege, he has a constitutional claim to protection, until the legislature further restricts, or entirely abolishes, the right bestowed. *Com. v. Brennan*, 103 Mass. 70; *Com. v. Kinsley*, 133 Mass. 578, 579; *Hirn v. State*, 1 Ohio St. 20, 21; *Schwuchow v. Chicago*, 68 Ill. 444; *State, Lantz, Prosecutor, v. Hightstown*, 46 N. J. L. 102, 107; *Grand Rapids v. Brady, supra*. Independently of this statute, while the board of health, under Pub. Stat. 1882, chap. 80, §§ 8, 12, after a hearing and on proper evidence, might have adjudged the defendant's building, when erected and occupied as a stable, detrimental to the public health, and therefore a nuisance, it had no jurisdiction to issue a license to him permitting and regulating such use except as authorized.

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Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679; *Cambridge v. Munroe*, 126 Mass. 496, 502; *Com. v. Plaisted*, 148 Mass. 375, 383, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224. It is the legislature alone that primarily can impose, or give authority to impose, conditions and exact forfeitures (*State, Lantz, Prosecutor, v. Hightstown, supra*; *Dill. Mun. Corp.* 3d ed. § 345, note 4, and cases cited); and the authority of the board as a governmental agent is commensurate with the provisions of the statute clothing it with this power. *Abbott v. Frost*, 185 Mass. 398, 400, 70 N. E. 478.

A licensee should not be subjected to the uncertainties that constantly would arise if unauthorized limitations, of which he can have no knowledge, are subsequently and without notice to be read into his license at the pleasure of the licensing board. Besides, all reasonable police regulations, enacted for the preservation of the public health or morality, where a penalty is provided for their violation, while they may limit or prevent the use or enjoyment of property except under certain restrictions, and are constitutional, create statutory misdemeanors, which are not to be extended by implication. *Com. v. Beck*, 187 Mass. 15, 72 N. E. 357.

The license issued to the defendant contained no limit of time for its exercise, nor was it made subject to an existing regulation which so provided. It stated that permission was given to keep eight horses, and purported to and did set out in full the statute under which it was granted, but contained no further recitals. Thus, neither by its terms, nor by the statute itself, was it made revocable; nor does it appear that any regulations had been adopted or promulgated the violation of which would cause a forfeiture. Originally it may have been improvidently issued, but upon being informed that citizens in the vicinity of the defendant's premises objected to the erection of the building for its proposed use, it was not within the power of the board of health, even after a hearing, in the absence of authority conferred upon them by legislative sanction, to deprive him of the privilege they had unreservedly granted. *Com. v. Moylan*, 119 Mass. 109, 111; *Com. v. Kinsley, supra*; *New York v. Third Ave. R. Co.* 33 N. Y. 42; *Shuman v. Ft. Wayne*, 127 Ind. 109, 11 L. R. A. 378, 26 N. E. 560; *Hirn v. State*; *Grand Rapids v. Brady*; and *State, Lantz, Prosecutor, v. Hightstown, supra*.

In the opinion of a majority of the court, the decree must be reversed, and a decree entered dismissing the bill, with costs.

So ordered.

MISSISSIPPI SUPREME COURT.

W. S. GORDON et al., Exrs., etc., of D. A. James, Deceased, Appts.,
v.

MARY E. JAMES et al.

(.... Miss.)

1. Dower—renunciation—right of widow.

The renunciation, by the widow, of the provision made for her in her husband's will, entitles her to her share of the estate after the debts are paid from the entire estate, under a statute providing that she shall be entitled to such part of the estate as she would have been entitled to if he had died intestate; and it does not make only

the property going to her intestate, so as to throw the entire debts upon it.

2. Same—right to land.

A statutory provision that, in case a widow renounces the provision made for her in her husband's will, she may have the difference between her separate estate and what she would be entitled to in case of intestacy made up to her notwithstanding the will, does not deprive her of her rights in the separate parcels of property, and require her portion to be made up to her in money, where the further provision for the distribution of the estate declares that she shall have her lawful portions of the lands and her distributive share of the personality.

Case Note.—In determining whether specific legacies must be wholly applied to the payment of the testator's debts before resorting to lands specifically devised, the intent of the testator, where it can be ascertained, must govern. As is said by Chief Justice Marshall, in *Finlay v. King*, 3 Pet. 346, 7 L. ed. 701: "The intent of the testator is the cardinal rule in the construction of wills; and, if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail."

An intention that devisees and legatees shall contribute ratably to the payment of debts has been held to exist where the testator makes the debts a charge upon his real, as well as his personal, estate, or upon his estate generally; as is the case where he commences his will with a direction to pay debts. *Shreve v. Shreve*, 10 N. J. Eq. 385; *Brant v. Brant*, 40 Mo. 266. *Contra*, as to the latter portion of the foregoing statement, *Miller v. Cooch*, 5 Del. Ch. 161.

But, where the property not specifically disposed of, or expressly devoted to the payment of debts, proves inadequate, a case arises where the intention of the testator ceases to be a guide, since a situation presents itself which was manifestly not within his contemplation. Whether, in such a case, specific devisees should contribute, along with specific legacies, to make up the deficiency, is a question on which there is some conflict of authority. Those cases which are in accord with *GORDON v. JAMES* (for some of which, see citations therein) rest their decisions on the general rule that the personal estate is the primary fund for the payment of debts. See *Shaw v. McBride*, 56 N. C. (3 Jones, Eq.) 173; *Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47; *Shreve v. Shreve*, *supra*.

A contrary conclusion has been reached in a number of cases, among which are *Maybury v. Grady*, 67 Ala. 147, in which the authorities are elaborately reviewed, and *Manlove v. Gaut*, 2 Tenn. Ch. App. 410, in which it is said: "While the rule of law is general, that personality must be subjected before realty, it is clearly, also, a rule of law that the testator may, if he choose, entirely exonerate the personality, and subject the realty by the terms of his will. So, at 1 L.R.A. (N.S.)

last, it is not so much a question of the application of the abstract rule of law above referred to, as an ascertainment of the testator's intention. That intention, as above stated, we think, is evidenced by his making specific bequests and specific devisees. He, in this manner, indicates a purpose on his part that both should be exonerated from debts. When that becomes impossible because of a deficiency of assets, it does not seem logical that we should resort to the dry rule of law above referred to; but, on the contrary, it does seem that we should sustain the testator's intention as far as possible. This can only be done by subjecting the specific legacies and specific devisees *pro rata*. In this manner, the testator's purpose of exoneration is as little interfered with as possible. On the other hand, if the personality covered by the specific bequest is wholly subjected to debts, the testator's purpose with regard thereto is entirely superseded. We are, therefore, of opinion that the specific devisees and specific bequests should contribute *pro rata*."

Another class of cases, reaching the same conclusion, is seemingly based on the equity principle that, where a person may resort to two funds, persons interested in the one to which he resorts may enforce contribution by the other. Of this class is *Armstrong's Appeal*, 63 Pa. 312, in which the court says: "It was settled in England, by *Long v. Short*, 1 P. Wms. 403, that specific devisees of land and specific bequests of personality must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts, and it was equally the intention of the testator that the legatee should have the chattel, and the devisee the land. 1 Roper, Legacies, 254. In this state, where lands have always been assets for the payment of debts by simple contract, as well as by specialty, the rule is general, that, wherever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably."

This principle is, of course, inapplicable in cases where, as in *GORDON v. JAMES*, the law requires an exhaustion of the personal, before resort to the real, assets.

3. Decedent's estate—crops as assets.

Crops on the land at the time of the owner's death are assets for payment of debts, under a statute directing the executor to sell for cash such crops, and account for the proceeds as assets, notwithstanding his will may imply that they shall belong to the devisee; nothing short of an express direction will avoid the application of the statute.

4. Same—testamentary direction.

A testamentary direction as to the disposition of crops growing on the land in case testator's death shall occur within a specified year will cease to have any effect at the expiration of the year; and after that time the matter will be governed by the statute.

5. Same—dividends on securities.

Dividends on stocks and bonds, declared after the death of the owner, belong to the specific devisee of the stocks and bonds, and are not assets for the payment of the debts of the estate, in the absence of statutory direction to the contrary.

6. Same—contribution toward debts.

Specific devisees of land do not share with specific bequests of personalty, in contribution towards payment of the debts of the estate, where the statutes plainly indicate that the land is to stand charged only for such debts as the personalty may not be sufficient to pay.

7. Dower—renunciation—right of specific devisee of land.

A devisee of land, who, before the renunciation by the widow of the provisions of the will, has accepted the devise with the condition that he pay the encumbrance on the property, cannot compel the widow to share in the satisfaction of such encumbrance, but she will recover her share of the property free from the encumbrance; the doctrine of purchase for value not applying in favor of the devisee.

(July 24, 1905.)

APPEAL by the executors of the will of D. A. James, deceased, from a decree of the Chancery Court for Yazoo County in a proceeding asking for the construction of the will and instructions as to distribution of the assets. Modified.

In addition to the facts set out in the opinion, it appeared that a provision of the will devised a plantation to T. W. James, "with the distinct understanding that the said T. W. James is to pay and assume any and all indebtedness due by me on account of purchase money of said place." This indebtedness was assumed by the devisee before the widow renounced the will, and he contended that that constituted him a purchaser for value of the plantation, so that the widow was not entitled to share in the portion so purchased.

Further facts appear in the opinion.

1 L.R.A. (N.S.)

Messrs. Barnett & Perrin and Noel, Pepper, & Elmore for appellants.

Messrs. Campbell & Campbell for appellees.

Truly, J., delivered the opinion of the court:

This is a proceeding instituted by appellants, as executors of the last will and testament of D. A. James, seeking a construction of that testament, and asking instructions from the chancery court as to the proper method to be adopted in distributing the assets of the estate. All devisees and legatees, and other parties in interest, were cited, and duly appeared as parties defendant.

The facts which rendered the action of the executors advisable and seemingly necessary are these: D. A. James, the testator, died on the 14th day of December, 1903, leaving a last will and testament, in which the appellants herein were nominated as executors. James left surviving him a widow and an only child, an infant of tender years, born since the date of the execution of the testament, but dealt with and provided for in a codicil thereto. At the date of his death the testator was seized and possessed of a large estate, consisting of three valuable plantations stocked with farming implements and work stock, one or more houses and lots, about 1,500 bales of cotton, a large amount of insurance on his life, stock in several banks and in many other enterprises, interests in mercantile establishments, jewelry, and other personalty. All of his property, without exception, was dealt with by the will, there being a general residuary clause. Most of it, and all of the more valuable portion, was either specifically devised or the subject of specific or demonstrative legacies. The will, executed over three years before the death of the testator, made no adequate provision for the payment of the debts. Hence, in entering upon the administration of the estate, it was evident to the executors that the property not specifically devised or bequeathed would be insufficient to pay in full the debts due by the testator. The widow, being dissatisfied with the provision made in her favor by the will in due time and in the manner pointed out by the statute, filed her formal renunciation of the will, and demanded the allotment of the portion granted her by the law. The agreed statement of facts admits that the separate estate of the widow did not amount in value to one fifth of what she would lawfully have been entitled to, and, as there was only one child, she claimed to be entitled to a one-half interest in the real and personal estate of her deceased husband. Upon final hearing the chancellor

rendered a decree giving specific directions with regard to the distribution of the estate. Some of the provisions of the decree are not excepted to, and we will recite only such portions as are directly challenged by this appeal, and shall deal with them, not in the order of their presentation, but according to the magnitude of the property interests and the importance of the legal principle involved.

The first ground of error which we shall consider arises from the second paragraph of the decree, which is as follows:

"Second. It appearing that Mrs. Carrie W. James, the widow of said D. A. James, deceased, had renounced the provisions made for her under said will, and that the separate estate of said Carrie W. James was less than one fifth of what her legal portion of the estate of said D. A. James, deceased, would amount to, it is ordered, adjudged, and decreed that the said Carrie W. James be, and she is, entitled to receive one half of said estate after the payment of the debts and costs aforesaid, and said executors be, and they are hereby, ordered to turn the same over to said Carrie W. James in kind so far as the same can be done."

The facts disclosed by the record upon which this portion of the decree is based are uncontradicted. The widow, in pursuance of the provisions of § 4496 of the Revised Code of 1892, within six months of the probating of the will filed her renunciation thereof in the form indicated by the statute. It is admitted that the entire separate estate owned by the widow, which consisted exclusively of portions of the proceeds of certain insurance policies upon the life of her husband, taken out by him for her benefit, and collected by her after his death, and therefore, under the decision of this court in *Osburn v. Sims*, 62 Miss. 429, constituting a portion of her separate property, amounted in value to less than one fifth of what she would be entitled to by law in her husband's estate. It is conceded that D. A. James had only one child, and therefore the widow's lawful portion of her husband's property would be one half of the real and personal estate. It is contended by counsel for appellants that, inasmuch as the widow in this case renounced the provision made for her by the will of her husband, by operation of law her share of the property descends to her as heir, and coupled with all the burdens imposed by law as if her husband had died intestate as to this portion; and that the one half of the estate as to which the decedent died intestate is first liable to all the debts of the decedent, by operation of the general principle of law which renders property undisposed of by will, and which descends to the heir in cases

of partial intestacy, primarily subject to sale for the satisfaction of the debts of the decedent before any of the property which has been disposed of by the testator can be devoted to that purpose. The argument is perfectly sound, but the existence of the premises is erroneously assumed. Section 4496 does not say, upon the renunciation of the will by the widow the decedent becomes "partially intestate," or "intestate as to a portion of his estate," but expressly recites that upon the filing of such renunciation the widow "shall be entitled to such part of his estate, real and personal, as she would have been entitled to if he had died intestate." If the decedent had died intestate in the instant case,—and by operation of the statute quoted so he did, so far as regards the rights of his widow,—the widow would have been entitled to one half of his real and personal estate under certain well-understood conditions and limitations. And they are not difficult of understanding. Upon the death of an intestate the estate, both real and personal, stands charged with the debts of the decedent,—the personal estate primarily; secondarily, when the personalty is exhausted, the real estate. After the payment of debts, an heir's lawful portion of the residue vests in the widow. This is the right of the appellee in this case. The widow's lawful portion of the residue under the facts of this record is an undivided one half. To adopt the argument of appellants that, by renouncing the provision made in the will, and demanding, in lieu thereof, her lawful portion in the estate of her husband, that thereby her share became chargeable with all of the debts of the decedent, might defeat the very end sought by the statute. In many instances, especially where the decedent leaves several children surviving him, the lawful portion of the widow in the estate would be entirely consumed in the payment of the debts due by the decedent, and thereby the widow either practically disinherited by the inadequate provision of the will, or absolutely so by having her portion devoted to the satisfaction of the creditors. Appellants endeavor to avoid the result of this consideration by the observation that it is not compulsory upon the widow to renounce the provision made for her, but that she is granted six months after the probating of the will to investigate the condition of the estate, and decide advisedly whether she will abide by the wish of her husband as expressed in his last will and testament, or, renouncing that, place herself under the protection of the law. Counsel evidently overlooked the fact that, while the renunciation is required to be made within six months after the probating of the will, debts due by the testator are not required

to be registered or filed for probate until twelve months after publication for creditors; so that it might often be that an estate apparently solvent six months after the probate of the will would subsequently be shown to be deeply involved, and thus the widow be left destitute through a mere error of business judgment into which she had been entrapped by a misleading appearance of solvency. But a far weightier and more potential consideration is that the manifest intent of the legislature, as gleaned from all the statutory enactments bearing on this question, shows beyond peradventure that this privilege of renunciation was granted the widow so that she might be protected from possible injustice or misjudgment, and her proportionate interest in the residue of his estate not be at all dependent upon the whim or caprice of her husband. So, Rev. Code 1892, § 4497, provides that, if the will of the husband or wife shall not make any provision for the other, the survivor shall have the right to share in the estate of the deceased husband or wife as in case of unsatisfactory provision in the will; and in such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory, and it had been renounced. In such case, if the argument of counsel for appellants were sound, by the simple device of omitting all mention of his wife in his will any husband, if financially involved, could effectually disinherit his wife, or force her lawful portion of his estate to assume the entire burden of his indebtedness. For this reason, there being no provision made for her, and no renunciation of the will under such circumstances being required (because the law does not demand the doing of an idle thing), when the wife made a demand for her lawful share, and it was allotted to her, it would be consumed in the payment of the debts, under the principle already adverted to that it had not been dealt with, and was, therefore, liable to the debts of the decedent; thus bringing about, without the chance of escape or remedy by the disinherited wife, the very condition of affairs which the legislature wisely sought to prevent. We see nothing complex or involved in the beneficent legislative plan developed by the sections under review. It is this: The wife for whom in her husband's will an unsatisfactory provision is made, or for whom no provision is made, and who does not own separate property at the time of the death of her husband equal in value to what would be her lawful portion of her husband's real and personal estate, is at liberty to signify her dissent to the will; and, when she has done this, in the eyes of the

law the decedent, so far as her rights are concerned, becomes an intestate, and her rights are fixed by the law, which would control if he had died in a state of total intestacy. Hence, after the debts are paid, she is entitled to her lawful portion in the residue of the estate, both real and personal, subject to the deduction which must be made therefrom, provided she owned at the date of the death, any separate property exceeding in value one fifth of her lawful portion in her husband's entire estate.

In the instant case, Mrs. Carrie W. James, by her act of renunciation, became entitled to a one-half interest in the real and personal estate of her deceased husband as if he had been an intestate. Therefore, when all of the debts of the estate have been fully paid, she will be entitled to her distributive share of one half of all the residue of the personal property, and will become a cotenant with each devisee, and own a half interest in each and every parcel of real estate specifically devised by her deceased husband. The contention that Rev. Code, § 4499, by making use of the expression that the widow may signify her dissent to the will and "claim to have the deficiency made up to her, notwithstanding the will," intends to convey the meaning that this deficiency between the value of her separate estate and her lawful portion in her husband's estate has to be "made up to her" in money, and that to this extent she becomes, not a tenant in common of the property, but a creditor of the estate, is manifestly unsound. The contrary intention is plainly disclosed by the clause of the section immediately following, which announces the rule whereby the court shall be governed in proceeding to make up the deficiency. That rule provides that she is to have a certain proportion of her "lawful portion of the lands" and her "distributive share of the personalty;" such interest being arrived at by a calculation based upon the relative value of her lawful portion of the estate as compared with the previously ascertained value of her own separate property. This is the interpretation which has been placed upon similar provisions in other states in the few cases which our research has disclosed. In *Doyle v. Doyle*, 50 Ohio St. 330, 34 N. E. 166, the view which we have above announced, after full discussion, is approved, and the court in that case quotes from *Hartshorne v. Ross*, 2 Disney (Ohio) 15, where it is said: "If he [the husband] die intestate, there is manifest propriety that she [the widow] should receive a liberal allowance; and, should he devise his estate without providing as generously for his widow as did the statutes, she should have the option to abide by the will

or take her portion at law. The election to receive less than her legal allowance should be hers. . . . The husband executes his will subject to the law in force when it shall take effect; and, therefore, his devisees cannot complain. He might have cut off his heirs without any token of remembrance. Not so with his wife. Her right is paramount. It depends not upon his kindness, much less his caprice." And in *Gupton v. Gupton*, 3 Head, 490, speaking of a similar statute permitting renunciation of, or dissent from, the will, the court says: "It was intended to secure to her an election between the provision made for her by the will of her husband and the law of the land. It was intended that he should not have the power to deprive her of a just and proper share of an estate which she may have aided in building up. She has a right to stand upon the law and participate in his estate, whether he is willing or not. We will not defeat that right, and render this provision nugatory, unless we are compelled to do so." *Re Taylor*, 55 Ill. 252; *Stokes v. O'Fallon*, 2 Mo. 32; *Arrington v. Dortch*, 77 N. C. 387. We hold, therefore, that the decree of the chancellor was correct in deciding that appellee, Mrs. Carrie W. James, the widow, after the payment of all the debts of the estate, is a cotenant of the lands of the estate, and also entitled to her lawful portion and distributive share, —one half of the residue of the personalty.

The extent of the widow's interest as fixed by law being ascertained, it is next necessary to determine to what property her right is, by law, affixed. An answer to this inquiry requires, first, an ascertainment of what will constitute the residue of the estate of D. A. James. And this, in turn, necessitates a determination of the manner in which, under the law and the will of the testator, the different species of property and classes of legacies and devises forming the corpus of the estate are to be dealt with in the due administration of the estate, and the order in which they are to be applied to the payment of debts. And this brings us to the consideration of the next assignment of error. This assignment challenges the correctness of the propositions of law contained in the third and portions of the first and fifth paragraphs of the final decree herein. By the first paragraph, the executors were directed, in the payment of the debts and cost of administration of said estate, to "first exhaust all moneys which have come into their hands as the proceeds of notes, accounts, or moneys due the said D. A. James, deceased, individually, or due Peter James & Company; and, if the proceeds from this source shall be insufficient to pay said debts and cost of adminis-

tration, said executors shall next use the proceeds of all property not specifically bequeathed or devised, including all bequests or devises made to Carrie W. James, the widow of said D. A. James, deceased, who has renounced the provision made for her under said will, and including any rents or shares of crops for the year 1903 which have come into the executors' hands; and, if the proceeds arising from the above two sources be insufficient to pay said debts and costs of administration, and it shall be necessary for the specific legacies and specific devises to abate, it is ordered that the said specific legacies and the said specific devises shall be abated proportionately to their actual value." The third paragraph of the decree recited "that the legatees who were left stocks or bonds upon which dividends have been paid to said executors are entitled to said dividends, to be distributed in accordance with the terms of this decree." And by the concluding clause of the fifth paragraph of the decree it was ordered that "the rents and shares of crops from said Stonewall plantation for the year 1903 shall go to the said executors as assets of said estate, to be used in the payment of debts in the manner provided in the first paragraph of this decree." The soundness of the ruling of the chancellor embodied in the first paragraph above recited, which undertakes to fix the character of assets upon the crops and rents of the year 1903, especially those flowing from the Stonewall plantation, is first assailed. It is contended by the devisees that the rents and crops pass with the land to the specific devisee, and do not become assets in the hands of the executors. It is further urged by T. W. James, to whom the Stonewall plantation was specifically devised, that, regardless of the general rule, the rents remaining uncollected, and the growing crops which were on that plantation ungathered at the date of the death of the testator, amounting, as the record shows, to 78 bales of cotton, passed absolutely with the devise of the plantation, for the reason that, by item 2 of the will, it is expressly recited that, "in case my death occurs before the 1st day of January, 1901, then and in that event the rents due from the said place for the year 1900 are to be paid to my executors." In this connection, we may also consider the next assignment of error, based upon the alleged error of law in the ruling of the chancellor in the third paragraph of the decree directing the dividends collected by the executors on the stocks and bonds specifically bequeathed to be paid to the legatees and distributed according to the terms of the decree. It is urged that such dividends are properly assets of the estate, and should have been ap-

propriated by the executors to the payment of debts of the testator. In passing upon the questions presented by the recitals of the decree now under review, it becomes necessary to determine what, under our law, constitutes assets of a decedent. And this inquiry involves the necessity of an interpretation of the sections of the Code applicable to the subject. Rev. Code 1892, § 1881, provides: "The goods, chattels, personal estate, choses in action, and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real or personal, or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets, and shall stand chargeable with all the just debts and funeral expenses of the deceased, and the expenses of settling the estate." And in § 1882 it is further provided that "the court or chancellor may, on the application of an executor or administrator, decree the sale of the crop growing at the time of the death of the testator or intestate, upon such terms and in such manner as may be deemed best." Section 1892 gives the executor authority to "sell for cash the cotton raised on the farm of the deceased, or any other commodity raised for market, and to account for the proceeds thereof as assets." Regardless of the rule which might have formerly prevailed, or which may now control in jurisdictions in which there has been neither modification nor regulation by express statute, either as to the mode to be followed in the distribution of estate, or as to what were formerly considered as assets, we now are governed by statutory provisions, and must first seek in them a definite and certain rule for our guidance. If the lawmaking power has spoken, the courts must obey, and confine themselves to a simple endeavor to effectuate the legislative intent as made manifest. Giving to the sections quoted their natural and usually accepted meaning, it is evident to our minds that the rents flowing from the lands of the testator, accruing during the year of his death, and the crops, remaining on the lands at the date of his death, whether gathered or still in the field, matured or unmatured, are alike considered assets of the decedent, whether testate or intestate, and, as such, pass into the hands of his legal representative, and constitute a portion of the primary fund which is liable for the payment of the debts of the decedent and the expenses of the administration of the estate. In the instant case we are of the opinion that the rents and the growing crops on all of the lands of the testator are to be considered as assets, and dealt with accordingly. Nor do we think any intention on the part of the testator to

make a difference with reference to the rents or growing crops upon the Stonewall plantation definitely appears from the item quoted. The expression in that item referred solely and specially to the year 1900, and was only to control in the event of a certain contingency, namely, the death of the testator before January 1, 1901. What special reason the testator had for this provision nowhere distinctly appears. But probably, in view of the season of the year in which the will was executed, after the crops had all been planted, and were then growing, and the expenses of the year's planting operations already in a large manner incurred, it was inserted to prevent the possibility of a dispute or misunderstanding over the rents and crops for that year between his devisee and his executors. But, whatever the purpose, that expression was restricted in its application to the year 1900, and dependent for its operation upon the happening of an event which never in fact transpired. After the end of the year 1900, the will being silent, the statute law applied as well to the rents and crops grown upon the Stonewall plantation as to the other lands of the testator. Nothing short of the positive, unequivocal expression of the testator can avoid the application of the statute. There is no such expression in this will. We hold, therefore, that the chancellor was correct in ordering the rents and crops, including the 78 bales of cotton, gathered after the death of the testator upon the Stonewall plantation, to be delivered to the executors as assets of the estate. We also uphold as announcing the true rule the third paragraph of the decree, directing the dividends upon the stocks and bonds to be delivered to the specific legatees. This provision must, of course, under the facts of the instant case, have read into it the modifications that, first, these and all other specific legacies must suffer proportionate abatement, if necessary, as herein-after indicated; and, second, that the widow is entitled to one half the remainder of each specific legacy after the payment of debts; and this necessarily includes an equal proportional interest and share in the dividends. Of course, if any of the dividends had been earned and declared, but simply remained unpaid, prior to the death of the testator, they would have passed to the executors as assets of the estate. But we do not understand that the decree in this regard contravenes the rule announced; the inference being, from the language employed, that the dividends were not declared or fully earned until after the death of the testator. In such state of case, the rule is clearly and concisely stated in 1 Underhill on Wills, § 409: "A specific legacy of securities, as of shares, notes, or bonds, carries with it all

accessions to it, or incidents of it, which have been created prior to the death of the testator. . . . The specific legatee of shares of stock is entitled to all dividends which have accrued down to the death of the testator as well as to those which subsequently accrue." See, as sustaining the text. *Re Hodgman*, 140 N. Y. 428, 35 N. E. 660; *Bristow v. Bristow*, 5 Beav. 289. A specific legacy is a gift, not only of the thing or fund itself, but of all its produce, from the time of the testator's death. *Barrington v. Tristram*, 6 Ves. Jr. 345, and note. A specific legacy is "a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing." Such legacies "carry any accessions that may accrue by way of increase or interest after the death of the testator." 18 Am. & Eng. Enc. Law, 2d ed. p. 714, and many citations. This being the generally approved rule, and not having been changed or modified by the express terms of plain intentment of the statute, we accept and adopt it as stated.

The next ruling of the chancellor, set forth in the concluding clause of the first paragraph of the decree above recited, assigned for error, is the requirement that, in the event the proceeds of all property not specifically devised or bequeathed should prove insufficient to pay the debts and costs of administration, so that it should become necessary for the specific legacies or the specific devises, or both, to be abated, so that the debts should be paid in full, "the said specific legacies and said specific devises shall abate proportionately to their actual value." This presents for our consideration the question, never before expressly adjudicated by the courts of this state, whether a specific devise of land stands upon the same plane, and is to be controlled by the same principle, as a specific bequest of chattels. Again referring for our guidance to the statutory provision as contained in the Code, we find there plain recognition of the general principle that the personal estate of the decedent is the primary fund to which creditors must first look for the satisfaction of their debts. The last clause of § 1881 provides: "The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed." By § 1893 an executor is granted authority, when he shall discover that the personal property will not be sufficient to pay the debts and expenses, to "file a petition in the chancery court for the sale of the land of the deceased, or so

much of it as may be necessary; and exhibit to the court a true account of the personal estate and debts due from the deceased, and the expenses and description of the land to be sold." And even then, after the insufficiency of the personal estate has become apparent to the executor, no valid final action can be taken on the petition until the heirs and devisees and all other parties in interest are duly cited to appear and contest, if they so desire. Upon the hearing, it is only in the event the court is "satisfied that the personal estate is insufficient to pay the debts of the deceased, and that the lands ought to be sold for that purpose," that it is lawful to render a decree for a sale of a part or the whole of the lands. And in such case, where a portion of the lands have been sold after due observance of all the statutory requirements, "the heir or devisee whose lands shall be sold may compel all others holding or claiming under such intestate or testator to contribute in proportion to their respective interest so as to equalize the burden of the loss;" thus recognizing the doctrine of forced contribution among devisees. The personal estate of the testator is first liable for sale for the payment of his debts. When the decedent dies intestate, it must be conceded that, except in special cases, provided for by § 1900, where the interest of all parties make it advisable, the entire personal estate must be exhausted before, even by recourse to the courts, any portion of the lands can be sold and the proceeds devoted to that purpose. The reason for this distinction between personalty and land is obvious, and is still recognized in our jurisprudence. The personalty, upon the death of the owner, passes to the administrator; the title to the land vests at once in his heir. If this be the rule, and the order in which property must be applied to the liquidation of the debts of an intestate, we see nothing in the statute to warrant the conclusion that the legislature intended to adopt a different order in the case of a man dying testate. If the testator devise and bequeath, by general terms, his entire estate unless the will contains evidence of a manifest intent on his part to commingle land and personalty, the personal estate must, as in case of intestacy, be first exhausted, before any portion of the lands can be used. In the case of *Cady v. Cady*, 67 Miss. 425, 7 So. 216, speaking of pecuniary legacies which were chargeable upon the estate of the testator, this court, advertent to the diversity of opinion which exists in this and other instances where courts seek to discover the intention of the testator from the language he employs, and recognizing that the sole difficulty is in discovering that intent, which, when once ascertained, must

be strictly followed, says: "Ordinarily, pecuniary legacies are payable by the executor, and out of the personal estate. The claim of the heir at law, or of the devisee, is ordinarily as much in the mind of the testator as that of the legatee, and, unless a contrary purpose appears from the will, it will be assumed that the testator intended that legacies are to be paid only out of his personal estate, and, that, upon that being insufficient, the legacies must abate in whole or in part." See *Knotts v. Bailey*, 54 Miss. 238, 28 Am. Rep. 348; *Heatherington v. Lewenberg*, 61 Miss. 376.

Is there any valid distinction on which to base a logical differentiation between a case of a general legacy not charged on the land and one where the entire estate is disposed of by specific legacies and specific devises? We can see no logical ground on which to base a distinction or a difference. In the case of a general legacy or bequest not charged on the realty, in an estate in which the land and personalty were not commingled by the testator, if necessary for the payment of debts, the general legacy would have to abate, even to the extent of obliteration, before any deduction could be made from the devise. And, unless we expect to overrule and repeal by silently ignoring the provision of our statute, which provides that no part of the landed estate shall be sold for the payment of debts except upon the insufficiency of the personal estate, we must adhere to the same rule. To uphold this portion of the decree of the chancellor, and to require in the instant case that the specific devises shall abate proportionately with the specific bequests, would be tantamount to ordering a sale of a portion of the land, not on account of the insufficiency of, but in order to protect, the personal estate from sale, because it is evident that every dollar which the devisees are required to pay in order to protect the lands specifically devised to them is simply the levying of a tribute upon the real estate before the personalty has been exhausted. This would be accomplishing by indirection that which the plain letter of the law forbids the court to do directly. If the executors filed a petition asking a decree for the sale of any portion of the lands as a condition precedent to the lawful rendering of such decree, it would be necessary for them to aver, and show to the satisfaction of the court, that the personalty had either been exhausted, or was insufficient to pay the debts. Yet in the instant case we are asked to apply a portion of the value of the lands to the payment of the debts, not because there is no personalty out of which the debts can be collected, but in order to protect and preserve the personalty itself. We announce our conclusion on 1 L.R.A. (N.S.)

this point while duly mindful of the fact that the courts of many jurisdictions have adopted the contrary view, and require a proportionate abatement of specific legacies and specific devises as if they were all of the same class. We are constrained to adhere to what seems inescapably to be the manifest legislative plan for the distribution of estates, leaving the wisdom and justice of the scheme to the consideration of the legislative department, which alone had authority to inaugurate it, and is alone, in the absence of an expressed intent on the part of the testator, vested with power to change or modify it. We are strengthened in our view by the consideration that in the instant case, as to the widow, the decedent died wholly intestate. Her rights, therefore, are fixed by the letter of the law, which requires the personal estate to be first exhausted before any part of the land can be sold for the satisfaction of debts. The widow is entitled to one half the residue of the personalty. That residue can only be known after all debts and costs of administration have been paid. Nor are her rights to, or the extent of her interest in, the lands of the estate complicated by any consideration of the legal rights of devisees and specific legatees. She is neither, but inherits as the forced heir of an intestate. As such, under no conceivable view of the law, can she be forced to abate or reduce her share of, or interest in, the lands. If the decree undertakes to deal with her legal rights, it is palpably violative of the statute. If her interest in the estate be exempted from its operation, the decree affords no definite rule by which any computation of the rights of the various parties can be accurately made, as it involves two contradictory methods of raising money to liquidate the debts of the estate,—one the statutory method of devoting the personalty to that purpose, the other requiring the devisees of the realty to contribute proportionately to that end.

In our judgment, the view we have indicated, that, in every instance, save, only, when a contrary desire on the part of the testator is plainly evinced by his will, the personalty constitutes the primary fund for the payment of debts, and must be first exhausted, can alone preserve in its fullness and integrity the legislative scheme devised for the administration and distribution of estates, and at the same time harmonize with the previous adjudications of this court. Any other rule would result in endless confusion, wrought alone by the proportion which the debts of the testator might bear to the value of his estate. The will of the testator is the supreme law. That being silent, or not showing a contrary desire, the statute will control.

But, aside from these deductions drawn from, and in our opinion warranted by, the language of our statutes, the conclusion we have reached that the doctrine of forced contribution does not apply against specific devisees in favor of specific legatees (as by the statute it does among devisees), but that specific legacies must be first obliterated before specific devises can be abated, is not, as a general proposition of law, without the support of eminent authority. Says the court in *Elliott v. Carter*, 9 Gratt. 548: "That the devisee of real estate not charged with the payment of debts is entitled to have the assets marshaled against the claimants of the other funds of the estate in the order stated, including specific legatees, is well settled by the authorities. 2 Jarman, Wills, 601; *Clifton v. Burt*, 1 P. Wms. 678; *Forrester v. Leigh*, 1 Ambl. 171; *Scott v. Scott*, 1 Eden, 458; *Keeling v. Brown*, 5 Ves. Jr. 359; *Mirehouse v. Scaife*, 2 Myl. & C. 695. . . . This exemption of real estate devised extends as well to the case of a deficiency of personal assets for the payment of legacies as of debts; the legatees having no right to call upon the devisee to contribute to the payment of their legacies unless the real estate be expressly charged. *Hayes v. Seaver*, 7 Me. 2; *Jarman, Wills*, 547, note." In *Rogers v. Rogers*, 1 Paige, 188, it is said: "Where the will of the testator contains no directions as to the payment of debts, chattels specifically bequeathed must be applied to the payment of a judgment against a testator before resort is had to the real estate devised." In a case where, as in the instant case, the payment of debts is charged by the testator, or, by operation of law, upon the personalty, the order of application is thus stated: "The personal property at large is first to be applied to the payment of debts, and when legacies are to be used to pay debts the first liable is the residuary legacy (2 Lomax, Exrs. 126), and the next are the general pecuniary legacies, then the specific legacies, and lastly the real estate devised by the will. *Edmunds v. Scott*, 78 Va. 729." See also 19 Am. & Eng. Enc. Law, p. 1316, and citations; 4 Kent Com. §§ 420 *et seq.*; 1 Story, Eq. Jur. § 577; *Shreve v. Shreve*, 10 N. J. Eq. 385; *Shaw v. McBride*, 56 N. C. (3 Jones, Eq.) 173; *Magruder v. Carroll*, 4 Md. 351; *Brill v. Wright*, 112 N. Y. 129, 8 Am. St. Rep. 717, and note, 19 N. E. 628. We hold, therefore, that it was error in the chancellor to decree that the specific devises of lands should abate proportionately to their value in the same manner as specific legacies. The true rule is that, upon an insufficiency of the personal estate, which is primarily liable to the debts, the specific bequests must abate proportionately, even to the extent of complete destruction, before

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the devisees to whom lands have been specifically devised can be called upon to contribute.

The conclusion reached upon these points renders consideration of other minor assignments of error unnecessary.

To prevent all possibility of misunderstanding upon a remand of this case, we recapitulate: The estate should be dealt with as follows: All of the assets in the hands of the executors, including the proceeds of the rents of all the lands for the year 1903 and the 78 bales of cotton gathered after the death of the testator on the Stonewall plantation, together with the other assets mentioned in paragraph 1 of the decree of the chancellor, are to be devoted to the payment of the debts of the decedent and the expenses of the administration of the estate. Should these be insufficient to a complete liquidation of all the debts of the estate, the specific legacies should abate proportionately, and, in the event these be exhausted, and there still remain any debts unpaid, the specific devises of land must contribute proportionately to the payment of the debts remaining. After all debts have been fully paid, the widow, Mrs. Carrie W. James, will be entitled to receive one half the residue of the personalty of the estate, and will be cotenant to the extent of an undivided one-half interest in all the lands of the estate. In ascertaining the interest of the widow in the Stonewall plantation, no account is to be taken of the unpaid purchase money due thereon. That debt constitutes no part of the indebtedness due by the D. A. James estate, having been by the express terms of the will affixed as a burden to the devise to T. W. James, and having been by him assumed before the renunciation by the widow, Mrs. Carrie W. James is the owner of an undivided one-half interest in the Stonewall plantation, with work stock, farming implements, etc., thereon, free of any encumbrance by reason of the unpaid purchase money due thereon. T. W. James, as to the Stonewall plantation, with the work, stock, farming implements, etc., thereon, in no sense occupies the position of a purchaser for value. The doctrine invoked applies only to cases where bequests or devises are made in lieu of lawful debts or demands which the recipient holds against the decedent, and which he releases by reason thereof. Pom. Eq. Jur. § 1142. The language of the clause of the will carrying the devise clearly evinces the intention and desire of the testator that the specific devisee shall take *cum onere*. This exonerates the personalty from its primary liability. 1 Underhill, Wills, § 384. T. W. James occupies no higher or better position than other spe-

cific devisees and legatees. All are alike mere recipients of the testator's bounty.

Decree modified and cause remanded to be proceeded with in accordance with the views herein expressed. Costs of this appeal to be taxed against the executors, appellants.

MISSISSIPPI SUPREME COURT.

SIDNEY JOHNSON, Appt.,

v.

KITTY LOU WALKER.

(.... Miss.)

1. Bastardy—dismissal—res judicata.

A dismissal, without prejudice, of a bastardy proceeding instituted before a justice of the peace, is no bar to a subsequent proceeding before another justice upon the same charge.

2. Same—venue.

A defendant may be tried in a bastardy proceeding by a justice of the peace in a district other than that of his residence, upon an affidavit made before still another justice, under a statute providing that the mother may make complaint before any justice of the peace of the county.

3. Same—pleading—closing issue.

The issue in a bastardy proceeding is properly made up when the affidavit and declaration charging defendant with being the father of the child are traversed by an affidavit filed by him.

4. Same—child in court.

Merely bringing the child into the court room in a bastardy proceeding is not reversible error, if it is immediately removed without the attention of the jury being called to it, or any reference to it being made in the presence of the jury.

5. Evidence—declarations during travail.

Declarations of the mother of a child, made during travail, as to its paternity, are admissible in support of her testimony in a bastardy proceeding.

6. Same—denial of pregnancy.

The exclusion, in a bastardy proceeding,

Case Note.—That the rule that a former judgment will not operate as a bar to a subsequent suit, unless it was upon the merits, is applicable to bastardy proceedings, as held in *JOHNSON v. WALKER*, seems to be uncontroverted.

A dismissal on account of the failure of the relator to appear is not a bar. *State ex rel. Sumpter v. Barbour*, 17 Ind. 526.

Nor is a dismissal for want of jurisdiction. *State v. Giles*, 103 N. C. 391, 9 S. E. 433; *Lynn v. State*, 84 Md. 67, 35 Atl. 21.

Nor the quashing of an indictment based on the former proceedings. *Neff v. State*, 57 Md. 385.

Where the jurisdiction of the magistrate before whom complaint is made is limited 1 L.R.A. (N.S.)

of evidence that complainant denied, up to the date of her confinement, that she was pregnant, is not error.

7. Same—cumulative.

Exclusion of testimony which is but a repetition of what has previously been admitted without objection is not reversible error.

8. Same—elicited by complainant.

A party cannot complain of the admission of evidence in response to his own questions.

(July 24, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Tate County in plaintiff's favor in a bastardy proceeding. Affirmed.

The facts are stated in the opinion.

Mr. W. J. East for appellant.

Mr. J. F. Dean, for appellee:

Accusations of the defendant during the travail of the mother may be shown in corroboration of her evidence.

5 Cyc. Law & Proc. pp. 660, 661; *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *Robbins v. Smith*, 47 Conn. 182; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Welch v. Clark*, 50 Vt. 386; *Reed v. Haskins*, 116 Mass. 198.

Houston, Special Judge, delivered the opinion of the court:

This is a proceeding under chapter 15, Code 1892, by appellee against appellant. On August 16, 1904, appellee, a single woman, resident in Tate county, was delivered of a child therein. The next day she made affidavit before J. H. Wallace, a justice of the peace of district No. 5 of said county, under § 249, Code 1892, alleging that appellant was its father. On the return day she appeared before Wallace, withdrew the affidavit, and dismissed her suit; the judgment reciting that the dismissal was "without prejudice." On the same day she made another affidavit before McKinnon, justice of the peace of district No. 3, taken before

to determining whether or not there is probable cause for holding the defendant to appear before another court, a discharge by him is no bar to a subsequent proceeding. *Marston v. Jenness*, 11 N. H. 156; *Nicholson v. State*, 72 Ala. 176; *Hyden v. State*, 40 Ga. 476; *Davis v. State*, 6 Blackf. 494; *Waterloo v. People*, 170 Ill. 488, 48 N. E. 1054; *Barnes v. Ryan*, 174 Mass. 117, 75 Am. St. Rep. 288, 54 N. E. 492; *Munro v. Callahan*, 41 Neb. 849, 60 N. W. 97; *State ex rel. Ortloff v. Linton*, 42 Minn. 32, 43 N. W. 571; *Re Parker*, 44 Kan. 279, 24 Pac. 338. *Contra*, *State ex rel. Dilworth v. Braun*, 31 Wis. 600; which is criticized and disapproved in *State ex rel. Ortloff v. Linton*, *supra*.

C. P. Varner, another justice of the peace of district No. 4 of said county, and he issued his warrant upon it. On the return day thereof, appellant made a motion to dismiss the case because of the above facts, alleging and proving, also, that defendant below was a householder and resident of district No. 5. This motion being overruled, Varner, after trial, required him to give bond for his appearance in the circuit court. In the circuit court, plaintiff below filed her declaration. Defendant renewed his motion, which being overruled, he traversed the allegations of said declaration. Trial being had upon the merits, the jury returned a verdict for \$1,000. Judgment was entered thereon, ordering defendant to pay said sum at once, or to execute his bond for \$1,000 payable to the state, to pay on the 1st day of January, 1905, and annually thereafter, for nine years, the sum of \$100 for the support and education of said child, etc. After motion for new trial was overruled, defendant prosecuted this appeal.

We think the motion to dismiss was properly overruled. That the dismissal "without prejudice," before Wallace, justice of the peace, did not bar the appellee from instituting another suit, and was not *res judicata*, is settled by *Wilson v. May Pants Co.* (Miss.) 37 So. 813. Counsel for appellant cites 3 Enc. Pl. & Pr. p. 300, to the effect that an adjudication in this proceeding is a bar to a subsequent prosecution on the same charge; but the very authority adds this. "But it seems that, unless the judgment is on the merits, it cannot be pleaded in bar,"—and cites decisions of several states, and they and the footnotes fully sustain the proposition that it is not a bar unless the case is tried on its merits. See also footnotes to 5 Cyc. Law & Proc. p. 674; *Mooney v. People*, 96 Ill. App. 622; and *Weatherford v. Weatherford*, 56 Am. Dec. 221, note (20 Ala. 548).

Justice of the Peace Varner had authority to issue the warrant and jurisdiction to try the case, even though the affidavit was made before the justice of the peace of another district, and the defendant was a householder and resident in neither of their districts. Section 2395, Code 1892, has no application to this character of proceedings. Chapter 15, Code 1892, is *sui generis*. Section 249 thereof provides that the mother can make complaint before any justice of the peace of the county where she may be delivered, etc. No affidavit and no written complaint is expressly required by the statute. But, even if an affidavit were required, it can be made before a justice of the peace other than the one who issues the warrant and tries the case. Code 1892, § 934; 1 L.R.A. (N.S.)

Mooney v. People, 96 Ill. App. 622; 3 Enc. Pl. & Pr. pp. 296-298.

As to an issue not being made up, even if there is any necessity for a formal issue or formal pleadings, other than the denial by defendant of the charge (as it is said there is not in the last two authorities cited), the issue was properly made up in the instant case, within the contemplation of § 252, Code 1892. The affidavit and declaration of the plaintiff were filed, alleging that the defendant was the father of the child, and the defendant filed his affidavit in the circuit court, traversing this allegation. Besides, defendant went to trial on this issue, without making objection until after judgment in his motion for a new trial.

The assignment of error as to the child being brought into court is untenable. There is diversity of opinion as to whether the child may not be exhibited before the jury for their inspection as evidence in the case to show its resemblance to defendant, by comparing the features and appearance of the two, and as to whether counsel may not draw attention to and comment on this resemblance. Among others, the states of Iowa, North Carolina, and Massachusetts permit this to be done. See *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 589, 24 N. W. 489; *Scott v. Donovan*, 153 Mass. 379, 26 N. E. 871. We are not called upon in this case to express any opinion as to which is the better and sounder doctrine, as this record shows affirmatively that, as soon as the mother brought the child into the court room, plaintiff's counsel directed plaintiff's father, in an undertone, to have it removed, which was done by plaintiff's sister, who was only about 30 feet away; that the child was in the presence of the jury for only about two minutes; that no protest of the child was made to the jury, and none offered to be made; nor was any reference to the baby made by counsel in the presence and hearing of the jury, and no attention called to it in any way. The authorities are uniform on the proposition that this does not constitute error,—certainly not reversible error. In *Hutchinson v. State*, 19 Neb. 266, 27 N. W. 114, the mother held the child in her arms in plain view of the jury during the entire time that she was testifying as a witness, to which due objection and exception was taken. The court said, *inter alia*: "It must be apparent to any mind that the mere presence of the child could have no prejudicial effect upon the rights of plaintiff in error."

Nor do we think that the admission of the evidence as to the declaration made by complainant during travail, relative to the paternity of the child, constituted reversible error. This question has never been adjudi-

cated by this court. The decisions are not uniform as to the admissibility of such declarations; but the better doctrine seems to be that they are admissible for the purpose of corroborating her evidence. 5 Cyc. Law & Proc. pp. 660, 661, while saying that "declarations of prosecutrix tending to corroborate her testimony are generally inadmissible," immediately adds "accusation of defendant during her travail may, however, be shown in corroboration of her evidence;" citing cases. See also *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Robbins v. Smith*, 47 Conn. 182; *Reed v. Haskins*, 116 Mass. 199. Wigmore, who is recognized as one of the highest authorities on the subject of Evidence, in his valuable new book says: "There is no reason why this should not be the general rule." And this, on common-law principles. 2 Wigmore, Ev. § 1141, p. 1340. While the text of 2 Encyclopedia of Evidence, p. 244, cited in the able and exhaustive brief of counsel for appellant, seems to deny the competence of such evidence, yet, in the note thereto (pp. 245, 246), it uses this language: "The mother is a competent witness to show, in corroboration of her testimony, that in the time of her travail she accused the defendant of being the father of the child." Also, that "declarations of the complainant, made during travail, as to the paternity of the child, are admissible in corroboration of her testimony." Counsel in his brief says: "The doctor could not tell what she said;" and cites *Weatherford v. Weatherford*, 56 Am. Dec. 219, note (20 Ala. 548), and *Eddy v. Gray*, 4 Allen, 435. These cases only hold that the declarations which the attending physician made to her during travail relative to her condition or peril are inadmissible. They do not apply to what she might have said to him. In the instant case the record does not show that Dr. Orr said anything whatever to her about her condition or peril. He asked her how long she was going to stick to the fact that it was Sidney Johnson. She replied, "Until I die."

It follows that instruction No. 4, given the plaintiff, was not error. It only tells the jury that it may consider the declaration of plaintiff, that defendant was the father of the child, in connection with all the other testimony in the case, and give it such weight as they may deem proper. Nor do we think that § 257, Code 1892, militates against, or excludes, the conclusion that such declarations are admissible. By its express language that section purports to deal with, and as a matter of fact only and merely deals with, the admissibility, after or "when the mother is dead," of her declara-

tions in her travail, and was simply intended to extend the doctrine of admissibility to the period after her death, and, in the contingency that she should die, and to provide that, in the event of such a contingency, they might, if proved to be her dying declarations, be received in evidence, not as corroborative merely, but as original substantive evidence, when the trial of the case occurred after her death. It left the question as to their admissibility when she was living at the time the case was tried, just as it was before its passage. Without this statute, the mother's deathbed declarations as to the paternity of the child were generally held to be inadmissible. 5 Cyc. Law & Proc. p. 661, note. The sole and only object of the statute was to extend the doctrine as to dying declarations to such declarations of the mother in bastardy proceedings, and to place beyond controversy their admissibility, not merely as corroborative, but as original and substantive evidence.

In our opinion the testimony of Mrs. Perkins that appellee, during her travail, told witness that appellant was the father of her child, was admissible. This being so, the jury already having before it this competent evidence as to that statement, we are unable to see from this record how the subsequent testimony of Dr. Orr and Mrs. Florence Walker, the mother of appellee, relative to this same matter and only cumulative, could operate so prejudicially upon the rights of defendant with the jury as to warrant us in reversing this case. The court expressly instructed the jury, at defendant's request, that they should carefully weigh and consider with great caution these statements, made by the plaintiff, as to who was the father of the child, and that such statements and declarations, made by the plaintiff, in the absence of the defendant and without his knowledge or sanction, are not binding upon him, and cannot affect his interest; and further instructed them "that they should also carefully weigh the plaintiff's evidence," as "this is a case where the charge is easy to fabricate and difficult to defend." By these instructions the declarations complained of became almost as "fangless serpents and shorn Sampsons," so far as being able to work harm to defendant was concerned. At least these cautionary instructions, with others, were quite as liberal to the defendant as he was entitled to, and must have minimized the effect of this corroborative evidence.

We find no reversible error in the other exceptions to the ruling of the court on the evidence. Even if appellee did deny, up to the date of her confinement, that she was *enceinte*, or that she had ever had criminal conversation with any man, this was but

natural, and what every young girl of eighteen years would have done, as every juror of any intelligence would know; and its exclusion could not be prejudicial error. The evidence fails to show any such criminal relations, and the verdict of the jury settles that there were none at the period of conception. Nor was the exclusion of the testimony of defendant that he and plaintiff never renewed their engagement to marry after it was canceled during Christmas of 1902. He had previously sworn to this before the jury without objection, and also afterwards, and thereby secured the benefit of it. Besides, he expressly admits that they were engaged about two or three years before October, 1904, and that he visited her often for several years, and still continued to visit her "about like he had before this engagement was canceled." He further admits that he was with the appellee alone at night, at the very times, places, and under the circumstances detailed by her as being the times and places when he, after having previously failed to subdue her chastity, as she swears, under promise of marriage, persuaded her to yield to him, polluted her prior chastity, blasted her honor and hope, and blighted her future happiness and life. As is so often the case, her love for him seemed too strong for her virtue, as it is often too strong for law and morality. And these times were at, or very near, the proper period of conception according to the ordinary course of nature with respect to the birth of the child; and there was no evidence that the period of her gestation was extraordinary or unusual. In fact he admits nearly every material fact and circumstance testified to by her, except the actual acts of intercourse. *McClellan v. State*. 66 Wis. 335, 28 N. W. 347, was a strikingly similar case to the instant one. The court there said that the defendant had been alone with her on occasions which he admitted, and had driven home with her several times late at night. This evidence and these circumstances corroborate the testimony of complainant, and we cannot say that the jury were not warranted in finding defendant guilty beyond a reasonable doubt. It was only material that defendant had intercourse with her at or near the proper time which, in the course of nature, might have made him the father of the child. The complainant was only eighteen years old, and she would not at all likely become a willing or swift witness against an innocent man. Cold, wilful, and corrupt perjury would not be likely to reside in the tender and untutored nature of such a young girl.

Relative to the appellant's complaint that the court allowed appellee to testify to the 1 L.R.A. (N.S.)

fact that she had appellant arrested, charging him with seduction, and that the jury must have considered this in determining upon their verdict, this record shows that appellant's counsel himself asked appellee this very question on cross-examination; and, although appellee's counsel objected, and the court sustained the objection, appellant's counsel, without reserving an exception, continued to question her in regard to it without further objection from counsel for appellee or further ruling by the court. Under such circumstances we fail to see how appellant can now successfully or consistently complain of this.

As to the other exceptions to the evidence respecting the conduct of this once spotless and stainless, but now sorrow-stricken, disgraced, and deflowered young girl, the "glass of whose virginity" was broken by this appellant (as she swears, and as the jury has found) before the bud of girlhood could bloom or blossom into the beautiful flower of Southern womanhood, and whose honor and happiness are ruined and wrecked and lost forever, we content ourselves with quoting and commending the language of that great jurist (Wm. L. Harris), in his opinion found in *Anonymous*, 37 Miss. 58: "The interests of justice do not require it, nor is the good of society promoted, by permitting the errors of a woman's whole life (perhaps sorely repented of by her, though never forgiven by the community) to be dragged from her own lips, and perpetuated in judicial history, for the mere gratification of her seducer. It is a sufficient stigma upon the age that, while it consigns to unattonable infamy the inexperienced victim who has yielded herself to his gratification, he bears no part in public estimation, or at least a very inconsiderable one, in the degradation, ruin, and lifelong wretchedness he has produced. The state has a deep interest in the equality of punishments, as well as the inducements to reformation, in cases of this character; and the disparity of suffering and inequality in social position, already existing, should neither be augmented nor countenanced by tribunals established to administer justice." We think that the court was sufficiently liberal to the appellant in regard to permitting evidence as to the conduct and character of appellee in this case.

We find no reversible error in the action of the learned lower court, in the modification of the instructions asked by defendant, or in granting those requested by the plaintiff. Instruction No. 6, granted the plaintiff, was in the very language of § 258, Code 1892, and was correct. Even if instruction No. 3, given for the plaintiff, was error (as we do not think it was), it was

cured by the very liberal charges given for the defendant, especially charge No. 1, relating to the same phase of the case. *Scarver v. State*, 53 Miss. 406; *Skates v. State*, 64 Miss. 644, 60 Am. Rep. 70, 1 So. 843. Even in a murder charge an erroneous instruction for the prosecution will not cause the reversal of a death sentence, if the instructions for the accused so clearly explain the law that the jury cannot be misled. *Nelson v. State*, 61 Miss. 212.

On account of the commendable zeal and earnestness displayed by counsel for appellant in behalf of his client, and the importance of our decision to all parties concerned, we have given an even and unusually careful consideration to this case; but the consideration has not resulted in our being able to affirm that the right result has not been reached by the jury, and that the same result would not inevitably be reached on a new trial, which would necessitate a rehearing and a rehashing of the harrowing and not morally healthy details of this most unfortunate case, without any corresponding good, so far as we are able to judge, after looking back over a completed trial and carefully scanning and conning this record. The testimony is conflicting, the jury has passed upon these controverted questions of fact, and, in view of our inability to say that it was unwarranted in arriving at the conclusion evidenced by its verdict, or that it is manifest from the whole record that its finding is clearly wrong, we feel constrained to let the verdict and judgment stand. *Kansas City, M. & B. R. Co. v. Cantrell*, 70 Miss. 329, 12 So. 344; *Yazoo & M. Valley R. Co. v. Williams*, 67 Miss. 18, 7 So. 279; *McAlexander v. Puryear*, 48 Miss. 420; *Mississippi C. R. Co. v. Mason*, 51 Miss. 234; *Buckingham v. Walker*, 48 Miss. 609.

Affirmed.

NEBRASKA SUPREME COURT.

THOMAS BAKER, Plff. in Err.,

v.

PETER A. McDONALD.

(.... Neb.)

1. Sale—change of title.

The general rule is that, when the terms Headnotes by DUFFIE, C.

Case Note.—The question as to the right of the seller to property which has been taken out of his possession by fraud under color of purchase was involved in *Sisson v. Hill*, 18 R. I. 212, 21 L. R. A. 206, 26 Atl. 196, where it was held that, if the sale was induced by fraud, replevin might be brought by the seller to recover back the property without first returning the money which had been received on the contract; and that the 1 L.R.A. (N.S.)

of sale of personal property have been agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer.

2. Same—payment of price.

Where the time of payment is not fixed by the contract of the sale, the law presumes a cash sale; and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered.

3. Same—measurement—fraud.

Where the amount to be paid is to be determined by measurement of the property, to be made by the parties, a measurement which is grossly unfair, as the result of fraud or mistake, is not binding, and a tender based thereon does not entitle the purchaser to possession.

4. Same—replevin.

Where the property has been set apart and identified, and title has been vested in the purchaser, who has paid part of the purchase price; but, because of fraud or mistake in the measurement, his tender of the balance due is not sufficient in amount,—the seller may recover possession of the property from the purchaser by an action in replevin, on the ground of special ownership and right of possession; but he cannot maintain such action under the claim of absolute ownership without rescinding the contract of sale and tendering back the amount paid.

(October 5, 1905.)

ERROR to the District Court for Dodge County to review a judgment in favor of plaintiff in an action brought to recover possession of certain hay. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. John P. Breen and C. E. Abbott, for plaintiff in error:

Where the vendor brings an action for the rescission of the sale, he must return, or offer to return, whatever of consideration he has received upon the sale.

Tootle v. First Nat. Bank, 34 Neb. 863, 52 N.W. 396; *Phenix Iron Works Co. v. McEvony*, 47 Neb. 228, 53 Am. St. Rep. 527, 66 N. W. 290.

If the vendor delivers without getting the cash, he cannot replevin the property.

Question as to what, if anything, should be returned, could be determined on the trial of the case. On this question of the necessity of returning consideration before bringing replevin for property obtained by fraudulent purchase, the note to this case reviews the authorities, and states that most of the prior cases had held that a return of all that had been received on the contract of sale must be made, and the contract rescind-

Cobbey, Replevin, § 248; Benjamin, Sales, § 308; Wallingford v. Burr, 15 Neb. 204, 18 N. W. 67; Farmers & M. Ins. Co. v. Graham, 50 Neb. 822, 70 N. W. 386.

Weighing or measuring in order to ascertain the amount to be paid at the price fixed in the bill of sale is not a part of the bill of sale at all, but is an independent agreement, and does not affect the passing of the title under the bill of sale *eo instanti*.

Ober v. Carson, 62 Mo. 209; Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Morgan v. King, 28 W. Va. 1, 57 Am. Rep. 633; Shealy v. Edwards, 73 Ala. 175, 49 Am. Rep. 43; Byles v. Colier, 54 Mich. 1, 19 N. W. 565.

Mr. George L. Loomis, with Messrs. H. C. Maynard and R. J. Stinson, for defendant in error:

The presumption is that title does not pass until the goods are paid for, and that they are to be paid for upon delivery.

Horacek v. Keebler, 5 Neb. 355; Wallingford v. Burr, 15 Neb. 204, 18 N. W. 67; Ober v. Carson, 62 Mo. 210; Lingham v. Eggleston, 27 Mich. 324; H. M. Tyler Lumber Co. v. Charlton, 128 Mich. 299, 55 L. R. A. 301, 92 Am. St. Rep. 452, 87 N. W. 268.

Duffie, C., filed the following opinion:

McDonald brought this action in replevin to recover from Baker certain hay, of which he claims to be the absolute owner. On a trial to the court without a jury, judgment went in his favor, and Baker has brought the case here on error. The parties entered into a contract relating to the hay in question, and signed the following memorandum:

Fremont, Neb., Oct. 9th, 1902.

This day I have sold to Thomas Baker thirty stacks of hay at \$2.75 per ton in the stack, for which I have received \$100.00. The hay is to be measured in the stack. This hay is to be moved off the ground before March 1st, 1903.

Thomas Baker.
P. A. McDonald.

There were more than 30 stacks in the field at the time the contract was made, and the particular stacks which Baker was to have were not set apart or designated; but it was understood that Baker might

select them from the whole number in the field. Some time after the contract was made, and before the hay was measured, Baker, at the request of McDonald, made a further payment of \$200, making \$300 paid on the contract price. Baker was unable to be present in person when the hay was measured, but was represented by a man of his own selection, who participated in that part of the transaction. The measurement was made of 31 stacks, instead of 30; but of this no complaint is made by Baker. Baker took the figures of the measurements with him to Omaha, and after some delay made a computation, and found, as he claims, that the stacks contained 112 tons and a fraction. He then wrote the plaintiff, giving the measurements and result of his computation, and inclosing his check for \$8.40, as the balance due on the hay according to his measurements and computation. McDonald immediately returned the check, with a letter to the effect that he was not satisfied with the measurements. On receipt of this letter Baker answered, saying that, if McDonald was not satisfied with the measurements, he could return the \$300 and have the hay. In the meantime Baker had commenced to bale the hay, and had shipped about 14 tons of it to Omaha. On receipt of Baker's last letter, McDonald went to the field where the hay was stacked, notified Baker's men not to press or ship any more of it, and then brought this action to recover possession of the hay, alleging that he was the absolute owner thereof.

The case was brought and tried on the theory that there was fraud or mistake in the measurement of the hay, and that, instead of 112 tons, as claimed by Baker, there was in fact 140 tons. As the evidence supports the claim of McDonald that the stacks contained about 140 tons, the questions involved will have to be considered upon the theory that McDonald's claim of fraud or mistake in the measurement has been established. That McDonald was entitled to the possession of the hay until paid the purchase price is not a question open to dispute. The written memorandum of contract, as well as the contract itself, so far

ed, before replevin could be brought by the seller. As a limitation on this, it is held in some of the cases that, if possession of the property is taken by the purchaser before the vender intends to deliver it, replevin will lie without a return of the consideration. Among the cases to this effect are Jennings v. Gage, 13 Ill. 611, 56 Am. Dec. 476, and Bush v. Bender, 113 Pa. 94, 4 Atl. 213. Some of the other cases have inclined to treat the question in an equitable manner, and, as far as possible, administer relief similar

to that which would be awarded in a suit in equity for rescission. The doctrine of the Sisson Case is followed in John V. Farwell Co. v. Hilton, 39 L. R. A. 579, 84 Fed. 293. To similar effect, it is said in Skinner v. Michigan Hoop Co. 119 Mich. 471, 75 Am. St. Rep. 413, 78 N. W. 547, that, in replevin for goods fraudulently purchased, it seems unnecessary to tender back overdue negotiable paper received for the goods. This was on the theory that the paper would be worthless.

as appears from the oral evidence in the record, are silent as to the time of payment of the price of the hay. The law, therefore, presumes a cash sale; that is, that payment and delivery were to be concurrent. Consequently Baker was entitled to possession only upon payment in full or tender of the agreed price, unless there was a waiver of such payment by McDonald, and such waiver is not to be presumed by Baker's selection of the stacks that were to become his under the contract. McDonald replevied upon the ground of absolute ownership; and his right to recover depends upon the question of whether he had title to the hay when the action was commenced, or whether such title was in Baker. As before stated, McDonald undoubtedly had the right of possession until paid for the hay; but such right of possession, if title had passed to Baker, could not support his claim of absolute ownership, and would not allow evidence in support of his petition. An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership. *Sharp v. Johnson*, 44 Neb. 165, 62 N. W. 466, and cases cited in *Page's Digest*, p. 1815.

The material question to be determined, then, is, Who held title to the hay at the time this action was commenced? The modern doctrine undoubtedly is that neither delivery nor payment of the purchase money is generally requisite for vesting title to personal property in the buyer under a contract of sale; it being necessary only that the identical goods which are the subject of the contract should be ascertained and the price fixed. *Newmark on Sales*, § 159, gives the rule in the following language: "When the terms of sale are agreed on, and the bargain struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." *Schouler's Personal Property*, vol. 2, § 243, is as follows: "Where specific chattels are embraced under a contract of immediate sale, and nothing remains to be done to them, the presumed intent of the parties is that the right of property shall become transferred to the buyer, and vest in him immediately upon the completion of the bargain by mutual assent; and, even though the seller subsequently continue in possession of the goods, the presumption remains the same as between the parties, his possession being that of a bailee with a right to recover his price." 1 L.R.A. (N.S.)

When the contract for the sale of this hay was made between the parties, title did not then vest in Baker, because the stacks were thereafter to be selected by him; but when his selection was made, and the hay definitely ascertained and measured, then he became vested with the title, and took all the risk of ownership. Had the hay been burned or otherwise destroyed, Baker, instead of McDonald, would have sustained the loss; and there can be no question that McDonald, immediately after the selection and measurement, might have sustained an action against Baker to recover the balance of the purchase price, and this on the theory that the title had passed. *Allen v. Rushfort* (Neb.) 101 N. W. 1028; *Barker v. Davies*, 47 Neb. 78, 81, 66 N. W. 11.

Had McDonald brought this action, claiming a special interest in the hay, there is no doubt that; upon proof of fraud or mistake in the measurement made, he would be entitled to a judgment giving him possession and determining the extent of his interest. His claim is that, by a fraudulent or mistaken measurement, it is sought to deprive him of about 28 tons of hay, of the value of \$77. Had his action been brought upon this theory, Baker could have tendered the amount, with costs, and retained possession of the hay, or, after the trial, could have paid the judgment given by the court, and both parties would have their full due; Baker the hay, and McDonald his money. Under the judgment appealed from, McDonald has \$300 of Baker's money, and is found to be the absolute owner of the hay, in part payment of which that money was given him. We have no doubt that, under the circumstances of this case, McDonald could not recover as absolute owner without rescinding the contract of sale and tendering back the \$300 received on the purchase. His action, if he desired to replevy the hay, instead of suing for the amount due him, should have been for possession as the owner of a special interest in the hay, and not as the unqualified owner.

We recommend that the judgment be reversed, and the case remanded.

Albert and Jackson, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded.

Petition for rehearing overruled.

OREGON SUPREME COURT.

ROBERT A. FERGUSON, Resp't.,
v.
CHARLES R. RAY, Appt.

(44 Or. 557.)

1. Treasure trove.

Gold-bearing quartz found hidden in the earth, where it has been placed by some person not discovered, is not treasure trove, so that the title to it will vest in the state.

2. Same—title to.

Property hidden in the earth near a marked tree is not regarded as lost, so that the title will vest in the finder as against the owner of the soil, although it has remained there so long as to indicate that the owner is dead or has forgotten it.

(July 18, 1904.)

APPPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff, in an action brought

Case Note.—Property long hidden, and found after all traces of its ownership are gone and the owner is probably dead, gives rise to a question on which there are not many precedents. The decision in *FERGUSON v. RAY*, and that in *Danielson v. Roberts*, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627, 74 Pac. 913, were rendered on facts that were very similar. The *FERGUSON CASE* denies that the finder has any title, as against the owner of the soil, to gold-bearing quartz that had been buried in some kind of a bag under or near marked trees and found long afterward, when the bag had almost entirely rotted away, while the *Danielson Case* holds that the finder is entitled, as against the owner of the soil, to gold coin found in a half-gallon, rust-eaten, tin can and in partially decayed sacks, where they had been hidden under dirt and debris in an old henhouse which apparently had no floor.

The court, in the *FERGUSON CASE*, cites the *Danielson Case*, and that of *Sovern v. Yaran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, and says that, since those cases were decided, "it has been very well understood in this jurisdiction . . . what is meant by lost or abandoned property;" but the court does not very clearly show how the *Danielson Case* constitutes a precedent for its decision in the *FERGUSON CASE*. The facts in the two cases are closely similar, while the decision in one sustains the right of the finder, and in the other denies it.

In the *Danielson Case* the court clearly declared its position as follows: "The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface." But in the later *FERGUSON CASE* the court seems to disagree. 1 L.R.A. (N.S.)

to recover possession of certain gold-bearing quartz which defendant was alleged to have wrongfully compelled plaintiff to deliver to him. Reversed.

Statement by Wolverton, J.:

The plaintiff, being in possession of defendant's premises under a lease, while cutting wood thereon in the afternoon of November 14, 1901, discovered a rich specimen of gold-bearing quartz lying on top of the ground. He at once secured a pick and shovel, and on scraping the leaves away he found one or two other small pieces "on top," as he testified, "or almost on top, of the ground, sticking through the ground." On digging through the surface he found others extending to the depth of 10 or 12 inches, in all weighing, approximately, 17½ pounds. There were no indications present of any natural ledge or lode of gold-bearing or other quartz in place, or of any pocket or placer or other natural deposit, the formation in which the specimens

with that rule, and says the presumption or inference of abandonment "does not obtain as to property intentionally left or deposited in a designated place and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory, or want of memory of the owner as to the locality at any given moment." Coming to the facts of the specific case in hand, and reciting the circumstances and conditions of the finding of the buried quartz rock, with the decayed remnants of a sack that had once contained it, imbedded in the ground near marked trees, the court says: "The presumption that it was lost, which attends property found on the surface of the earth, is wanting; so that there was no inference for the jury, deducible from the place of finding and the conditions of the property, that it was lost property. Indeed, the evidence, it would seem, refutes any such presumption or inference." This, being the latest decision, must be deemed to control that of the same court in the *Danielson Case* if they are not consistent; though it would have been helpful if the court in the later case had pointed out clearly the distinction, if any, which it found between the two cases. The language of the court, just quoted, does, however, suggest that it means to make the distinction consist of the fact that in one case the property was "found upon the surface of the earth," and, in the other, was embedded in it. But, so far as an inference that the property was lost or abandoned is concerned, it would not seem to be any greater in the case of a large, half-gallon, tin can containing \$7,000 of gold coin in sacks, when discovered under an old building, than in the case of gold-bearing quartz found in a rotted sack under or near marked trees. Hiding wealth under a building does not seem to indicate an intention to abandon it any

were imbedded being described as "a loose surface soil." Plaintiff disposed of a part of the quartz, estimated as being half of it in value, and delivered the remainder, 8¾ pounds in weight, to defendant, Ray. He now brings trover for the quartz thus delivered to the defendant, alleging that it was obtained from him through duress and threats of arrest and imprisonment and false and fraudulent representations. The defendant answers (1) that the specimens were his property by reason of having been extracted from his land, and (2) by virtue of an agreement entered into between him

and the plaintiff, whereby, upon an ascertainment of values and an accounting, defendant was to pay plaintiff one half of the excess value, if any should appear, between the rock delivered to defendant and that disposed of by plaintiff. The evidence shows that two trees standing nearest the place of discovery bear some old marks, consisting of one or more blazes, as if made with an ax, and indentations having the appearance of being struck with a hammer or some blunt instrument; that another has been partially peeled, apparently at a more recent date; that many trees and shrubs

more than does hiding it under the ground near a marked tree. Notwithstanding the fact, therefore, that the court, in the later case, speaks of the rule as to lost or abandoned property as "very well understood" in that jurisdiction, the cases, taken together, do not seem to leave it entirely beyond doubt.

The *Sovern Case*, which is also referred to, was one in which the question did not arise between the finder of property and the owner of the soil as such, but as between the administrator of the original owner of money, who had hidden it under the floor of a barn upon her own premises, and a subsequent owner of the premises, upon which the money was found after the death of the original owner.

A boat which had probably been buried two thousand years, and presumably had been abandoned or left derelict by its original owners on what is now the bank of the River Ancholme, with the result that it eventually became buried in the earth by the operation of natural causes, such as by sinking in the ooze and the deposit of alluvial soil, was discovered, a few years since, and excavated, by a gas company, which was in possession of the premises under a lease of ninety-nine years. Suit was brought by the lessor claiming that the boat was his property, and the court held that the boat, whether regarded as a mineral which was included within a reservation of minerals to the lessor, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor, even though he was ignorant of its existence at the time of granting the lease. But this, though it was a case of property embedded in the soil, involved nothing which suggested that the buried boat had been hidden or left where it was with any intent to assert ownership thereof subsequently. The case is, therefore, of little importance on the question of rights in property that has been hidden. *Elwes v. Brigg Gas Co.* L. R. 33 (Ch. Div. 562, 55 L. J. Ch. N. S. 734).

Valuable earthenware, which was discovered and taken out of the soil of a farm in which it had long been buried, without anything to show under what circumstances it was deposited there, or who was the original owner, was claimed by the executor L.R.A. (N.S.)

utors of the owner of the farm, in an action against the person who was charged to have unlawfully taken the property out of the soil and retained it. But the court held that the action would not lie, because the plaintiffs could not recover as executors, since whatever title the testator had had passed to devisees, and that the plaintiffs, in their individual capacity, were only tenants in common with others who were not joined. *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13. But the court also laid down the law of the subject as follows: "If personal property is deposited beneath the surface of the soil, and so left until the place where it is so deposited is forgotten, and the owner thereof, if living, or his personal representatives, if he is dead, cannot be found, such personal property, so in the possession of the owner of the soil, becomes, as a part of the soil, the property of the owner of the real property; and such personal property passes by gift, sale, or descent of said real property as a part thereof. When it is discovered and removed from the soil, as against everyone but the owner it becomes the personal property of the owners of such real property, and not the property of the finder thereof." The doctrine of the decision in this case is in substantial agreement with the conclusions of the court in *Ferguson v. Ray* and the English case of the buried boat, just referred to above. It would also permit a distinction between these cases and the *Danielson Case*, if, in that case, the hidden money had not become embedded in the soil; but as to this fact, the report says it was dug up from about 3 or 4 inches below the surface, and that the ground around it was quite solid.

On the general question of the right of the true owner of property to claim it from the finder on proof of his ownership, the authorities are many. As stated in an extensive discussion of this question in a note in 37 L. R. A., page 117, "there seems to have never been any question that an action would lie in favor of the owner in case the finder refused to deliver the property to him. In fact the word 'trover,' which was applied to actions to recover for the conversion of property, is from a word meaning 'to find' (*Bouvier, Law Dict. Trover*), and the fiction of the action is that defendant found and converted the property to his own use."

in the vicinity contain the marks of an ax, and that many more have been cut away and made into wood. The plaintiff testified, touching the ore, that "it had the appearance of having been placed there at some time long ago." Another witness testified that the quartz had at one time been connected with the vein, and had been broken out; that there were indications of the marks of a pick or a hammer upon portions of it, as it had the appearance of having been bruised, and that the break was evidently very old; and still another (using his language): "I found evidence of some kind of old cloth there,—duck cloth. The ground was stained around a small place there, of a dark brown stain. I even found a few old duck ravelings—their impression—on the dirt I dug up. They were decayed through until they would not hold together, and the ground about it for a space of 4 or 5 feet was stained with this dark brown stain, or about the color of it, and parts of it showed prints of old cloth of some kind, and a few old ravelings that were perfectly rotten. I tried to pick them up, and they would not hold together." No evidence was adduced of a different trend or tendency relative to the finding or the place thereof, or of the circumstances and conditions attending either. Upon this condition of the record, defendant moved for a nonsuit, which being denied, and judgment having been rendered adverse to him, he brings this appeal.

Messrs. William D. Fenton, Austin S. Hammond, and A. E. Reames, for appellant:

The rock was real estate. Real estate includes everything within or beneath the soil.

19 Am. & Eng. Enc. Law, p. 1032; 1 Kerr, Real Prop. §§ 22-90; 18 Am. & Eng. Enc. Law, 2d ed. p. 140.

The rock belonged to the defendant as owner of this soil.

Elwes v. Brigg Gas Co. L. R. 33 Ch. Div. 562; South Staffordshire Waterworks v. Sharman, 65 L. J. Q. B. N. S. 460 [1896] 2 Q. B. 47; Queen v. Rowe, 28 L. J. Mag. Cas. N. S. 128, 32 L. T. 339, 7 Week. Rep. 236; Goddard v. Winchell, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481, 52 N. W. 1124.

The defendant was entitled to the possession of the rock as owner of the premises.

Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644; McAvoy v. Medina, 11 Allen, 548, 87 Am. Dec. 733; People v. M'Garren, 17 Wend. 460; Kincaid v. Eaton, 98 Mass. 139, 93 Am. Dec. 142; Livermore v. White, 74 Me. 452, 43 Am. Rep. 1 L.R.A. (N.S.)

600; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; State v. McCann, 19 Mo. 249.

Where a contract is pleaded, it cannot be shown to be invalid for duress, unless the duress is specially pleaded.

7 Enc. Pl. & Pr. pp. 247-251.

It is not duress to threaten prosecution for supposed wrong.

Thorn v. Pinkham, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; Hilborn v. Bucknam, 78 Me. 485, 57 Am. Rep. 816, 7 Atl. 272; Bodine v. Morgan, 37 N. J. Eq. 426; Landa v. Obert, 45 Tex. 540; Knapp v. Hyde, 60 Barb. 80.

Messrs. Enoch B. Dufur and Hayward H. Riddell, for respondent:

Personal property embraces all objects and rights which are capable of ownership, except freehold estates and incorporeal hereditaments, issuing thereout, or exercisable within the same.

18 Am. & Eng. Enc. Law, p. 408.

Title to personal property may be acquired by occupancy, or the taking possession with the intent to appropriate them, of things which before belonged to nobody, or of things abandoned or lost by unknown owners.

18 Am. & Eng. Enc. Law, p. 410.

Abandoned property becomes the absolute property of the first occupant.

1 Am. & Eng. Enc. Law, p. 2, note; Wyman v. Hurlbert, 12 Ohio, 81, 40 Am. Dec. 461.

The finder of lost property has the right to retain it against everyone except the rightful owner.

7 Am. & Eng. Enc. Law, pp. 15-805; Armory v. Delamirie, 1 Strange, 504; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Bridges v. Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. N. S. 75; Lawrence v. Buck, 62 Me. 275; Clark v. Maloney, 3 Harr. (Del.) 68; Tatum v. Sharpless, 6 Phila. 18; New York & H. R. Co. v. Haws, 56 N. Y. 175; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Danielson v. Roberts, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627, 74 Pac. 913; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 604; Hoagland v. Forest Park Highlands Amusement Co. 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; Gardner v. 99 Gold Coins, 111 Fed. 552; Russell v. 40 Bales of Cotton, Fed. Cas. No. 12,154.

The place of finding is immaterial.

7 Am. & Eng. Enc. Law, p. 986; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Danielson v. Roberts, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627, 74 Pac. 913.

Possession under a claim of right will support a recovery for the value, against

one who interferes with the property without right.

Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

It was duress for the appellant to threaten the respondent with arrest and imprisonment to compel the delivery of the specimens.

Bellinger & C. Code (Or.) § 1777.

Wolverton, J., delivered the opinion of the court:

The theory upon which the cause is sought to be maintained is that the quartz, the subject of the dispute, was either lost or abandoned property, and that in either event plaintiff is entitled to its possession or value as against the defendant and all others except the true owner. As the property was found beneath the surface of the earth, not upon it, the question has been presented whether or not it is treasure trove. We are firmly impressed that it cannot be so considered. Treasure trove, and its legal status, according to Blackstone, "is where any money, or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown: in which case the treasure belongs to the King; but if he that hid it be known, or afterwards found out, the owner, and not the King, is entitled to it. Also if it be found in the sea, or upon the earth, it doth not belong to the King, but the finder, if no owner appears. . . . Formerly all treasure trove belonged to the finder, as was also the rule of the civil law. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the King; which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder." 1 Bl. Com. Lewis's ed. chap. 8, *295, 296. Bouvier gives the same definition, except that he adds that it includes not only gold and silver, but whatever may constitute riches, as vases, urns, statues, etc. Bouvier, Dict. Mr. Chief Justice Appleton declares that "nothing is treasure trove except gold or silver." *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600. So, according to an article found in the *Law Times* (vol. 81, p. 21), the prerogative of treasure trove is strictly limited, and touches only gold and silver plate and bullion, discarding the baser metals; and in *Elwes v. Brigg Gas Co.* L. R. 33 Ch. Div. 562, it is said that Roman coins, not being gold or silver coins, did not fall within the royal prerogative of treasure trove. A case has come to our notice where it seems 1 L.R.A. (N.S.)

to have been conceded that certain cups, a chalice, pyxes, and a paten, all of silver, were treasure trove (*Atty. Gen. v. Moore*, [1893] 1 Ch. 676), and another where solid gold rings and ornaments were so classed (*Queen v. Thomas*, 33 L. J. Mag. Cas. N. S. 22). In a case from Pennsylvania (*Huthmacher v. Harris*, 38 Pa. 491, 80 Am. Dec. 502) the court says, however, of treasure trove: "Though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver,—especially when they are found hidden with both of these precious metals." This is manifestly an enlargement of the common-law idea of the term, and we have been unable to find any cases that go beyond it. We find expressions by Chancellors Walworth and Kent, however, that would seem to give it further scope, even to the extent of comprising all chattels or goods hidden. We quote from the former in *McLaughlin v. Waite*, 5 Wend. 405, 21 Am. Dec. 232: "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth, or in the sea, if no owner appears to claim them, it is presumed they have been intentionally abandoned by the former proprietor; and as such they are returned into the common mass of things, as in a state of nature." And from the latter in his *Commentaries* (2 Kent, Com. *357): "Nor does this right of acquisition [by finding] extend to goods found hidden in the earth, and which go under the denomination of treasure trove. Such goods, in England, belonged to the King." It is at once apparent, however, that neither of these distinguished jurists was attempting to define treasure trove, but was distinguishing it, as it respects the rights of the finder, from goods found upon the surface of the earth; hence that they intended no innovation upon the common-law idea of the term. Indeed, Chancellor Walworth cites as his sole authority from volumes 1 and 2 of Blackstone's *Commentaries*, the substance of which, as it relates to the subject in hand, we have quoted above; and it is only upon the principle indicated that the citation supports him at all. But without further reference to the authorities, or attempting to define more precisely the scope and meaning of the term "treasure trove," we may very safely conclude that, in view of the nature of the

property in controversy, it does not fall within the classification. It is neither gold nor bullion. It is simply what may be correctly denominated gold-bearing quartz. The testimony varies touching the relative weight of the gold as compared with the rock in which it is carried, the estimates ranging from one fourth to three fourths; but it is manifest that in either extreme it cannot be fitly or properly styled bullion, and there is clearly nothing else that will give it the stamp of treasure trove.

This brings us back to the real controversy: Was it lost or abandoned property, or, rather, does the evidence suffice to carry the case to the jury upon that contention? The novelty of the affair is such as to induce hesitation, and to involve us in some doubt, but a careful survey of the authorities impresses us that it cannot be characterized as either lost or abandoned in the sense that the finder is entitled to its possession or ownership as against the owner of the soil. Nor do we think that any reasonable inference that such is its nature and character can be deduced from the evidence, and the case therefore is not one proper for the jury to pass upon. It has been very well understood in this jurisdiction, since the case of *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, and the more recent one of *Danielson v. Roberts*, 44 Or. 108, 65 L. R. A. 528, 102 Am. St. Rep. 627, 74 Pac. 913, what is meant by lost or abandoned property. To lose is casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event; and, if the property is found on the surface of the earth, the conditions suggest that it has been intentionally abandoned, and as such has returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing (1 Bl. Com. Lewis's ed. chap. 8, *295, 296; 2 Bl. Com. Lewis's ed. chap. 26, *402; 2 Kent, Com. *356; *McLaughlin v. Waite*, 5 Wend. 405, 21 Am. Dec. 232), the distinction between losing and abandonment being that one is involuntary, while the other is by intent or design. But the result, as it relates to the property, is practically the same, the owner not appearing to lay claim to it. In the one case the finder has the right to the possession against all except the true owner. In the other he acquires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier, the presumption being disputable by the rightful owner. Such presumption or inference does not obtain as to property intentionally left or de-

posited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory, or want of memory, of the owner as to the locality at any given moment. "In such case," says Baron Parke, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." The principle is amply illustrated in the cases. In *Lawrence v. State*, 1 Humph. 228, 34 Am. Dec. 644, a customer placed his pocketbook on a table in a barber shop, and, his attention being attracted to the outside, went out, forgetting it. The barber discovered the pocketbook and attempted to appropriate it, and it was held that it was not lost property. In *McAvoy v. Medina*, 11 Allen, 548, 87 Am. Dec. 733, the plaintiff picked up a pocketbook in a barber shop, and handed it to the barber, but, the owner not appearing to claim it, sued to recover it. In disposing of the case Mr. Justice Dewey says: "This property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there, and has never called for it. The plaintiff also came there as a customer, and first saw the same, and took it from the table. The plaintiff did not, by this, acquire the right to take the property from the shop, but it was rather the duty of the defendant . . . to use reasonable care for the safe-keeping of the same until the owner should call for it." See also, *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. 460. The circumstances must be such, considering the place and the conditions under which the property was found, as to lead to the inference that the property was casually or involuntarily left where found, or there can be no losing. This is well illustrated by the case of *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528. Plaintiff bought an old safe, and left it with his agent to sell, who in turn left it with defendant for a like purpose. The defendant, in looking through it, found a roll of bills, amounting to \$165, between the wooden lining and the sheet-iron exterior, which could only have gotten or been placed there through a large crack in the lining. The court said: "We think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it

was found, but that, being left in the safe, it probably slipped, or was accidentally shoved, into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit." The circumstances and conditions of the place where found afforded the *indicia* from which the inference of a losing was deduced. Now, in the case at bar, the quartz was not found on the surface of the earth. True, a small piece or so was picked up from the surface, but, if this were all, there would have been no controversy. The remainder was found imbedded in the earth, and the presumption that it was lost, which attends property found on the surface of the earth, is wanting, so that there was no inference for the jury, deducible from the place of finding and the conditions of the property, that it was lost property. Indeed, the evidence, it would seem, refutes any such presumption or inference. The property was valuable. It had certainly at some time previous been detached by human agency from a ledge, its natural place of deposit; and the evidence that it was once contained in a bag of some kind of cloth, and that trees nearest the place of finding bore some old marks, apparently made by design to aid in locating the property, would indicate that it was voluntarily deposited where found. What effect the elements have had upon the conditions and position in which it was left could only be the merest conjecture. In any event, there could be no inference of a losing or abandonment from the conditions present at the finding, and this is all the knowledge we have respecting the matter; so that the case was not such as was proper to be left to the jury for their determination upon the theory that the property was lost or abandoned. The case, to our minds, falls within the principle of a class of cases which we will now notice, and which counsel for defendant rely upon as controlling. The one most nearly illustrative is *South Staffordshire Waterworks v. Sharman*, 65 L. J. Q. B. N. S. 460. The subject of the controversy there was two gold rings found by a laborer in a pool upon the premises of his employers. He was engaged in cleaning out the pool, and, after throwing out large quantities of mud, came across the rings and some other articles of interest. Lord Russell, in announcing his opinion, quotes from Pollock and Wright on Possession in the Common Law, pp. 40, 41, as follows: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere,

the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence." "It is free to anyone who requires a specific intention: a part of *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorized interference." And then says: "It is upon the principle, expressed in this [the latter] passage, that I base my judgment, for it shows the broad distinction between the present case and the case contemplated in the passage cited to us in course of the argument from Blackstone's Commentaries, showing that a jewel cast into the sea or on the public highway could not be said to be in the possession of anyone, because no one had a right to exclude another from the public place;" and concludes as follows: "The general principle is that where anyone is in possession of house or land which he occupies, and over which he manifests an intention of exercising a control and preventing unauthorized interference, and something is found in that house or on that land by a stranger or a servant, the presumption is that the possession of the article found is in the owner of the *locus in quo*." Another case is noted in Law Notes (vol. 7, No. 8, p. 160), decided by Supreme Court Justice Forbes, of New York; not so authoritative as the preceding one, as it does not come from a court of appeals, but the principle is recognized. Some ancient dishes, supposed to have been buried by Col. Edmeston, an officer in the French-Indian war, one hundred and fifty years ago, at a time when he was obliged to flee from the Indians, were recently plowed up, and it was held as to them to be well established that where a thing is imbedded in the soil the right to it is in the owner of the land, unless it is of such a character as to constitute treasure trove. Other cases announcing the same principle are *Elwes v. Brigg Gas Co.* L. R. 33 Ch. Div. 562; *Reg. v. Rowe*, Bell, C. C. 93. Now, we have here property not treasure trove, found imbedded in the soil under circumstances repelling the idea that it has been lost. How long a time it had been in the place where found is conjectural, of course, but it had probably been there many years,—long enough, at least, that only a trace of the cloth bag that once contained it was left; and the ownership of the land where found is in the defendant. Being in the possession of the land, and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, as was announced by Lord Russell in *South Staffordshire Wa-*

terworks v. Sharman 65 L. J. Q. B. N. S. 480, that "the presumption is that the possession of the article found is in the owner of the *locus in quo*."

There was error, therefore, in denying the nonsuit, and the judgment appealed from will be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

Petition for rehearing denied.

OREGON SUPREME COURT.

P. F. FOUTS, Resp't.,

v.

HOOD RIVER, Appt.

(..... Or.)

1. Constitutional law—local option—taking effect.

The taking effect of a law cannot be made to depend upon the vote of the people under a constitutional provision that the taking effect of no law shall be made to depend upon any authority, except as provided by the Constitution, which merely authorizes the ratification by the people of the bill adopted by the legislature.

2. Same.

A statute providing the machinery by which the suspension of the law providing for the issuing of licenses for the sale of intoxicating liquor in cities and in incorporated towns may be secured, so that a majority of the voters of the precinct, ward, or

district involved may determine that such sale shall be absolutely prohibited in the district, becomes effective by the act of the legislature, and not by the vote of the people, and is not, therefore, prohibited by a constitutional provision that no law shall be passed the taking effect of which shall be made to depend upon any authority except as provided by the Constitution.

3. Same.

The intentional omission of prohibitory liquor laws from the list of laws the taking effect of which the Constitution permits to depend upon the vote of the people does not prevent the legislature from passing a statute providing the machinery by which license laws may be suspended by vote of the people.

(July 3, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Wasco County in favor of plaintiff in an action brought to recover the unearned license tax upon the termination of a license by the adoption of the local-option law. Affirmed.

The facts are stated in the opinion.

Mr. John McCourt, for appellant:

Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as statutes enacted by the legislature.

Kadlerly v. Portland, 44 Or. 146, 74 Pac. 710, 75 Pac. 222.

The local-option law is a general law.

Mathis v. Jones, 84 Ga. 812, 11 S. E. 1018; Blackwell v. State, 36 Ark. 178; State

Case Note.—The question whether a local-option law takes effect upon its enactment by the legislature, or whether its taking effect is contingent on its adoption by popular vote, has been largely discussed in passing upon the objection to the constitutionality of such legislation as a delegation of legislative power.

Upon this point, Black on Intoxicating Liquors, § 45, says: "The ground of objection most frequently urged against such laws is that they amount to an unlawful delegation of legislative power to the people. This, however, is based upon a misconception of the legal effect of the popular vote. If the law is complete in itself, it is the legislature which enacts it, not the people, although the people are permitted to determine the contingency on which its going into effect in a particular locality may depend. . . . But the law, to escape the charge of unconstitutionally delegating legislative power, must be a complete and perfect enactment as it leaves the hands of the legislature. It must not depend upon the expression of the popular will in respect either to its validity or its terms. Certainly the lawmaking body would have no power to authorize the people of a district to decide what kind of a liquor law they will have. 1 L.R.A. (N.S.)."

Nothing can be referred to the voters but the question whether they will adopt the particular law which the legislature enacts."

It may be remarked, in passing, that local-option laws have been sometimes sustained upon the ground that, admitting them to be a delegation of legislative power, the subject is within the class of police regulations, in respect to which it is proper that the local judgment should control. See Cooley, Const. Lim. 7th ed. p. 174; Anderson v. Com. 13 Bush, 485; State v. King, 37 Iowa, 462; State, Paul. Prosecutor v. Circuit Judge. 50 N. J. L. 585, 1 L. R. A. 86, 15 Atl. 272; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 3 L. R. A. 355, 41 N. W. 746.

The reasoning of those cases which hold that local-option legislation is made effectual by act of the legislature, and not by the vote of the people, is fully set forth by the quotations in the opinion in Fouts v. Hood River.

The language of the court in Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63, is also in point: "It is evident, we think, that the act whose constitutional validity is called in question was a complete law when it had passed through the several stages of legislative enactment, and derived

ex rel. Maggard v. Pond, 93 Mo. 606, 6 S. W. 469; Ex parte Swann, 96 Mo. 44, 9 S. W. 10; Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; State, Paul, Prosecutor, v. Circuit Judge, 50 N. J. L. 585, 1 L. R. A. 86, 15 Atl. 282.

Section 21, art. 1, of our Constitution was designed to prohibit the taking effect of prohibitory liquor laws upon the authority of a popular vote.

Where the sovereign power of the state has located the authority, there it must remain until the Constitution itself is changed.

Cooley, Const. Lim. p. 137.

Mr. W. H. Wilson, for respondent:

The proper construction of § 21, art. 1, of the Constitution of Oregon is the same that is given to state Constitutions generally, to

the effect that legislative authority cannot be delegated.

Locke, Civil Government, 142; Cooley, Const. Lim. 163; Arms v. Ayer, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357, 61 N. E. 851; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738; Bradshaw v. Lankford, 73 Md. 428, 11 L. R. A. 582, 25 Am. St. Rep. 602, 21 Atl. 66; State v. Weir, 33 Iowa, 134, 11 Am. Rep. 115; Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425; Willis v. Owen, 43 Tex. 41; Farnsworth Co. v. Lisbon, 62 Me. 451.

The local-option law became a law and took effect when the same was adopted by a majority of the voters at the June, 1904, election, and the result thereof was ascertained and determined.

Sutherland, Stat. Constr. 68; Locke's Ap-

none of its validity from a vote of the people. In all its parts it is an expression of the will of the legislature, and its execution is made dependent upon a condition prescribed by the legislative department of the state. By its terms, it was made to take effect from and after its passage. . . . So far from the vote of the electors breathing life into the statute, it is only through the statute that the electors are entitled to vote at the special election. While they are free to cast their votes, the consequence or their aggregate vote is fixed and declared by the act of the legislature. The penal sanction of the act is subject to no modification by the action of the electors; and it is an elementary principle that 'the main strength and force of law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.' 1 Bl. Com. 57."

A leading case on the opposite side of the question is Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425, where the statute under consideration provided that, if a majority of ballots should be cast "against license" at a special election called upon petition of one fourth the voters of any township, incorporated city, or town then no license to retail liquor should be there granted; and that it should thereafter be unlawful for any person to sell, etc., until at a subsequent election a majority should vote in favor of license; and established a penalty for such unlawful sale. The court said: "It is urged, however, that for the legislature to enact that a law shall take effect, provided the people of the state, or of a district, shall vote in favor of it, is not to delegate the lawmaking power. This position has been upheld by courts of high character, but I think the decisions in which it has been denied are sustained by the better reasons. It is true, a statute may be conditional; its taking effect may sometimes be made to depend upon a subsequent event. . . . But it does not follow that a statute may be made to take effect upon the happening of any subsequent event which may be named in it. The event must be one which

shall produce such a change of circumstances as that the lawmakers, in the exercise of their own judgment, can declare it to be wise and expedient that the law shall take effect when the event shall occur. The legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies. To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient. Can it be said in such case that any member of the legislature declares the prohibition or enactment to be expedient?"

Another case is Thornton v. Territory, 3 Wash. Terr. 482, 17 Pac. 896, in which the argument is that the vote under the local-option law operates to repeal the general license law. And the court further says: "It has been said that the law is in force from the date of its passage, but takes effect only upon the happening of the contingency of a petition and election resulting in a certain way. If this be the contingency, then a law can be made to go into effect at the option of those subject thereto. If a law goes into effect only at the option of those subject thereto, then it is not mandatory. Can that be law which is not mandatory, and from the terms of which it cannot be discovered whether the rule of action exists, or whether there exists a penalty for the violation of this rule?"

But that the great weight of authority is unquestionably in favor of the validity of such statutes is expressly stated in Savage v. Com. 84 Va. 619, 5 S. E. 565; Com. v. Weller, 14 Bush, 218, 29 Am. Rep. 407, and Schulherr v. Bordeaux, 64 Miss. 59, 8 So. 201. To the numerous cases cited in *FOURTS V. HOOD RIVER* which support such legislation, may be added Feek v. Bloomingdale, 82 Mich. 393, 10 L. R. A. 69, 47 N. W. 37; Cain v. Davie County, 86 N. C. 8, and Bancroft v. Dumas, 21 Vt. 456.

peal, 72 Pa. 495, 13 Am. Rep. 716; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 90; Weir v. Cram, 37 Iowa, 653; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Dalby v. Wolf, 14 Iowa, 229; State ex rel. Witter v. Forkner, 94 Iowa, 1, 28 L. R. A. 206, 62 N. W. 772; Savage v. Com. 84 Va. 619, 5 S. E. 565; Com. v. Bennett, 108 Mass. 27; Fell v. State, 42 Md. 71; Hammond v. Haines, 25 Md. 541, 90 Am. Dec. 77; Garrett v. Aby, 47 La. Ann. 618, 17 So. 238; Anderson v. Com. 13 Bush, 485; Groesch v. State, 42 Ind. 547; Ginz v. State, 44 Ind. 218; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 3 L. R. A. 355, 41 N. W. 746; State v. Wilcox, 42 Conn. 364, 19 Am. Rep. 536; State v. Cooke, 24 Minn. 247, 31 Am. Rep. 344; Schulherr v. Bordeaux, 64 Miss. 59, 8 So. 201; State, Paul, Prosecutor. v. Circuit Judge, 50 N. J. L. 585, 1 L. R. A. 86, 15 Atl. 272.

Wolverton, Ch. J., delivered the opinion of the court:

The single question presented in this case is whether what is known as the "local-option act," initiated with and adopted by the people, is constitutional. It is urged by the appellant that it is not, for the reason that by its terms it is made to take effect, if at all, upon the popular vote of the locality or localities within which it is sought to have it apply or become operative. This feature, it is urged, is inimical to § 21, art. 1, of the Constitution, which reads as follows (omitting the proviso): "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." The cardinal provisions of the act necessary for us to take note of now are as follows: "Whenever a petition therefor, signed by not less than 10 per cent of the registered voters of any county in the state, or subdivision of any county, or precinct of a county, shall be filed with the county clerk of such county in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, and in the entire district mentioned in such petition, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision of such county, or in such precinct." Or. Laws 1905, p. 41. "The petition therefor shall be filed with the county clerk not less than thirty nor more than ninety days before the day of election. In every county, subdivision of county, or precinct thereof, that shall return a majority vote for prohibition in November, 1904, the law shall take effect on the 1st day of 1 L.R.A. (N.S.)

January, 1905. In all succeeding elections, the law shall take effect on the 1st day of July following the day of election." Id. p. 43. Only qualified electors are permitted to vote at such elections. Ample provisions are then made for holding elections under the act. On the tenth day after any election so held the county clerk is required to take to his assistance two justices of the peace, and proceed to open the returns, and make an abstract of the vote for the information of the county court; and the court is required on the eleventh day after the election, or as soon thereafter as practicable, to hold a special session, and, if a majority of the votes thereon in the county as a whole, or in any subdivision of the county as a whole, or in any precinct in the county, are for prohibition, it shall immediately make an order declaring the result of such vote, and absolutely prohibit the sale of intoxicating liquors within the prescribed limits, except for the purposes and under the regulations specified in the act, until such time as the qualified voters therein at a regular election held for the purpose by a majority decide otherwise, and thereafter it shall be unlawful to sell, exchange, or give away any intoxicating liquor within the territory included within said prohibitory order, except as in the act provided. By § 11 (p. 47), it is further provided that, if a majority voting at any election held under the act vote against prohibition, the court shall make an order declaring the result, and have the same enrolled in its records. Further provision is made that, after the election has been held and the result declared, no subsequent election shall be held before the second calendar year thereafter; and that, when such subsequent election results against prohibition, then that the court shall enter an order setting aside the previous order enforcing it. A penalty is denounced against violations of the act.

There exist among the earlier adjudications directly opposing opinions as to the constitutionality of a statute which has been referred to the people to determine whether it shall become a law or not under Constitutions vesting legislative authority merely in a legislative assembly, without other provisions qualifying or limiting such authority. Rice v. Foster, 4 Harr. (Del.) 479; Maize v. State, 4 Ind. 342; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Geebrick v. State, 5 Iowa, 491; Baltimore v. Clunet, 23 Md. 449; People v. Collins, 3 Mich. 343; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; Parker v. Com. 6 Pa. 507, 47 Am. Dec. 480; Bancroft v. Dumas, 21 Vt. 456; State v. Parker, 26 Vt. 357; Bull v.

Read, 13 Gratt. 78. As if to set the principle at rest by explicit declaration, our Constitution has provided: "Nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." [Art. 1, § 21.] Indiana has the same provision in her Constitution, which has there received judicial construction, not fully but in a measure, to the purpose that a law made to take effect or not, dependent upon the popular will or vote of the people, is inimical to the clause, as being made to take effect by dependence upon other authority than that provided in the Constitution. *Maize v. State*, *supra*. This, we take it, should be so upon principle. Under our form of government the people have delegated to the legislative assembly, the lawmaking body, the power and authority to enact laws. The legislature must itself exercise the power. It cannot delegate it to any other authority. Since the adoption of the initiative and referendum amendment to the Constitution, however, the people have reserved to themselves the power to initiate an act, and to adopt or reject it by popular vote, and a bill adopted by the legislature may be referred to the people for their ratification; but the mode in this instance is the measure of the power. But where an act comes from the legislative assembly it may be affirmed, we think, under the clause of the Constitution above quoted that that body cannot leave it to a vote of the people to determine whether or not it shall become a law, because the taking effect thereof is thereby made to depend upon an authority other than that provided for in the Constitution. The proposition seems so clear that it is unnecessary to go further with the demonstration, but the pivotal and cardinal question here is whether the present legislation has been made by the act itself to take effect—that is, to become a law—dependent upon a vote of the people. It may be assumed, as counsel for appellant asserts, that the act is general, as contradistinguished from local or special, and such appears really to be its purpose and intentment. It might be further observed, however, that the subject-matter thereof does not fall within the category of cases concerning which local or special legislation is inhibited by § 23 of article 4 of the Constitution. In the case of *Maize v. State*, *supra*, a law similar in its provisions to this one was declared inimical to the Indiana Constitution, but it was not on account of the clause we now have under consideration alone, but as read in connection with another clause, which provided that, "whenever a general law can be made applicable, all laws shall be general and of uniform operation throughout the state;" 1 L.R.A. (N.S.)

the court regarding the subject as matter for general and uniform legislation, and not local or special. In a much later case from the same state (*Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185), where was considered a law providing for the submission to the people of a county or township whether a tax should be levied and an appropriation made to aid in railroad construction, and wherein was not involved the requirement that the law should be of general application, the court held it to be valid and operative, notwithstanding a contention that it was made to take effect upon an authority otherwise than as provided in the Constitution. The *Maize* Case was distinguished upon the ground that the subject there treated of was matter for general legislation, while the act then under consideration did not fall within such classification. A similar act, applying to incorporated cities, authorizing an issue of bonds to pay for subscriptions to stock of a railroad company to aid in the construction of the road upon a petition of a majority of the resident freeholders therein, had been theretofore held valid in *Thompson v. Peru*, 29 Ind. 305, although the act was general, the power being conferred upon all cities. By a still later case (*Groesch v. State*, 42 Ind. 547), involving a statute whereby the issuance of a license was made to depend upon securing a majority of the legal voters in the township or ward of a municipality, it was determined that the law was general, and of uniform operation throughout the state; and that it took effect by force of its enactment by the legislature, and not by authority of a majority of the legal voters in the locality where sought to be invoked. These are the Indiana cases bearing upon the question, and are noticed particularly as our Constitution is the same as hers touching the taking effect of an act.

Other cases from elsewhere hold that a law similar in its provisions to the one under consideration does not take effect or become a law by reason of the popular will, but that it is a law perfect in all its parts as it comes from the hands of the legislative assembly; that the election is prescribed by the law, not by the people, to determine its application and limitation; and that the expressed will of the people is but an appropriate contingency upon which the law shall depend for its operation. We cannot better state or discuss the doctrine involved than by quoting from the opinion of Mr. Justice Agnew in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716. The act there considered was by nature purely local, affecting only the twenty-second ward in the city of Philadelphia. He says: "What did the legislature, in this section, submit to the people, and what did

they not submit? This is quite as clear as any other part of the act. Each elector is to vote a ticket for license or against license. He is allowed by the law to say, 'I am for the issuing of license,' or 'I am against the issuing of licenses,' and thus to express his judgment or opinion. But this is all he was permitted by law to do. He declared no consequences, and prescribed no rule resulting from his opinion. Nor does the majority of the votes declare a consequence. The return of a majority is but of a mere numerical preponderance of votes, and expresses only the opinion of the greater number of electors upon the expediency or inexpediency of licenses in this ward. When this is certified by the return, the legislature, not the voters, declare 'it shall (or it shall not) be lawful for any license to issue for the sale of spirituous liquors.' Thus it is perfectly manifest this law was not made, pronounced, or ratified by the people; and the majority vote is but an ascertainment of the public sentiment,—the expression of a general opinion,—which, as a fact, the legislature have made the contingency on which the law shall operate. When the law came from the halls of legislation it came a perfect law, mandatory in all its parts, prohibiting in this ward the sale of intoxicating liquors without license, commanding an election to be held every third year to ascertain the expediency of issuing licenses, and, when the fact of expediency or inexpediency shall have been returned, commanding that licenses shall issue or shall not issue. Then what did the vote decide? Clearly, not that the act should be a law or not be, for the law already existed. Indeed, it was not delegated to the people to decide anything. They simply declared their views or wishes, and when they did so it was the fiat of the law, not their vote, which commanded licenses to be issued or not to be issued. . . . So long, therefore, as the legislature only calls to its aid the means of ascertaining the utility or expediency of a measure, and does not delegate the power to make the law itself, it is acting within the sphere of its just powers." This case overrules the earlier case of *Parker v. Com. supra*, which held to a contrary opinion. The identical principle is aptly stated and avowed as sound by Mr. Justice Wagner, speaking for the court, in *State ex rel. Dome v. Wilcox*, 45 Mo. 458, 464. He says: "Now, the legislature cannot propose a law, and submit it to the people to pass or reject it by a general vote. That would, indeed, be legislation by the people. But the proposition cannot be successfully controverted that a law may be passed to take effect on the happening of a future event or contingency. The future
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event—the happening of the contingency, or the fulfilment of a condition—affords no additional efficacy to the law, but simply furnishes the occasion for the exercise of the power. The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act. In the case we are now considering the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the Constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose, as their interest or will should dictate. If they elected not to avail themselves of its privileges, it did not in the least impair its force. It still stood a valid enactment on the statute book. If they organized under it, they were entitled to the benefit of its provisions; but in either event the law remained the same. There is no pretense, therefore, for saying that the law is objectionable because it depends for its efficacy on the vote of the people. This point must be ruled against the plaintiff in error." So, in the case of *Fell v. State*, 42 Md. 71, 85, 20 Am. Rep. 83, involving almost an identical statute with our own, it was declared that the question was not a new one in that state; the court further saying: "Now, what has been delegated to the voters by this act of assembly? Certainly not the power to make the law, or to repeal existing laws. They are called on by the first section simply to express, by their ballots, their opinion or sentiment as to the subject-matter to which the law relates. They declare no consequences, prescribe no penalties, and exercise no legislative functions. The consequences are declared in the law, and are exclusively the result of the legislative will. The act of assembly is 'a perfect and complete law as it left the halls of legislation and was approved by the governor;' but by its terms it was made to go into operation in any district upon the contingency of a majority of the legal voters within the district being ascertained to be in favor of the prohibition contained in the second section. The question before us therefore resolves itself simply into this: May the legislature constitutionally enact a law, and make its operation depend upon the contingency of the popular vote?" Answering the question, it was resolved in the affirmative, and to the same effect is a more recent case in New Jersey, involving a similar act. *State, Paul, Prosecutor, v. Circuit Judge*, 50 N. J. L. 585, 1 L. R. A.

86, 15 Atl. 272. So, also, in Iowa. *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 28 L. R. A. 206, 82 N. W. 772. See also, as announcing the same principle in that state, *Dalby v. Wolf*, 14 Iowa, 228, and *Weir v. Cram*, 37 Iowa, 649. Two earlier cases, holding to the doctrine for which the appellant contends, are distinguished, namely, *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, and *Gebrick v. State*, 5 Iowa, 491. We may remark, also, that the case in 5 Iowa was made to turn as well upon the constitutional provision that all acts of a general nature shall have uniform operation, which it was held the act there considered did not have. For other cases in harmony with the view entertained in *Locke's Appeal*, see *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Caldwell v. Barrett*, 73 Ga. 604; *Com. v. Weller*, 14 Bush, 218, 29 Am. Rep. 407; *Gayle v. Owen County Court*, 83 Ky. 61; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Dean*, 110 Mass. 357; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344; *Rohrbacher v. Jackson*, 51 Miss. 735; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201; *State ex rel. Dome v. Wilcox*, 45 Mo. 458; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *State v. Noyes*, 30 N. H. 279; *State ex rel. Sandford v. Common Pleas Court*, 36 N. J. L. 72, 13 Am. Rep. 422; *Clark v. Rochester*, 24 Barb. 446, 28 N. Y. 605; *State ex rel. Atty. Gen. v. O'Neill*, 24 Wis. 149. There are cases, of which *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, is perhaps the strongest, opposed to this view. It is true; but the very great weight, as the above numerous authorities will attest, is in support of it.

As the law stood at the time of the adoption of the act, no person was permitted to sell spirituous liquors in the state in less quantities than one gallon without having obtained a license from the county court of the proper county for the purpose, which provisions are without application to cities and incorporated towns. The mode prescribed for securing such license is for the applicant to procure the signatures of an actual majority of the whole number of legal voters in the precinct in which he is desirous of carrying on the business; and, upon the production of such a petition and a compliance with other provisions, the county court is authorized to grant the license. The cities and incorporated towns are governed in the issuance of licenses of the kind by their several charters and ordinances. All these provisions remain operative, and are unaffected by the local-option act, now under consideration, unless the people, by a majority vote in the precinct, ward, or district

involved, determine the contingency upon which the sale of intoxicating liquors shall be absolutely prohibited in such district. *Sandys v. Williams*, 80 Pac. 642, recently decided by this court. If the vote be against prohibition, then the old law—both the general statute and the local acts and ordinances pertaining to incorporated towns and cities—remains operative; but, if for prohibition, then its operation is suspended within the district until the people again vote against prohibition, as is firmly established by the foregoing authorities. The present law, when enacted, was complete in itself, requiring nothing else to give it validity. It became effective as a law from the time of its enactment. All its provisions were then susceptible of unrestricted operation. When the time came for 10 per cent of the voters of any authorized district to petition the county court to order an election, a way was provided and open; and so the very steps are prescribed in their regular order until an election determines the question of the expediency or in expediency of enforcing prohibition within the district involved. The law provides for all these things, and this it did as it came from the people duly adopted. It is not the election that breathes into the act its validity or vitality. The act is complete, and an active, living force without it; but the election as is designed, and which is constituted a part of the machinery of the law, does contribute to designate or determine the contingency upon which prohibition shall become operative or not, according to the popular will in the locality or localities where invoked. The new law is but supplementary to the old. It does not repeal or amend the old, or any portion of it, although it may suspend it for the time being, but not to eradicate it, or permanently to change its functions. *Schulherr v. Bordeaux*, *supra*. Suppose the two were adopted by the same statute, so that there was but one act instead of two or more, operating as an harmonious whole, would anyone doubt its constitutional efficacy or validity? It then would be license if applied for in the way prescribed, or prohibition, as the popular will might determine as to the expediency or in expediency in the premises. So it is now, and thus the matter is so simplified that none can fail to comprehend fully its operation. The wording of the act is not aptly devised, as it reads that "in every county, subdivision of a county, or precinct thereof, that shall return a majority vote for prohibition, . . . the law shall take effect on the 1st day of January," or "the 1st day of July," as the case may be; but the undoubted intentment is that prohibition shall become operative or not within the territory involved, depend-

ent on the contingency to be determined by a vote of the people concerned, and is clearly distinguishable on principle from the act which was declared invalid in the early case of *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506, because of the provision that "it should or should not become a law," dependent upon a majority vote of the people of the state. Such an act would have been clearly inimical to our Constitution, as being made to take effect upon authority other than that prescribed in the instrument itself. But not so here. The act being general, it is also such by nature as that it may have local operation, and is not inhibited, as we have before observed, by any provision of § 23 of article 4 of the Constitution. It does not, as is suggested, provide for a different rule for the punishment of crimes and misdemeanors, nor does it in any measure regulate the practice of the courts of justice. The crime or misdemeanor prescribed or created for a violation of the prohibition order is alike and uniform all over the state, and so it is with such as are prescribed for a violation of the old law if prohibition is not ordered. The suggestion is therefore untenable.

But it is urged that the proviso annexed to § 21, art. 1, indicated a different intentment than such as we are disposed to attribute thereto. After reciting, "nor shall any law be passed, the taking effect of which," etc., the section continues: "Provided that the laws locating the capital of the state, locating county seats, and submitting town and corporate acts and other local and special laws, may take effect or not, upon a vote of the electors interested." The argument of counsel is based upon the fact that an amendment was proposed in the convention by inserting after the word "acts" contained in this latter clause the words "prohibitory liquor laws," and was voted down; from which he concludes that it was the intentment that no prohibitory liquor law should be made to take effect upon a vote of the people. This is true in a sense. The mover of the amendment intended, no doubt, to create an exception to the preceding provision so as to permit prohibitory liquor laws to take effect or not upon a vote of the people,—that is, a general law providing for that, and nothing else; but as the section now stands, considered in connection with § 23 of article 4, there is nothing to prevent the adoption of a local or special law inhibiting the sale of intoxicating liquors within any precinct, county, ward, or city in the state; and the fact that the present law may become operative locally, and not generally, is aptly in accord with the very spirit and letter of the Constitution. We have come to this
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conclusion after a very careful consideration of the reading of the Constitution, and are convinced that its soundness is established upon principle by the vast weight of the more recent authorities. *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185, is especially instructive in this view.

With the wisdom, policy, and expediency of the legislation the courts can have nothing to do. That is a matter purely and solely for another department of state,—the lawmaking body, the legislative assembly,—or, under the initiative and referendum amendment, for the people themselves to determine, and their determination in that regard is final and conclusive, save by an appeal to the same authority or department.

The judgment of the Circuit Court should be affirmed, and it is so ordered.

Petition for rehearing denied.

TEXAS COURT OF CRIMINAL APPEALS.

MAX KELLER, Appt.,

v.

STATE OF TEXAS.

(.... Tex. Crim. App.)

1. Local option—sales in nonprohibitive territory.

Under a constitutional provision that the people of any locality may prohibit the sale of intoxicating liquors "within the prescribed limits" of the precinct or county, the legislature cannot prohibit the sale, in other

Case Note.—The view taken in the above case, that a command to the legislature to enact certain laws impliedly prohibits it from legislating on the subject in other particulars, which otherwise would have been within its power, is also supported by the following authorities: *Holley v. State*, 14 Tex. App. 505, holds that the express provision of the Texas Constitution, that the legislature shall enact a law whereby the qualified voters of any county, precinct, town, or city may determine from time to time whether the "sale" of intoxicating liquors shall be prohibited within the prescribed limits, impliedly prohibits the legislature from passing an act prohibiting the "gift" of liquor within the prescribed limits. *Stallworth v. State*, 16 Tex. App. 345, and *Steele v. State*, 19 Tex. App. 428, follow the *Holley Case* in denying the power of the legislature, under such constitutional provision, to prohibit the "gift" of intoxicating liquors. *Ninenger v. State*, 25 Tex. App. 449, 8 S. W. 480, holds that a provision for submitting to the people of any district the question of prohibiting the sale, or "exchange," of intoxicating liquors was beyond

localities, of intoxicants to be shipped into territory which has adopted prohibition.

2. Same—C. O. D. sales.

The legislature cannot enact that all C. O. D. sales shall be deemed to have been made at the place of destination, if it is local option territory, under a constitutional provision permitting the people of any locality to prohibit the sale of intoxicants within the limits of the town or precinct adopting the law.

3. Sale—shipment C. O. D.

The sale is completed where the order is received and filled, where a person in one place sends an order for intoxicating liquor to another place, to be sent C. O. D.

(Brooks, J., dissents.)

(April 12, 1905.)

A PPEAL by defendant from a judgment of the Hill County Court convicting him of violating the local option law. Reversed.

The facts are stated in the opinion.

Messrs. Collins & Cummings, for appellant:

The locus of a sale in a C. O. D. shipment is at the point of shipment.

Bruce v. State, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; Weldon v. State, 36 Tex. Crim. Rep. 34, 35 S. W. 176; Freshman v. State, 37 Tex. Crim. Rep. 127, 38 S. W. 1007; Weathered v. State (Tex. Crim. App.) 60 S. W. 876; James v. Com. 102 Ky. 108, 42 S. W. 1107; Treadaway v. State, 42 Tex. Crim. Rep. 466, 62 S. W. 574; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Specialty Furniture Co. v. Kingsbury (Tex. Civ. App.) 60 S. W. 1030; Mechem, Sales, §§ 726 et seq.; Black, Intoxicating Liquors, § 269.

Messrs. Etheridge & Baker, also for appellant:

A wholesale liquor dealer, legally conducting his business as such in a county where local option does not prevail, commits no offense by accepting and filling an order emanating from a party in a local-option county, requesting a C. O. D. shipment to him of a specified amount of liquor. In such case the sale is consummated at the domicile of the vendor, and no sale is made within the local-option territory.

the power of the legislature under the same provision. *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554, denies the power of the legislature, under such provision, to pass an act making it a crime to keep intoxicating liquor in cold storage, by one citizen for another, in a local-option territory. *State v. Gilman*, 33 W. Va. 146, 6 L. R. A. 847, 10 S. E. 283, holds the provision of W. Va. Const. art. 6, § 46, that laws may be passed "regulating or prohibiting" the sale of intoxicating liquors within the state, an implied prohibition against the power of the legislature to pass an act providing that no person shall, without a state license, "keep in his possession for another spirituous liquors." *People ex rel. Mooney v. Hutchinson*, 172 Ill. 486, 42 L. R. A. 770, 50 N. E. 599, holds the provision of Ill. Const. art. 4, § 6, that the general assembly shall apportion the state every ten years, beginning with 1871, by dividing the population as ascertained by the Federal census, a prohibition against a change in apportionment within the ten years. This case is cited in *Cooley*, Const. Lim. 7th ed. p. 115, in support of the principle that, if directions are given in a Constitution respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only. *Denney v. State*, 144 Ind. 503, 31 L. R. A. 726, 42 N. E. 929 holds the same way, under the provision of Ind. Const. art. 4, § 4, for an apportionment by the general assembly at its second session after the adoption of the Constitution and every six years thereafter.

There are other cases in opposition to such 1 L.R.A. (N.S.)

view. Koester v. Atchison County, 44 Kan. 141, 24 Pac. 65, holds the creation of county high schools not prohibited by the provision of Kan. Const. art. 6, § 2, requiring the legislature to establish a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments; even if high schools are not embraced in the latter provision. *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450, holds that the provision of Minn. Const. art. 8, § 1, that the legislature shall establish a general and uniform system of public schools, does not prohibit it from providing other public schools in addition to those included in the general system, nor from creating, by way of exception to the general uniformity, special school districts to meet particular and exceptional cases. *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 377, 27 So. 225, holds that the provision of Fla. Const. art. 16, § 30, requiring the legislature to provide for enforcing, "by adequate penalties and forfeitures," laws passed to prevent discrimination and excessive charges by common carriers, does not, by implication, prevent the legislature from authorizing the use of mandamus to enforce the duties imposed by such laws. *And Brown v. Com.* 98 Ky. 652, 34 S. W. 12, holds that the provision of Ky. Const. § 61, requiring the general assembly to provide, by general law, a means for taking the sense of the voters of any county, city, town, district, or precinct as to whether liquor shall be sold, does not deprive it of the power to permit or prohibit sales until such time as the sense of the people can be taken in the manner prescribed by law.

Ryan v. Missouri, K. & T. R. Co. 65 Tex. 16, 57 Am. Rep. 589; Fidelity Life Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; O'Neil v. Vermont, 144 U. S. 345, 36 L. ed. 460, 12 Sup. Ct. Rep. 693; Waples v. Overaker, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527; Voelcker v. McKay (Tex. Civ. App.) 61 S. W. 424; Specialty Furniture Co. v. Kingsbury (Tex. Civ. App.) 60 S. W. 1030; Pilgreen v. State, 71 Ala. 369; State v. Carl, 43 Ark. 353, 51 Am. Rep. 565; Irvin v. Edwards, 92 Tex. 258, 47 S. W. 719; Potts v. State (Tex. Crim. App.) 74 S. W. 31; Harkins v. State (Tex. Crim. App.) 75 S. W. 26; Black, Intoxicating Liquors, § 434, p. 510; Williams v. Feiniman, 14 Kan. 288; Haug v. Gillett, 14 Kan. 140; Banchor v. Warren, 33 N. H. 183; Boothby v. Plaisted, 51 N. H. 436, 12 Am. Rep. 140; 17 Am. & Eng. Enc. Law, 2d ed. pp. 300, 301; Carthage v. Duvall, 202 Ill. 234, 66 N. E. 1099; Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; Farmers' Phosphate Co. v. Gill, 69 Md. 537, 1 L. R. A. 767, 9 Am. St. Rep. 443, 16 Atl. 214; Sarbecker v. State, 65 Wis. 171, 50 Am. Rep. 624, 26 N. W. 541; State v. Intoxicating Liquors, 73 Me. 278; State v. Peters, 91 Me. 31, 39 Atl. 342; Com. v. Fleming, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; Sachs v. Garner, 111 Iowa, 424, 82 N. W. 1007; Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514; United States v. Lackey, 120 Fed. 577; De Bary v. Souer, 41 C. C. A. 417, 101 Fed. 425; Shuenfeldt v. Junkermann, 20 Fed. 357; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; State v. Cairns, 64 Kan. 782, 58 L. R. A. 55, 68 Pac. 621; State v. Flanagan, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; James v. Com. 102 Ky. 108, 42 S. W. 1107; Garbracht v. Com. 96 Pa. 449, 42 Am. Rep. 550; Higgins v. Murray, 73 N. Y. 252; Smith v. State (Ark.) 16 S. W. 2; Dunn v. State, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. 806; Crook v. Cowan, 64 N. C. 743; State v. Shields, 110 La. 547, 34 So. 673; Pearson v. State, 66 Miss. 510, 4 L. R. A. 835, 6 So. 243; Gross v. Scarr, 71 Iowa, 656, 33 N. W. 223; State v. Ascher, 54 Conn. 299, 7 Atl. 822; State v. Wingfield, 116 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; Kerwin v. Doran, 29 Mo. App. 397; State v. Colby, 92 Iowa, 463, 61 N. W. 187; State v. Peters, 91 Me. 31, 39 Atl. 342; Frank v. Hoey, 128 Mass. 263.

Messrs. Greenwood & Traylor and Howard Martin for the State.

Davidson, P. J., delivered the opinion of the court:

The facts disclose that appellant shipped from West, in McLennan county, to 1 L.R.A. (N.S.)

Pat Moore, at Hillsboro, in Hill county, some whisky C. O. D., on an order previously given by Pat Moore to appellant. The conviction occurred in Hill county for a violation of the local-option law. There is no question as to the fact that this was an ordinary C. O. D. contract or order. So we have practically the sole question as to where a sale under this character of contract occurs. Contracts are matters of fact, to be decided by the terms and stipulations of the contracts and intent of the contracting parties. Where the question of presumption may be one arising in the case, that presumption will be taken in favor of the accused, under the broad theory of the presumption of innocence and the reasonable doubt of guilt which obtains in all trials of criminal cases. Even in civil cases it will not be presumed that parties deliberately enter into an agreement or make a contract, knowing or intending that it shall be invalid or violative of the law. Ryan v. Missouri, K. & T. R. Co. 65 Tex. 16, 57 Am. Rep. 589. The place of sale often becomes a very material question in construing contracts. "The test is generally held to be the acquiescence or final agreement of minds by which the contract is concluded, and the place where that occurs is the place where the contract, for most purposes, is held to have been made." Fidelity Mut. Life Assn. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635. In Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274, it is said: "By the common law, if a seller make a proposition, and the buyer accept, and the goods are in the possession of the seller, and nothing remains to be done to identify them or in anyway prepare them for delivery, the sale is complete, and the property in the goods passes at once. The buyer acquires not a mere *jus ad rem*, but an absolute *jus in re*, and he may demand delivery at once on tender of the price, and sue for the goods as his own if delivery be refused. . . . The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed before the property can pass. . . . Until this be done, it is merely a sale without a subject-matter *in esse*, which cannot take effect *in presenti*." So, where the party sells a certain stipulated amount of property, to be segregated from a general stock, the sale is complete when the amount of property agreed upon has been so set apart, and the title at once passes to the buyer. However, if there are other conditions to pass title, it will not pass until compliance with such conditions. For instance, if, in addition to the segregation from the general stock, it is stipulated that the seller shall convey

and turn it over to a common carrier, the title will not pass until it has been received by the common carrier. This was decided in *Woods v. Half*, 44 Tex. 633. After it has then been received by the common carrier, the title is in the purchaser.

In *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527, appellants were millers doing business in the city of Sherman, and contracted with appellees to buy wheat at the market price in Collin county, where they lived. Seven car loads of wheat were bought by appellees under this contract, and shipped to appellants, who refused to receive the wheat on its arrival at Sherman. The court said: "There may have been such constructive delivery and existence of such other facts as would have vested title to the wheat in appellants; but they cannot claim, under the facts shown, that such an absolute delivery had been made as would defeat the lien of appellees for the purchase money." Again: "As the wheat stood in the cars, appellants refusing to receive and pay for it, it was the right of appellees to hold it until its price was paid, as they might have done, had the wheat not been shipped to Sherman. Appellants having refused to receive and pay for the wheat, appellees might have retained it, and recovered the difference between the contract price and the market price at time and place of delivery, or they might have held the property for appellants at their risk, and recovered the purchase money," etc. See also *Voelcker v. McKay* (Tex. Civ. App.) 61 S. W. 424.

In *Specialty Furniture Co. v. Kingsbury* (Tex. Civ. App.) 60 S. W. 1030, the court, speaking through Judge Pleasants, said: "The contract of sale was complete when appellant accepted the order for the goods, and a delivery of the goods on the car at Evansville, Indiana, would have been a delivery to the appellee, and the title to the goods would have passed to appellee by such delivery."

In *Irvin v. Edwards*, 92 Tex. 258, 47 S. W. 719, there was a contract between Irvin and Jennings by which Irvin contracted to sell Jennings certain cattle. A small portion of the purchase money was paid; the remaining instalments to be paid as the cattle were delivered. The cattle were not delivered until after the 1st of January, 1895; the contract having been entered into on the 18th day of the previous September. The question in the case was whether Irvin, the vendor, or Jennings, the vendee, was liable for the taxes for 1895 on the cattle. It was contended that, as possession was surrendered subsequent to January 1, 1895, Irvin was liable for the taxes. Suit was instituted by Irvin to restrain Sheriff Ed-
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wards from enforcing the collection of the taxes. The district court issued a temporary injunction, which was subsequently perpetuated. The court of civil appeals (45 S. W. 1026) reversed the judgment and dissolved the injunction. On writ of error the supreme court reversed the judgment of the court of civil appeals, and affirmed the judgment of the district court. Passing on the question, the supreme court uses this language: "The court of civil appeals held that, construing the whole instrument, the intention [that is, of passing the title] thus manifested was shown not to exist in fact, but that the parties intended the title should not vest until delivery should be made: It is true that only a part of the purchase money was paid at the time, and the contract prescribed that the remainder of the purchase money should be paid in instalments as the cattle should be delivered. This does not prove that the parties intended the title to remain in Irvin until delivery: It was not at all unusual in such transactions to so provide, but was a reasonable arrangement for completing the payments of the price."

In *Greif v. Seligman* (Tex. Civ. App.) 82 S. W. 534, this language is used: "In the absence of an express or implied agreement, it is the general rule that, as between the parties, if the goods are delivered to a carrier by a seller, it is a delivery to the buyer, and a *fortiori* to one specially designated, by the buyer. The rule is that stated in *Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787: 'When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser; or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected,—the goods, when delivered to the carrier, are at the risk of the purchaser; and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*.' If, however, there be an express agreement that the vendor must actually deliver the goods at the point of destination, and not to be paid for unless so delivered, it would be binding upon the parties; and a delivery to the carrier would not be sufficient. From the testimony of Julius Seligman, a jury might possibly be justified in concluding that such a contract was made. . . . Further, if it had been shown that no route had been designated, the delivery of the

goods to the carrier was a delivery to appellee, in the absence of an agreement requiring the actual delivery of the goods to appellee in Seguin. Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier, in the usual and ordinary course of business, transfers the property to the vendee. *Mechem, Sales*, § 736, and authorities cited."

Authorities along this line might be multiplied indefinitely.

Mr. Benjamin, in his work on *Sales*, 7th ed. § 362, says: "In 1803, in the case of *Dutton v. Solomonson*, it was treated as already settled law that, where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined, the delivery to the carrier is a delivery to the vendee, and the property vests immediately. And in the United States the law is established to the same effect;" citing in the note supporting this proposition 3 Bos. & P. 582, per Lord Alvanley, Ch. J. And see *Cork Distilleries Co. v. Great Southern & W. R. Co.* L. R. 7 H. L. 269; *Johnson v. Lancashire & Y. R. Co.* L. R. 3 C. P. Div. 499, where, under somewhat curious circumstances, the same rule was applied; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Pacific Iron Works v. Long Island R. Co.* 62 N. Y. 272; *Mee v. McNider*, 39 Hun, 345. On page 349 of the same work, in the note headed, "American Note. §§ 358-380," these cases are cited: "The American law fully agrees with the English that a delivery to a carrier, as directed by the purchaser, or as warranted by custom and usage, is such an appropriation as to bind the vendor, and make the goods the property of the vendee from the moment of such delivery; and the risk thenceforth is on him. This is so obvious as hardly to need any reference to the authorities; but see *The Mary*, 1 Wheat. 25, 4 L. ed. 27; *Stanton v. Eager*, 16 Pick. 467; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; *Bailey v. Hudson River R. Co.* 49 N. Y. 70; *Gutwillig v. Zuberbier*, 41 Hun, 361; *Stafford v. Walter*, 67 Ill. 83; *Whiting v. Farrand*, 1 Conn. 60; *Ranney v. Higby*, 4 Wis. 154, 5 Wis. 62; *Blum v. The Caddo*, 1 Woods, 64 Fed. Cas. No. 1,573; *Wing v. Clark*, 24 Me. 366; *Schmertz v. Dwyer*, 53 Pa. 335; *Putnam v. Tillotson*, 13 Met. 517; *Griffith v. Ingledew*, 6 Serg. & R. 429, 9 Am. Dec. 444; *Waldron v. Romaine*, 22 N. Y. 368; *Grove v. Brien*, 8 How. 438, 12 L. ed. 1146; *Hunter v. Wright*, 12 Allen, 548; *Kelsea v. Ramsey & G. Mfg. Co.* 55 N. J. L. 320, 22 L. R. A. 415, 26 Atl. 907; *Lawrence v. Minturn*, 17 How. 107, 15 L. ed. 61; *Clafin v. Boston & L. R. Co.* 7 Allen, 341; *Odell v. Boston & M. R. Co.* 109 Mass. 50; 1 L.R.A. (N.S.)

Johnson v. Stoddard, 100 Mass. 306; *Torrey v. Corliss*, 33 Me. 333, 336; *Armentrout v. St. Louis, K. C. & N. R. Co.* 1 Mo. App. 158; *Ober v. Smith*, 78 N. C. 313; *Philadelphia & R. R. Co. v. Wireman*, 88 Pa. 264; *Summeril v. Elder*, 1 Binn. 106; *Swanke v. McCarty*, 81 Wis. 109, 51 N. W. 92; *Whitman Agri. Co. v. Strand*, 8 Wash. 647, 36 Pac. 682; *Embree-McLean Carriage Co. v. Lusk*, 11 Tex. Civ. App. 493, 33 S. W. 154; *Taylor v. Victoria Co-Op. Store Co.* 26 N. S. 223, following *Fragano v. Long*, 4 Barn. & C. 219; *Falvey v. Richmond*, 87 Ga. 99, 13 S. E. 261, citing the Georgia cases; *Mann v. Glauber*, 96 Ga. 795, 22 S. E. 405; *Brooks v. Geo. H. Field Paper Co.* 94 Tenn. 701, 31 S. W. 160."

This has been settled law in Texas from the beginning. See also *Smith v. Whitfield*, 67 Tex. 126, 2 S. W. 822; *Ballinger Nat. Bank v. Bryan*, 12 Tex. Civ. App. 674, 34 S. W. 451; *Owens v. Clark*, 78 Tex. 550, 15 S. W. 101; *Stephens v. Adair*, 82 Tex. 222, 18 S. W. 102; *Hopkins v. Partridge*, 71 Tex. 608, 10 S. W. 214; *Downey v. Taylor* (Tex. Civ. App.) 48 S. W. 542. These authorities establish beyond controversy the law in Texas to be that wherever, under a contract, the goods are turned over to the common carrier or the transporting agent by the vendor, to be carried to the vendee, unless there be some contingencies defeating or withholding the title in the vendor, it immediately passes to the vendee; and the seller has the right to collect his money from the purchaser, although lost in transit. There are only a few cases in the United States which hold to the contrary, and none in Texas of which we are aware. The same rule applies to the ordinary C. O. D. shipment.

Mr. Justice Field, in *O'Neil v. Vermont*, 144 U. S. 345, 36 L. ed. 460, 12 Sup. Ct. Rep. 701, uses this language: "Transactions like those in controversy—that is, purchases of small quantities of goods upon orders, the packages to be shipped by the vendor, with a direction to collect the amount of the price on delivery—take place in this country every month to the amount of millions of dollars. Orders are sent all over the country for articles of small bulk; to California for fruits and wines, to Florida for oranges, to Kentucky for whiskies, and to the dealers in our large cities in general merchandise for small parcels of different kinds. They are transmitted without hesitation by the vendors upon the receipt of such orders, often even without knowledge of the parties sending them, their security being the retention of a lien upon the property shipped until the cash is actually paid. Amazement would strike the large class of merchants engaged in transmitting goods in

this way from one portion of the country to another if they were told that they thereby rendered themselves liable to the penal statutes of the states to which the goods were sent in compliance with the orders of the purchasers, and might be prosecuted for criminal offenses committed in those states, which they had never visited, and with whose laws they never intended to interfere." These views were subsequently adopted by the entire court in the case of *Norfolk & W. R. Co. v. Sims*, 191 U. S. 446, 48 L. ed. 256, 24 Sup. Ct. Rep. 151; and in the later case of *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182. This has now become the settled rule by the decisions of the Supreme Court of the United States.

The same rule is laid down in *Black on Intoxicating Liquors*. Section 267 of that work says: "It frequently becomes important to localize a sale of liquor, in order to determine whether the transaction must be regarded as taking place in the foreign state, where it would be lawful, or in the state of the forum, where it would be illegal. Many elements may enter into the determination of this question, but those most important to be considered are the place where the order was given, the place where delivery is made, and the character of the sale, as final or conditional." And in § 208 the same author says: "It is generally held that where a person living and doing business in one state sends his agent into another state to solicit orders for goods, and the agent there takes orders and sends them to his principal's place of business, and the latter fills the orders, and, without any special arrangement as to the manner and place of delivery, delivers them to a carrier in his own state, to be transported at the expense of the purchaser to the latter's place, the place of sale is in the state where the agent's principal does business." And in § 434 it is said: "The privilege conferred by a license to sell liquor is territorially restricted. And the license affords no justification for a sale made beyond the limits to which it is applicable. For instance, a person who has a license to sell in one county, and sells in another, may be indicted for selling without a license. In cases arising under this rule the vital question is almost always the determination of the place of the sale. And in this connection we find the following rules established or recognized by the best authorities: (1) Where a liquor dealer has a license from the city or county in which his store is kept, he may send out agents and take orders in any part of the state, for goods to be selected and forwarded from the stock kept in such store; and he is not

required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents.

(2) A licensed dealer, who receives at his place of business an order for liquor from a place in which he has no license, and fills it by selecting the liquor from his stock and delivering it to an express company or other carrier, to be carried to the purchaser, does not violate the license law, although the carrier agrees to collect and return the price; for the sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to the consignee. (3) Irrespective of the place where the bargain was made or the order received, if the seller, by his own hands or the hands of his servant or agent, carries the liquor to the purchaser, without any intermediate delivery to or through a common carrier, and delivers the liquor to the purchaser at the latter's place, and there receives the pay for it, the sale is made at the place of delivery; and, if the vendor is not licensed to sell there, he is indictable. (4) If an order for liquor is given by a person in A to an agent of a dealer, who has a license to sell liquor in B, and received by the agent subject to his principal's approval, and the liquor is put up by the seller, directed to the buyer at A, and delivered to a carrier at B, the sale is regarded as made at B, and is not unlawful."

In *Com. v. Fleming*, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622, the majority opinion held, in accordance with the views expressed by this court, commencing with *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683, that the sale is at the point of shipment, and not at the point of destination, and that the seller simply retains the lien upon the goods so shipped, and uses the C. O. D. method as a convenient one for the collection of the money,—the contract price. See also *Black, Intoxicating Liquors*, § 434. The doctrine is clearly declared in *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836, 17 S. E. 792. For a collation of some of the authorities supporting the decisions of this court, see 22 L. R. A., note on page 426; *Kelsea v. Ramsey & G. Mfg. Co.* 55 N. J. L. 320, 22 L. R. A. 415, 26 Atl. 907; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Smith v. State* (Ark.) 16 S. W. 2; *Williams v. Feiniman*, 14 Kan. 288; *Haug v. Gillett*, 14 Kan. 140; *Bancher v. Warren*, 33 N. H. 183; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Carthage v. Duvall*, 202 Ill. 234, 66 N. E. 1099; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Farmers' Phosphate Co. v. Gill*, 69 Md. 537, 1 L. R. A. 767, 9 Am. St. Rep. 443, 16 Atl. 214;

Sarbecker v. State, 65 Wis. 171, 56 Am. Rep. 624, 26 N. W. 541; State v. Intoxicating Liquors, 73 Me. 278; Com. v. Fleming, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; Sachs v. Garner, 111 Iowa, 424, 82 N. W. 1007; Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514; Pilgreen v. State, 71 Ala. 369; United States v. Lackey, 120 Fed. 577; De Bary v. Souer, 41 C. C. A. 417, 101 Fed. 425; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Shuenfeldt v. Junkermann, 20 Fed. 357; State v. Cairns, 64 Kan. 782, 58 L. R. A. 55, 68 Pac. 621; James v. Com. 102 Ky. 108, 42 S. W. 1107; Garbracht v. Com. 96 Pa. 449, 42 Am. Rep. 550; Higgins v. Murray, 73 N. Y. 252; Dunn v. State, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. 806; Crook v. Cowan, 64 N. C. 743; State v. Shields, 110 La. 547, 34 So. 673; State v. Colby, 92 Iowa, 463, 61 N. W. 187; State v. Peters, 91 Me. 31, 39 Atl. 342; United States v. Orene Parker Co. 121 Fed. 596; Newman v. State, 88 Ala. 115, 6 So. 762; Hunter v. State, 55 Ark. 357, 18 S. W. 374; Berger v. State, 50 Ark. 20, 6 S. W. 15; Bunch v. Potts, 57 Ark. 257, 21 S. W. 437; Com. v. Russell, 11 Ky. L. Rep. 576; Com. v. Kearns, 15 Ky. L. Rep. 332; State v. Hughes, 22 W. Va. 743; State v. American Exp. Co. 118 Iowa, 447, 92 N. W. 66; Benjamin Sales, p. 374, and note for further collation of authorities.

In *James v. Com.* 102 Ky. 108, 42 S. W. 1107, the court of appeals of Kentucky uses this language: "The sole question involved is whether the sale was made in the county of Rockcastle or in Lincoln county. This precise question was determined in *Com. v. Russell*, 11 Ky. L. Rep. 576; and it was held that, where whisky ordered by letter was shipped from one county to another by express, C. O. D., the sale took place in the county in which the whisky was delivered to the carrier, and was not a violation of a prohibitory liquor law in force in the county to which it was shipped;" citing 2 Kent, Com. 492; Crawford v. Smith, 7 Dana, 60; Sweeney v. Owsley, 14 B. Mon. 413; Duncan v. Lewis, 1 Duv. 184. The same conclusions are reached by the superior court in a number of other similar cases. Prof. Benjamin, in his recent *Principles of Sales* (p. 86), states the rule thus: "Where goods are ordered and shipped C. O. D. (collect on delivery) the carrier is said to be the agent of the buyer to receive the goods from the seller, and the agent of the seller to collect the price from the buyer; and the sale is complete when the goods are delivered to the carrier."

It seems to be well settled that, if the goods are delivered under a C. O. D. shipment

without collecting the price of the goods, the common carrier would be responsible to the seller for the price, or the seller could sue the purchaser for the contract price. Shipment C. O. D. does not retain title to the property, but it is simply in the nature of a lien,—the common carrier being intrusted by the seller with the power of collection,—and, as the authorities put it, it is but a convenient method for collecting the price of the goods already sold. This is the view taken by courts in Texas without a single exception, in an unbroken line of decisions. Judge Brooks, however, marked his dissent in *Sinclair v. State* (Tex. Crim. App.) 77 S. W. 621.

Presiding Judge Hurt's opinion in *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683, in the judgment of the writer, is one of the clearest to be found in all the books on this question, and lays down the rule as above stated. After citing the authorities, Judge Hurt says: "Tested by these rules, it would appear that, if there was no special contract between the parties, but a mere order by the purchaser at Gordon to the seller at Weatherford to ship beer to him C. O. D., the sale was completed at Weatherford." In the *Bruce Case*, however, there were circumstances or portions of the contract which rendered it not an ordinary C. O. D. sale. It was stipulated in that case, if the beer should sour or be lost, the seller was to stand the loss, and the beer should remain the property of the seller until it should be received by the purchaser at Gordon. "This appears to be a stipulation of the contract, and such a stipulation as the parties had a right to make." It was further said: "We cannot make a contract for the parties, or undo one that they may have made, no matter what we may conceive their purpose or intention to have been. Parties who are competent to trade can make their own contracts, stipulate as to terms, and can make such terms as are not illegal. The contradicted stipulation in this regard is that the beer in question was to remain the property of the seller until its delivery to the purchaser at Gordon, and the sale consequently was not an executed sale until the delivery of the beer to the purchaser at the latter place; and, the sale not being a completed sale until the delivery of the beer at Gordon the transaction was not in violation of the local-option law at Weatherford." It was further said: "We understand the weight of authorities hold that, if goods such as liquors are ordered to be shipped from one point to a buyer at another C. O. D. by common carrier, the sale is considered as completed at the point of shipment;" citing many of the cases al-

ready cited. Bruce was shipping from Weatherford, which was a local-option territory. If the sale was made at Weatherford, Bruce could have carried on his liquor trade at that place though it was under operation of the local-option law.

The same rule was followed in *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007. The writer hereof wrote the opinion in that case. When the Bruce and Freshman Cases were decided, the court consisted of Judge Hurt, Judge Henderson, and the writer. The question was again decided by this court in *Weathered v. State*, 1 Tex. Ct. Rep. 655, 60 S. W. 876, and *Treadaway v. State*, 42 Tex. Crim. Rep. 466, 62 S. W. 574. The personnel of the court had then changed, Judge Brooks having succeeded Judge Hurt. This language is found in *Weathered's Case*: "The evidence discloses that within the local-option territory appellant gave an order to a party in Hillsboro, outside the territory in question, for a half gallon of whisky, to be sent by express C. O. D.; the purchaser paying express charges. This does not constitute a sale within the inhibited territory. *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Pilgreen v. State*, 71 Ala. 368; *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; *Kelsea v. Ramsey & G. Mfg. Co.* 22 L. R. A. 415, and notes on pages 425, 426 (55 N. J. L. 320, 26 Atl. 907); *Garbracht v. Com.* 96 Pa. 449, 42 Am. Rep. 550; *Com. v. Fleming*, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *McComb v. Doe*, 8 Smedes & M. 510; *Higgins v. Murray*, 73 N. Y. 252; 21 Am. & Eng. Enc. Law, p. 511." This was written by the writer hereof, and rendered February 6, 1901. On the same day *Treadaway v. State* was decided, the opinion being delivered by Judge Brooks. In that opinion this language is found: "We do not think the court erred in refusing this charge. This court has heretofore held that, when whisky is shipped to a party C. O. D., the moment it is placed in the express office it becomes the property of the consignee; and this is clearly true the moment the consignee receipts the express company for the same, and pays the C. O. D. charges thereon. Hence the court did not err in refusing this charge;" citing *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007; *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683. As before stated, this case and the *Weathered Cases* were decided the same day by this court. To the same effect is *Bills v. State*, 1 L.R.A. (N.S.)

(Tex. Crim. App.) 3 Tex. Ct. Rep. 227, 64 S. W. 1047. This opinion was written by Judge Henderson on October 30, 1901. *Davidson v. State*, 44 Tex. Crim. Rep. 586, 73 S. W. 808, rendered on March 25, 1903,—the opinion written also by Judge Henderson,—followed the previous authorities.

There were some comments in the *Sinclair Case* (Tex. Crim. App.) 77 S. W. 621, in regard to the question of C. O. D. This was decided on November 25, 1903; but, on motion for rehearing, it was expressly stated that the *Sinclair Case* was not a C. O. D. sale, and therefore the question was not there decided. In the *Sinclair Case* Judge Brooks entered a general dissent, without specifying his reasons, as he did in *James v. State* (Tex. Crim. App.) 78 S. W. 951. This latter case was also written by Judge Henderson on February 10, 1904. Judge Brooks wrote the opinion in *Kirby v. State* (Tex. Crim. App.) 80 S. W. 1007, on May 4, 1904. It followed the cases cited, and the unbroken line of authorities in this state.

Sedgwick v. State (Tex. Crim. App.) 12 Tex. Ct. Rep. 455, 85 S. W. 813, decided at the Dallas term, 1905, was written by the writer of this opinion, in which two propositions were decided: First, that the case came within the purview of the interstate commerce clause of the Constitution of the United States, and was not, therefore, a violation of the law of Texas; and, second, being a C. O. D. shipment, the sale was at the point of shipment, in Missouri, and not at the point of destination, in Texas. Judge Brooks concurred in the opinion as to the interstate shipment, and dissented as to the place of sale; holding the sale to be at the point of destination. There have been several cases decided since the *Sedgwick Case* on the same line. See also *Weldon v. State*, 36 Tex. Crim. Rep. 34, 35 S. W. 176.

This seems to be the history of this question, viewed from the standpoint of the decisions of this court, where the sale was under a C. O. D. contract.

We have another line of decisions in this state. *Treadaway v. State*, 42 Tex. Crim. Rep. 466, 62 S. W. 574; *Young v. State* (Tex. Crim. App.) 4 Tex. Ct. Rep. 90, 66 S. W. 567; *Ashley v. State* (Tex. Crim. App.) 80 S. W. 1015; *Cantwell v. State* (Tex. Crim. App.) 85 S. W. 18; *Dunn v. State* (Tex. Crim. App.) 86 S. W. 326; *Beall v. State* (Tex. Crim. App.) 86 S. W. 334, decided at Dallas term, 1905. These decisions hold that, where a shipment is made C. O. D., without a contract between the shipper and the consignee, the sale is at the point of destination, if the property is there accepted by the consignee or someone designated by him. So the difference between those two questions turned upon whether

or not there was a contract. Under the Young, Ashley, Cantwell, and Dunn Cases, there being no contract, the goods belonged to the shipper or seller, and the common carrier was his agent to carry to the alleged consignee, who was not a party to the contract until his acceptance. Therefore the express company was the agent of the seller or shipper to carry and tender the goods to the consignee, and, upon acceptance by the consignee of the goods at the point of destination, it became a sale at that point. Upon the latter line of cases the court has been united and harmonious. This much in regard to place of sale.

On April 17, 1901, the governor approved an act of the twenty-seventh legislature (Acts 1901, p. 262), which went into effect ninety days after the adjournment of the legislature, which is as follows: "Art. 402a. That in all contracts of sale and shipment of intoxicating liquor from any point in this state to any other point within this state located in any county, justice precinct, city, or town, or subdivision in which the sale of intoxicating liquor has been prohibited, under the laws of this state, where the terms of said contract is C. O. D. or 'Collect on delivery,' that the same is and shall be a sale at the point where said goods are delivered and paid for; and provided, further, that where orders are solicited for intoxicating liquor in any territory within this state, where the sale of intoxicating liquor has been prohibited by law and such order is subsequently filled, the sale shall be construed to have been made at the place where such order was solicited.

"Sec. 2. Whereas, there is now no law adequately regulating the sale of intoxicating liquor in territory where the sale of intoxicating liquor is prohibited by law, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that said rule is hereby suspended and this act take effect and be in force from and after its passage and it is enacted."

Now it will be noted that, until the Sinclair Case (Tex. Crim. App.) 77 S. W. 621, was decided, in November, 1903, the Texas Reports, criminal and civil, so far as we have been able to ascertain, furnish no dissenting opinion from the rule announced in Bruce, Freshman, and that line of cases. So, until more than two years after this act of the legislature, it was unquestionably the law, without dissent, that the sale was at the point of shipment, and not at the point of destination, and appellate courts in this state had never questioned that rule. The passage by the legislature of the above act cannot but be regarded as

an express recognition that the rule of law was so well and thoroughly settled and recognized that the sale was at the point of shipment that it required legislation to change it; else this act was totally unnecessary. By the passage of this act that body undertook to set aside the well-settled law as understood from the beginning in Texas. It is not only an express recognition by the legislative body that such was the law as to the place where the sale occurred generally, but it is further an express recognition of the fact that, in passing the act, they were culling from this general law, and making an exception thereto, sales of intoxicating liquor. They also thoroughly understood that they were leaving by this act the law as settled in regard to all other sales except intoxicating liquors. Not only so, but that act is further an express recognition of the fact by that body that the sale of all intoxicants should be under the law as it had been always, except where that sale occurred by virtue of a C. O. D. contract or shipment. We have held this act unconstitutional, and upon a review of the question we have been confirmed in the correctness of that conclusion. The provision of the Constitution in regard to local option only authorizes the people of a county, a justice precinct, city, or town, etc., to prohibit the sale of the intoxicants "within the prescribed limits;" that is, the limits of the territory in which the law has been voted into operation. They could vote on no other proposition, except the prohibition of the sale of the intoxicants "within the prescribed limits" or given territory, because this is the extent of the constitutional authority. The inclusion of this matter is the exclusion of all others. This would prohibit the legislature or the people voting on local option prohibiting the sale outside the "prescribed limits." Therefore, if the sale occurs outside the local-option territory, the legislature has no authority to prohibit the purchaser from carrying such intoxicants into the prohibited territory. The question is one only of sale within the local-option limits. The Constitution does not make, or undertake to make, contracts between individuals; nor does it interfere with the right of contract; nor does it undertake to impair the obligation of contracts. It simply prohibited the sale within such territory.

In this connection, the Constitution did not undertake to give the word "sale" a definition contrary to its ordinary acceptance, any more than that same instrument undertook to give the word "jeopardy" a different definition from that in which it was ordinarily understood when placed in that instrument. In Powell v.

State, 17 Tex. App. 345, it was expressly held that the legislature could not change the meaning of the word "jeopardy," as understood when the Constitution was adopted. See also *Baltimore v. Horn*, 26 Md. 194; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22; 8 Cyc. Law & Proc. pp. 725, 810; *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 156, 42 L. R. A. 783, 24 So. 171; *State ex rel. Richey v. McGrath*, 95 Mo. 193, 8 S. W. 425; *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; *State ex rel. Kenner v. Spears* (Tenn. Ch. App.) 53 S. W. 247. "Sale," used in article 16, § 20, had as thoroughly known and definite meaning as did the expression "intoxicating liquors," used in the same section. The legislature could with as much propriety pass an act defining "intoxicating liquor" entirely destructive of its meaning as used in the Constitution, as it could the definition and meaning of the term "sale" as therein used. The same reasoning which justifies one would authorize the other, and one proposition is as subversive of the Constitution as would be the other.

Those who would sustain the act of the legislature above quoted, defining C. O. D. sales as occurring at point of consignment despite the real contract, would scarcely agree that that body could eliminate "intoxicating liquors" by giving that term a definition out of accord with its ordinary and well-understood meaning as therein employed, or add "liquors" thereto which are not intoxicating.

Where words, terms, or language of the Constitution are plain and definite, there is no room for construction, for such language is self-construing, and to be taken in its ordinary meaning and acceptance at the time of the adoption of the Constitution. If this were not true, the legislature could carve or legislate away the plainest provisions of that instrument, or these provisions could be construed to mean anything to suit the passing fancy of the hour, or as clamor might demand. Above all, there remains this fundamental rule: That, wherever the purpose and intent of the framers of the Constitution is clearly expressed, it will be followed by the courts in construing that instrument. Therefore, we assert with absolute confidence that, looking to the face of this constitutional provision, it is too obvious for discussion it was only placed there to prohibit the sale within the local-option territory. The language is more than all sufficiently plain to indicate such purpose and intent. To hold otherwise would overturn the intent and purpose of the local-option law, for, if one legislature or one court could give a meaning to suit the construing body, then a subse-

quent court or legislature could give it an entirely different meaning; and the Constitution would not be what the framers made it, but what the passing caprice of a construing body might see proper to make it. "The general principle on which we have heretofore insisted that the meaning of a written law is to be found in its terms, and that we are not at liberty to resort to extrinsic facts and circumstances to ascertain what the framers might have intended, has frequently been declared to apply to the Constitution." *Sedgw. Stat. & Const. Law*, 2d ed. p. 552. In *Sturges v. Crowninshield*, Chief Justice Marshall said: It is well settled that the spirit of a Constitution is to be respected no less than its letter; yet that spirit is to be collected from its words, and neither the practice of legislative bodies, nor other extrinsic circumstances, can control its clear language. 4 Wheat. 202, 203, 4 L. ed. 550. The same rule is adopted in the learned opinion in *Newell v. People*, 7 N. Y. 9. Courts, in the interpretation of Constitutions, have little to do with the argument *ab inconvenienti*, and should not "bend the Constitution to suit the law of the hour." That inconvenience may and will arise from an adherence to the Constitution may be conceded; but this affords no reason for construing away its provisions. It is not for the courts or legislatures to supply these defects. This is for the people who made that instrument. "If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written Constitutions will be worse than useless. Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be obtained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it, and inconveniences can be borne long enough to await that process. But, if the legislature, or the courts, undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Consti-

tion which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." This was the language of Chief Justice Bronson in *Oakley v. Aspinwall*, 3 N. Y. 547, 568. These words are well worthy of consideration in these days of latitudinarian construction. No change in public opinion on questions of policy can ever be given any weight in construing the provisions of a Constitution, where the meaning is clear; for the adoption of the construction that might be deemed wise at one time and unwise at another would abrogate the judicial character of the court, and make it the reflex of the popular opinion or the passions of the day. This was the thought expressed by Chief Justice Taney in the celebrated *Dred Scott Case*, 19 How. 393, 15 L. ed. 691. That case cites *Crandall v. State*, 10 Conn. 339. Speaking in regard to the wish or will of the people, expressed in the organic law, these words are more than significant. If decisions are to be made to suit the clamor of the hour in one section of the state, then a different clamor coming from another portion of the state would force a contrary ruling, and we would have the same question decided in antagonistic ways, not on the law, but from adverse clamor arising in different sections. The results which would follow from such diverse, but existing, lines of decisions would be more than disastrous. It would be worse than revolution. It would be chaos. The writer knows no will of the people on such questions, save that found in the Constitution. It was the will of the people that made that instrument, and it can only be changed by the same authority.

The history of local option is not of remote date. In 1876, § 20 of article 16 for the first time was embodied in the Constitution. In 1887 there came one of those fierce political struggles which sometimes happen in the change, or attempted change, of the organic law, wherein it was sought to make radical amendments to said § 20. The history of that terrific political struggle is yet well remembered. Its fearful defeat, if it could indicate anything as to the popular will, shows clearly and beyond any question that by about 100,000 majority the popular will was against these amendments; and it stands to-day as originally created, except for the little clause inserted in 1891, extending its operations to such subdivisions of a county as "might be

designated by the commissioners' court." The popular will in regard to this matter, therefore, must be found in the Constitution. It stands there as the expression of the will of the majority of our voting population. It is here the "inherent power" of the people speaks. When the writer desires to seek the popular will or the public sentiment in regard to organic law, his recourse is and will be to the provisions of the Constitution, and not to popular clamor. As the plain reading of that instrument is found, it shall be his mission on the bench to declare. If the people want a change in the Constitution, there is a method provided in that instrument by which it can be accomplished. It cannot be done by the legislature, nor by the courts. Whatever decision the court may render, or whatever act the legislature may pass, contrary to the Constitution, is not and cannot be the law; and no attempt ought to be made thus to override the provisions of that instrument.

It is contended that *Bogle v. State*, 42 Tex. Crim. Rep. 380, 55 S. W. 830, is in conflict with *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007; *Weathered v. State* (Tex. Crim. App.) 1 Tex. Ct. Rep. 655, 60 S. W. 876, and *Treadaway v. State*, 42 Tex. Crim. Rep. 466, 62 S. W. 574, and that line of cases. The *Bogle Case* did not involve a C. O. D. sale. Nor is it in conflict with the cases mentioned. The *Northcutt Case*, 35 Tex. Crim. Rep. 584, 34 S. W. 946, and the *Bruce Case*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683, were cited in support of the *Bogle Case*. The decision in the *Bogle Case* held that the sale was in Hunt county, the point of destination, and not in Dallas, the point of shipment. It was said: "If the purchaser was to, and did, deliver the goods in Greenville to the purchaser, Reeves, then it was a sale in Greenville, and not in Dallas, because, under the *Bruce Case*, the property did not pass until the delivery." While the facts should have been more fully stated, still in the report of the case the reporter makes a statement of the case which shows the contract to be a sale in Greenville. This is in the report of the case along with the decision. The writer of this opinion was also the writer of the opinion in the *Bogle Case*, and, while the facts could have been more clearly and definitely stated than they were, we thought the profession would understand, where the shipper or seller agrees to and does deliver the goods, that he assumes the risk, and the sale was at the point of destination. In order to be more definite about this matter, and satisfy those who

find an apparent contradiction, I have taken the liberty to go to the original case itself, and copy from the statement of facts some of the evidence. The witness Reeves testified: "My beer had been costing me about \$9 to \$9.50 per cask, and defendant agreed to deliver to me in Greenville at between \$8 and \$9 per cask, if I would take it. I told him that I would take it, and he went his way. In a few days the beer came. I paid the drayage from the depot in Greenville to the place I was doing business, but the freight was prepaid, according to my contract with the defendant." It is not necessary here to repeat the order, because it is set out in the original opinion. He further testified: "There was nothing said at the time I am testifying about as to a conditional sale. The defendant agreed to deliver the beer in Greenville at a certain price, which I was to pay after the same was delivered and received by me at my place." Bogle himself testified to the written order, and that it was the only order he ever took from Reeves. He used this further language: "The conversation I had with Mr. Reeves is about like he stated it in his testimony." But for the urgent insistence that the opinion in the Bogle Case was contrary to that in the Bruce, Freshman, and that line of cases, I should not have taken the trouble to make these observations. It would hardly be questioned, if the defendant in that case agreed to deliver the goods in Greenville at \$8.50, the sale would be there. He did not agree to ship the goods from Dallas in the ordinary way, but curtailed that with the express agreement and statement, as a consideration for the purchase and sale, that his house would deliver the beer in Greenville at that price. Certainly it would not be contended a moment, if the goods had not been delivered on the terms stipulated, that Reeves would in any way become responsible for his contract with appellant was that he was to deliver the goods at Greenville, "to be paid for as sold." There was no responsibility upon Reeves in any manner until the goods were delivered. If the goods had been lost in transit, the loss would not have fallen upon Reeves, but upon the shipper or seller.

The sale in the case at bar occurred in McLennan county. The goods were shipped into the local-option territory of Hill county. We have universally held, and are sustained by the great weight of authority, both Federal and state, including the Supreme Court of the United States, that in such C. O. D. shipments the sale is at the point of shipment. If this is true in interstate commerce, it is true in the ship-

ment between points in the state. The fact that the sale occurred out of the state is the reason for attaching Federal jurisdiction. And this must be so by reason of a contract; otherwise it would not be interstate commerce, for, if a party outside the state ship the goods into Texas without contract, they remain his goods until they reach the point of destination and are accepted by the consignee, and this acceptance would constitute the sale at the point of destination.

In Sedgwick's Case it was held (following the decisions of the Supreme Court of the United States and the great weight of authority in number and reason) that an interstate shipment under a C. O. D. contract or sale was at the initial point, and not at its destination. This is the construction placed upon the Wilson act by the Supreme Court of the United States, which act, in regard to the sale of intoxicants, eliminates the sale of the unbroken package at the point of destination, and protected the interstate shipment only between the contracting parties. Under that act, it would seem that the contract is necessary to call into play the exercise of the interstate commerce regulation or law. Without a contract between the citizens of the different states, it would hardly be contended, under the Wilson act, that the question of interstate commerce is suggested. If a party living in St. Louis, Missouri, should ship a package of intoxicating liquors to a party living in the local-option territory in Texas, without a previous understanding between the parties, the sale would be at the point of destination, for the reason that the goods from the time of shipment at St. Louis until they reached the hands of the alleged consignee at the point of destination remain the property of the shipper. This being true, when the property reaches its point of destination, and is tendered by the express company, as the agent of the shipper, to the alleged consignee, and is accepted by him, the sale is consummated at that point, and the local-option law is violated. As we understand, this is in strict accord with the Wilson act, because it limits the transaction as between the consignor and the consignee, and this upon a previous contract between them. If this is not true, then the interstate commerce would be distorted from its high purpose, and made the cloak for carrying on a liquor business in the local-option territory, without the hope of regulation or control in any manner by the state authorities. Such is not the interstate commerce law under the Wilson act. In fact, the Wilson bill, it would seem, was enacted to prevent just that sort of contingency. This

condition was possible under the interstate commerce law as it stood before, when, by the provisions of that law, a disposition at the point of destination could be had of the unbroken package. Giving the Wilson bill the construction that all of these sales were at the point of destination would annihilate the local-option law of Texas, and make every local-option territory within the state the "dumping ground" of illegal shipments from parties outside the state.

Again, if this view is not correct, then we would have this anomalous condition: The interstate commerce law protects the drummer or solicitor of the house beyond the state from prosecution, while the citizen of Texas, under the same circumstances, would be amenable to imprisonment and fine. To illustrate: A, representing a St. Louis house, enters the local-option territory and takes an ordinary C. O. D. order for the shipment of intoxicants. B, a citizen of Texas, accompanies him, and takes an order for intoxicants from the same man from whom the order is taken by A. The whisky is sent in each instance in accordance with the C. O. D. contract. A, representing the St. Louis concern, is absolutely innocent of any transgression of the law. B, representing the Texas house, is placed in jail not less than twenty nor more than sixty days, and fined not less than \$25 nor more than \$100. What would be an innocent act in relation to A would be seriously criminal when performed by B, though at the same time, under the same circumstances, and in relation to the same matter. Thus we would have this anomalous condition: That the shipment C. O. D. would be a sale at the initial point when shipped from Missouri, and a sale at the point of destination when shipped from some point in Texas; that is, under the same identical facts, except residence, innocence in the one, and guilt in the other. The law would be one way with reference to A, and exactly the reverse with reference to B, on similar facts. To say the least of it, this would be a very remarkable conception of the law, under our form of government.

While we have deemed the law in respect to the question herein discussed settled by an unbroken line of decisions in this state, civil and criminal, as well as by the Supreme Court of the United States and the states of the Federal Union, except, perhaps, three, yet, as the decisions in this state have been criticized in a recent discussion before this court in this and companion cases, we have again reviewed the matter at some length. We find no reason authorizing an overturning of this well-settled law, but are the more thoroughly convinced we are and have been legally cor-

rect. To hold otherwise would be not only to reverse the decisions of this court, but to place this court in opposition to the well-settled law enunciated by our supreme court and courts of civil appeals, as well as the Supreme Court of the United States and a great majority of the states, in regard to the law of sales.

The judgment is reversed and the cause remanded.

Henderson, J., concurring:

While I entirely concur in the opinion of my brother Davidson, yet, on account of the importance of the question involved, and, moreover, because our brother Brooks has for the first time expressed his dissenting views as to C. O. D. shipments, I deem it necessary to review and point out what I consider some of the errors contained in the dissenting opinion.

I notice that my brother Brooks, at the outset of his dissenting opinion states: "Any inference therein to the effect that I have ever actually assented to the proposition therein laid down in the previous decisions of this court is not correct. As will be shown hereafter, in some of the decisions of this court my dissent was not marked. This is an omission frequently occurring in the decisions of this court, where one does not really agree to the principle laid down in the case, which principle has theretofore been announced by the majority of the court. But I have never agreed in principle with the proposition that an ordinary C. O. D. shipment by express is a sale at the point of shipment." In view of the opinion of my brother Davidson, and his reference to this matter, it would appear that the above is a severe indictment of what was said on the subject in that discussion. As to the duty of a judge on the bench in the rendition of an opinion, I believe the practice is well settled. He may concur either in whole or in part; that is, he may agree to the result, but disagree as to some of the propositions stated and discussed, in which event, if the matter is of sufficient interest, he may so express himself. Or there may be cases in which he is not in accord with a majority of the court, but, there being no principle involved, or the matter being of minor significance, he may merely tacitly concur. However, if the question is one of any magnitude, or the principle involved is of any consequence, and a judge does not agree with a majority of the court rendering an opinion, he is not expected to remain silent. On the contrary, duty requires that he should utter his dissent. He may do so by simply marking his dissent, or he may express his views on the subject. If he does not do so, he will be presumed to have concurred in

the opinion. In other words, the principle of estoppel, and not the doctrine of "mental reservation," applies here. It is taken for granted that a judge may agree to an opinion when rendered, and he may subsequently change his views, in whole or in part, as to the propositions involved, in which event he is, of course, at perfect liberty to change or modify his position as to any particular decision. In such case he should not ordinarily be subject to criticism or censure. Perhaps no judge who ever sat upon any bench for any considerable length of time adhered to all the views theretofore concurred in or expressed by him. In what has been said there is no intention to reflect on the motives which may have actuated my brother Brooks in the attitude assumed by him on this subject in his dissenting opinion, nor to question the statement therein contained that he never in mind agreed to the propositions laid down by this court on the subject of C. O. D. shipments. Besides, he has supported his declaration in this regard by reviewing some of the cases which treated of this question, and in which he was presumed to have concurred, which review I shall now proceed to review as to some of the cases discussed.

As is generally known and conceded, the case of *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683, was the first case written on this subject. The opinion is from the pen of that distinguished jurist, Judge Hurt, and concurred in by both Judge Davidson and myself. There it was distinctly stated, as a starting point or predicate for the decision, as follows: "We understand that the weight of authorities hold that if goods, such as liquors, are ordered to be shipped from one point to a buyer at another, C. O. D., by a common carrier, the sale is considered as completed at the point of shipment." And a number of authorities are cited in support of this. Then follows: "Tested by these rules, it would appear that, if there was no special contract between the parties, but a mere order by the purchaser at Gordon to the seller at Weatherford to ship beer to him C. O. D., the sale was completed at Weatherford." The opinion then proceeds to state that there were other conditions of a contractual character between the parties, which it was held took the case out of an ordinary C. O. D. package, and that consequently, on account of such additional facts, the case was not an ordinary C. O. D. sale, and that the title did not pass at Weatherford, but at the point of destination, which was Gordon. Now, the dissenting opinion disposes of this case by stating it was a "bogus order." He says: "It was clearly done in order to evade the local-option law, and could have been

for no other purpose. The blank was prepared by Bruce, furnished to the consignee, who merely filled it out, and then it constitutes an absolute defense for Bruce against any prosecution. This case was tried before the court without the intervention of a jury. The court had a right, under the conflict in the evidence, to decide—which he necessarily had to do in order to find the defendant guilty—that the order from the consignee to the defendant was a bare subterfuge resorted to for the purpose of evading the local-option law." Now, I have read that decision carefully, and, if there is anything said in the opinion, or in the statement of facts accompanying it, that the order was a subterfuge,—much less, that the decision of the court was in any wise based on the fact that the same was a subterfuge and an evasion of the local-option law,—I have failed to find it. Indeed, a careful reading of the decision shows that the parties had a right to make their own contracts, and, if legally made, although the effect may be to evade the local-option law as to the place of the sale, by actually making the sale at another point, the parties had a perfect right to make such contract.

As to *Weathered v. State* (Tex. Crim. App.) 1 Tex. Ct. Rep. 655, 60 S. W. 876, decided on February 6, 1901 (Judge Brooks being on the bench and participating in the decision), it is said in the dissent: This "appears to have been a memorandum decision, and was really decided upon another question than that of C. O. D., in this: There were two local-option laws adopted. One was valid, and the other not. The record shows appellant objected to the introduction of the valid law, which objection was sustained. This of itself should and did reverse the case. It is true that Judge Davidson, in writing the opinion, cites the above cases to support the C. O. D. proposition. But this case was agreed to on the first proposition." What is meant by a "memorandum decision," I am at a loss to understand, unless by this it was intended to convey the idea that it was a short opinion. If this be a correct version of the matter, I believe memorandum opinions are to be commended. However, let us look to the opinion itself, as to what it decides, and upon what grounds it was rendered. In this regard I can do no better than quote the opinion: "This conviction was for violating the local-option law; the punishment being assessed at a fine of \$25, and twenty days' imprisonment in the county jail. The offense is charged to have been committed in justice precinct No. 5 of Navarro county. There seems to have been two elections in that precinct, both of which resulted in favor of prohibition. Where this is the case,

the prosecution can be under either, if both were in accordance with the statute; and, if one is legal and the other not, the prosecution could be had under the legal election. We will not enter into a discussion as to whether or not the later election was strictly legal. Appellant sought to prove the prior election, which was admitted in the bill of exceptions to be valid, but the court rejected the testimony. While appellant cannot complain, this evidence was admissible. If it had been admitted, there would be no question of the legality of prohibition in that territory. See *Leftwich v. State* (Tex. Crim. App.) 55 S. W. 571; *Decker v. State*, 39 Tex. Crim. Rep. 20, 44 S. W. 845. The evidence discloses that within the local-option territory appellant gave an order to a party in Hillsboro, outside the territory in question, for a half gallon of whisky to be sent by express C. O. D., the purchaser paying express charges. This does not constitute a sale within the inhibited territory. *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Pilgreen v. State*, 71 Ala. 368; *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 832, 17 S. E. 792; *Kelsea v. Ramsey & G. Mfg. Co.* 22 L. R. A. 415, and notes on pages 425, 426 (55 N. J. L. 320, 26 Atl. 907); *Garbracht v. Com.* 96 Pa. 449, 42 Am. Rep. 550; *Com. v. Fleming*, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *McComb v. Doe*, 8 Smedes & M. 510; *Higgins v. Murray*, 73 N. Y. 252; 21 Am. & Eng. Enc. Law, p. 511. Because the evidence does not sustain the conviction, the judgment is reversed and the cause remanded." From this we gather that the court, in passing, says there were two elections, both of which resulted in favor of prohibition, and that the prosecution could be maintained in such case under either. I certainly do not understand that this was made a ground of reversal. Evidently the case was reversed upon the proposition that it was a C. O. D. shipment, and that the sale was completed at the point of shipment, which was not within the inhibited territory. A number of authorities are cited in support of this view, and it does not occur to me that there can be any question than that this case directly involved a C. O. D. shipment, and its reversal was solely predicated upon the proposition that the sale was made at the point of shipment, and not at the point of destination, which was the local-option territory, and on which the prosecution was predicated.

In *Treadaway's Case*, 42 Tex. Crim. Rep. 1 L.R.A. (N.S.)

466, 62 S. W. 574, which was rendered on the same day as the *Weathered Case* (Tex. Crim. App.) 1 Tex. Ct. Rep. 655, 60 S. W. 576, Judge Brooks, who wrote that opinion, says of same in his dissenting opinion, "that any candid man, in reading the same, will find that the point in issue was not a C. O. D. sale at all." Evidently a reading of the opinion shows that the package came to Kemp, in Kaufman county, as a C. O. D. shipment. The express charges had been prepaid by the sender, Bruce, at Dallas; and the C. O. D. charges on the same was simply the value of the whisky, which was \$1. It appears, however, that the prosecution was predicated on a sale by appellant, Treadaway, to Will Jeffreys, who paid the \$1 charges on the whisky, and the whisky was turned over to him by the consignee, Treadaway. This was held to be a sale. However, the judge, in passing upon the legal questions in giving and refusing charges, uses this language: "We do not think the court erred in refusing this charge. This court has heretofore held that, when whisky is shipped to a party C. O. D., the moment it is placed in the express office it becomes the property of the consignee; and this is clearly true the moment the consignee receipts the express company for the same, and pays the C. O. D. charges thereon. Hence the court did not err in refusing this charge;" citing *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007, and *Bruce v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683. This shows very clearly that his attention was directly called to the previous decisions of this court in the cases named, and shows, further, as it seems to me, a concurrence in the views therein expressed.

Nor is Judge Brooks any more fortunate in stating what the United States Supreme Court has decided as to this question. He disposes of *Norfolk & W. R. Co. v. Sims*, 191 U. S. 446, 48 L. ed. 256, 24 Sup. Ct. Rep. 151, substantially after this manner: That the sole question before the court was whether the C. O. D. shipment was interstate commerce, and not where the sale occurred; so that all that was said by the court as to the place of sale was purely *dicta*. It appears from the opinion that *Sears, Roebuck, & Company of Chicago*, on the written order of Mrs. Satterfield, of Roxboro, North Carolina, shipped to her by railroad freight a sewing machine, and sent the bill of lading to her by express, C. O. D. Upon payment to the express agent of the C. O. D., the bill of lading was delivered to her, and she presented the bill of lading for the sewing machine, tendering the freight charges. The express and railroad agent was the same person. However, before she got the machine

out of the office, the tax collector of Person county, seized the same to satisfy the license or occupation tax; claiming that Sears, Roebuck & Company were liable for the tax, as being engaged in selling sewing machines in North Carolina. The court found against Sears, Roebuck, & Company, the amount of the tax, and this decision was affirmed by the supreme court of the state. The case was subsequently carried to the Supreme Court of the United States on the ground that it involved interstate commerce. Here is what Justice Brown, speaking for the court, says: "To the ordinary mind it seems a somewhat startling proposition that a manufacturing corporation located and doing its main business in a distant city, having no manufactory in North Carolina, no stock in trade, no place for the sale of its goods there, and no agent authorized to sell them, can be compelled to take out a license required of all those 'engaged in the business of selling,' from the mere fact that it had done what hundreds of others were doing daily,—sent a single machine there upon a written order of a customer, and under an ordinary C. O. D. consignment. . . . While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence, it may be said that the sale is not completed until then, yet, as matter of fact, the bargain is made and the contract of sale completed, as such, when the order is received in Chicago, and the machine shipped in pursuance thereof. A sale really consists of two separate and distinct elements: First, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property, which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but, in substance, it is a mere method of collection; and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although in certain cases arising under the police power it has been held that the sale is not complete until delivery, and sometimes not until payment." It occurs to me that, notwithstanding the court took jurisdiction of the case on the ground that it was an interstate shipment, yet, in order to exonerate Sears, Roebuck, & Company from the tax, it became necessary for the court to find that the sale was made in Chicago, and not in

North Carolina, which they accordingly did. So much for these cases, and the grounds upon which they were decided.

The Weathered and Treadaway Cases were rendered in May, 1901, and it was not until the Sinclair Case, which was decided on November 25, 1903, that my brother Brooks ever uttered one note of dissent from the views expressed in Bruce's Case, and followed in subsequent cases. While the Sinclair Case discusses the doctrine of C. O. D. shipments as to place of sale, the question was not really in the case, as the opinion on motion for rehearing clearly shows. So in that case, no views being expressed in the dissent, the C. O. D. shipment not being in the case, and it being reversed on other grounds, we were unable to determine the reason for his disagreement. However, it is not surprising that he should wander far afield to discover some analogy between a bill of lading and a C. O. D. shipment, and that he should build an argument predicated upon a condition precedent founded on such analogy. Of course, it cannot be said that the two are not in some of their features alike. Both are, in a sense, contracts for the shipment of goods. A bill of lading is a contract between the carrier and the sender, for a consideration to transport and deliver goods at a specified place to a person therein named, or to his order, and in commercial usage it may be, in a sense, negotiable; that is, the bill of lading has become symbolical, and stands for the property itself. We do not understand that a C. O. D. has this characteristic. Ordinarily, where goods are shipped under a bill of lading, the property passes as soon as they are delivered at the point of shipment to the common carrier. But if the bill of lading is taken in favor of the consignor himself, or some agent of his, by commercial usage and the decisions of the court the property does not pass, though intended for some consignee at the point of destination, until some stipulation is complied with, as payment of the purchase money. Of course, there may be exceptions to this rule, depending on the intent of the parties, to be gathered from the stipulations of their contract. *Gulf, W. T. & P. R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341. For an able discussion of the meaning of the terms, "cash," "cash down," or "cash on delivery," as used in sale, see *Austin v. Welch*, 31 Tex. Civ. App. 526, 72 S. W. 881. Here it is shown a cash sale may not necessarily involve the investment of title, as a condition precedent. A sale for cash on delivery may be entirely consistent with the investment of title, though the purchase money be not paid at the time of delivery of the property.

In such case "the buyer, though he has title, is not entitled to possession until he pays the price, for payment and delivery in such a case are presumed to be concurrent acts, and, until payment is made, the seller may retain the goods, by virtue of his vendor's lien; but he retains the goods, and not title." And such, I understand, is the doctrine applied to C. O. D. shipments by the authorities.

A C. O. D. package, by commercial usage, means, "Collect on delivery,"—that is, for the price of the goods shipped and the express charges,—and is generally applied to small packages, and not to large consignments of goods, which are ordinarily shipped under bills of lading. As to bills of lading taken in favor of the consignor or his agent, or as held by a number of the courts, even if taken in favor of the consignee, if the bill is forwarded to some bank, with draft attached, the property does not pass until the payment of the purchase money. The authorities appear to treat the payment of the purchase money as a condition precedent to the investment of the title in the purchaser. On the other hand, the same courts hold that a C. O. D. package, although it requires payment to the carrier before delivery of the goods, is not a condition precedent to the investment of title in the property; but they treat this merely as a method of collecting the money for the goods, and the contract is regarded as a lien to enforce this payment. It is not necessary here to enumerate the authorities which establish this doctrine as to C. O. D. packages, they being collated in the opinion of my brother Davidson. It may be conceded, if there was no commercial usage, and no decisions on the subject of C. O. D. shipments as to the place of sale, and there was commercial usage and decisions of the courts on bills of lading, to the effect that bills of lading, with drafts attached, contained a condition precedent to the delivery of the goods, and that, consequently, in such case the title did not pass; and it was presented as a new and original proposition, that the two being alike as to conditions of delivery, and on account of this analogy the rule of law as to investment of title should be the same,—there might be some plausibility or even force, in the argument. But I submit that, the matter being thoroughly settled by commercial usage and the decisions of the courts, as to one as well as the other, the proposition to control the one by the other can find no support in reason. It could as well be urged that, because of this same apparent analogy, the law in regard to bills of lading, as to payment of the price as a condition precedent to the investment of title, should be overturned by the decisions with regard to C. O. D. shipments, which in-

vest the title at the point of shipment, but retain a mere lien for the collection of the purchase money. It necessarily follows, if the judge's argument based on some analogy between the law as to bills of lading and shipments by C. O. D. in regard to conditions precedent falls to the ground, then the whole structure erected by him must likewise tumble; and consequently the decisions invoked on this line, including *Joseph v. Cannon*, 11 Tex. Civ. App. 295, 32 S. W. 241, by which an estoppel was claimed on the writer, pass out of the case, as having no application.

As to C. O. D. shipments, as has been shown in the opinion of my brother Davidson, the great weight of authority is in favor of the doctrine announced in the *Bruce Case*; that is, that the title passes at the point of delivery to the common carrier. All the decisions, both state and national where the question has been raised, except in three or four states, agree with the rule announced in the *Bruce Case*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; and even in Iowa, one of the excepted states, in the case of *State v. American Exp. Co.* 118 Iowa, 447, 92 N. W. 66, that court says: "If the question were *res integra* in this state, a majority of the court as now constituted would be inclined to the view that, under such a shipment, the carrier is the agent of the buyer for the purpose of transportation, and of the seller for the purpose of retention of possession and collection of the purchase price; and that, as a necessary corollary, title passed to the buyer on delivery to the carrier." But they go on to say that the question had previously been decided adversely in that state, and they would consider it *stare decisis*.

Now, this court having adopted this rule as early as the *Bruce Case*, and having continuously followed it since that time, we are asked, because there is some analogy between a bill of lading and a C. O. D. package, that we should not only disregard the decisions of the Supreme Court of the United States, and the great majority of the state courts, but that we should overturn our own decisions on this subject and establish a new rule. What emergency exists for a change of front by this court on this question, which has long since become the settled law of the state? It is because, as suggested in the dissenting opinion, under the decisions of this court the express companies have been converted into saloons in local-option districts? It may be true that express companies are being used by violators of the law in local-option territory, but as to the extent of this evil I am not prepared to say. I do know that it is the purpose of this court, as manifested in its de-

cisions, to prevent all sales of liquor in local-option territory. And so we have held there must be a prior contract as to C. O. D. orders; and no express company can send intoxicating liquor into such territory to persons without previous orders, as all such transactions are held to be sales in the territory. *Dunn v. State*, 12 Tex. Ct. Rep. 803, 86 S. W. 326; *Beall v. State*, 12 Tex. Ct. Rep. 801, 86 S. W. 334; *Ashley v. State* (Tex. Crim. App.) 80 S. W. 1015. As stated, it may be conceded that express companies furnish facilities for violations of the local-option law. While this would afford ground for changing the law of the Constitution, as the case may be, it would furnish no reason to this court for disregarding or overruling the law. Public clamor may put a judge on guard to attend more zealously to the responsibilities of his high office, but it should never swerve him from a conscientious discharge of his functions to patiently investigate in order to determine the right, which is the law, and then to stand firmly by it after he has found it. Claiming for ourselves the same exalted motives which we accord to others, we trust we shall be able to enshrine in our hearts the majesty of the law, which to the judge on the bench should be the polar star pointing the way to duty.

Brooks, J., dissenting:

I do not agree with the opinion of the majority. Any inference therein to the effect that I have ever actually assented to the proposition therein laid down in the previous decisions of this court is not correct. As will be shown hereafter, in some of the decisions of this court my dissent was not marked. This is an omission frequently occurring in the decisions of this court, where one does not really agree to the principle laid down in the case, which principle has theretofore been announced by the majority of the court. But I have never agreed in principle with the proposition that an ordinary C. O. D. shipment by express is a sale at the point of shipment.

In order to properly discuss this matter it is necessary to revert to some rudimentary principles of law. A sale, by the law of merchants, is a transfer of title for a consideration. The title may pass at once, as the effect of a present agreement of the parties, or it may pass in the future, depending upon the performance of some precedent condition. In this lies the distinction between executed and executory sales, or a sale under an agreement to sell. *Mechem. Sales*, pp. 4, 5. In the case of a sale the agreement and transfer of title are practically contemporaneous. But in case of an agreement to sell the agreement may be

consummated at one time, and the sale at another. *2 Mechem, Sales*, § 1111. Hence, in looking for the *locus* of the sale, I think it is essential to ascertain where the title was transferred, and not where the agreement to sell was consummated, because the agreement to sell may be completed outside the prohibited district, and the sale be consummated in the prohibited district, in which case, according to my understanding, the *locus* of the sale would be in the prohibited district, and therefore a violation of the law. The question as to where the title passes is primarily one of the intention of the parties. *Mechem, Sales*, § 760; *Texas C. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575; *Elliott, Railroads*, § 114; *Wells v. Littlefield*, 59 Tex. 556.

As to where and when a sale takes place is a question of fact, and not of law; and, where the facts show an undisputed consummation of the sale at a certain place, then necessarily the sale takes place there. But, if the facts indicate a doubt as to where the sale takes place, then this becomes an issue of fact for the court to submit to the jury. In order to make a sale, the parties' minds must meet upon the same thing; otherwise there cannot be a sale, within contemplation of law, either of real or personal property. In all sales we find two great subdivisions of conditions,—a condition precedent and a condition subsequent. These two great subdivisions of conditions are subdivided, but, so far as this opinion is concerned, it is not necessary to trace them farther than the two subdivisions stated. A material condition precedent precludes the consummation of any contract until such condition is complied with. A condition subsequent may be the basis for the cancelation of the contract entered into; and hence, where one ships goods by express C. O. D. (the C. O. D., by the law of merchants, and as understood by the courts, being cash on delivery), the consignor makes the express company his agent both for the delivery of the goods and the collection of the money, and the C. O. D. thereby becomes a condition precedent to the consummation of the sale. If the consignee complies with his condition and pays the contract price, the sale is consummated. If he does not, the property remains that of the consignor, and he can immediately, upon the failure of the consignee to comply with the terms of the sale, order the goods reshipped to him. In construing questions of this sort, the authorities sustain the proposition that the courts can look to the ordinary business affairs of life that are of common experience and knowledge. In my view, in the light of common experience and knowledge, the consignor does not in-

tend to part with his property until the C. O. D. is paid; and, further, upon his failure to comply with the terms of the contract, the consignor uniformly has the goods returned to himself. Suppose the goods are lost in transit before they reach the consignee. Would it be seriously contended that the consignee would be bound in any court of justice for the purchase price? Certainly not. Nor is there any decision sustaining this proposition. Could the consignee sequester the goods from the hands of the express agent without paying the C. O. D.? Certainly not. Yet the majority opinion places the consignee in the unique attitude of owning property, which property is in the possession of the consignee's agent, and yet the consignee cannot get his property from his agent without paying the consignor. It is a rudimentary principle of law that, where one has a lien upon property, the owner of the property can sequester the same. But here the majority insist that my agent has my property, and yet the possession of my agent is my possession, and I cannot get my property from my agent without paying a third party, the consignor. Suppose the consignee steal the property without paying the C. O. D. Could he be indicted for the theft of his own property? Or suppose he uses violence in obtaining the property from the express agent without paying the C. O. D. Could he be indicted for the robbery of his own agent, whereby he takes by violence his own property from his own agent? These illustrations show to my mind the legal absurdity urged with such prolixity in the majority opinion.

But it is insisted that the majority of the decisions of the courts of other states sustain the majority opinion. This may be conceded, in so far as said decisions relate to the sale of whisky. But such decisions are at variance with the philosophy of the law, and also at variance with other decisions upon other sales of like kind and character all over the United States; and they, in that respect, are an anomaly in the jurisprudence of this country. Suppose I say to A, "I will sell you my hat for \$5, cash on delivery." Surely it is not A's hat until he pays the \$5. Or, if I say to A, "I will sell you my hat for \$5, cash on delivery, and have B bring and deliver the same to you, provided A pays B \$5." Certainly this would not authorize A to say the hat was his until he paid the \$5. Then what virtue is there in the intervention of an express company in the place of B? What reason or philosophy can there be in the distinction between the agency of B, in the illustration just used, and the express company? I have the utmost respect for the decisions of the courts of last resort of other states, 1 L.R.A.(N.S.)

but that respect does not go to the extent of a fetich worship of authorities upon isolated propositions when those propositions are at variance with the whole trend of all the other authorities, and at variance with reason and law.

I will now review some of the authorities on this question, laying down the converse rule to that stated in the opinion of the majority:

In *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214, I find that the consignor had sent the goods to the consignee, and then sent the bill of lading to a bank, with draft attached. The Supreme Court of the United States holds this is a sale at the point of destination. In other words, it is a condition precedent to the sale, to wit, the payment of the draft. The bill of lading is the evidence of title. The title vests when the draft is paid. The draft being paid at the point of destination, the sale occurs at the point of destination. And again I find this language: We agree that, where a bill of lading has been so taken, the inference that it was not so intended that the property in the goods should pass may be submitted, though it is held to be almost conclusive; and we agree that, where there are circumstances pointing both ways, some indicating an intent to pass, others *contra*, it becomes a question for the jury whether the property has passed. This proposition was laid down by Judge Fisher in *Texas C. R. Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. 575. And again, the learned court in the case first cited says: "There are no circumstances to rebut the intent to retain ownership; . . . nothing in the evidence . . . tended to show any other intent. Hence there was no necessity of submitting to the jury the question, whether there was a change of ownership." If the carrier had instructions not to deliver the property until it was paid for, then it did not belong to the plaintiff at the time of the injury in transit, and he could not maintain his action therefor. *Cudahy Packing Co. v. Dorsey*, 26 Tex. Civ. App. 484, 63 S. W. 549. While it is true that, where delivery of property sold is to be determined by the contract between the vendor and vendee, yet, if the vendor sent bill of lading to his order, draft attached, the presumption arises that he thereby intended to retain title in himself until payment. *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 670. It is true that this presumption might be rebutted by evidence, and it would then become an issue for the jury. So, also, I hold that, if the goods are sent C. O. D., the same presumption would arise; and, there being no evidence combatting the pre-

sumption, there would be no issue, except the general one of innocence. But the liquor dealer might show that the purchaser directed that it be turned over to the carrier. Then it would be a question of fact for the jury to determine whether he intended to pass the title when he delivered to the designated carrier. If there was no intention to pass title at the point of shipment, it would not pass until the delivery and payment at the point of destination,—guilt depending upon the question of intent. Where there is no issue as to the intent, there is no issue to be presented to the jury, except the general presumption of innocence.

Now, as stated above, it is the common experience that, where a consignor places goods with an express company C. O. D. (these alone being the facts), he does not intend to part with his property until the property reaches the point of destination, and until the consignee pays the contract price to his agent, the express company. I do not mean to be understood, as indicated above, that acts might not be shown establishing conclusively that the intent of the parties was merely to use the C. O. D. as a convenient mode of collecting the money. Certainly they could, since the intent of the parties making the contract, and what intent they had, is a question of fact, and not a question of law. But in an ordinary C. O. D. express shipment no other intent is suggested than that the consignor did not intend to part with his property until the condition precedent, to wit, the payment of the purchase price, was complied with. When the price is paid the sale is consummated. If this is in the prohibited district, the consignor becomes guilty of the sale there.

The rule is thus expressed in Benjamin on Sales, §§ 382 *et seq.*: "If A, in New York, orders goods from B, in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival: B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods, or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A, and sell the bill to a Liverpool banker; transferring to the banker the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now, in both of these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A at the

time of appropriating the goods to the contract." There is no distinction between this character of sale and an ordinary C. O. D. shipment. To attempt to make one would be urging merely a difference wherein there is no distinction.

Again, if A puts goods in the express office to be sent to B, by a previous arrangement, C. O. D., he thereby expresses an evident intent to hold the title to the goods until the purchase price is paid. In other words, the C. O. D. becomes a condition precedent to the sale. Suppose A swears he transferred the title, and it was agreed that the title passed at the point of the shipment, but, in the same connection, swears he did not agree to deliver the goods until the C. O. D. was paid. Now, this, I take it, would be a bare subterfuge. Yet it would not preclude a charge of the court upon what his intent might be. If the case were tried before a jury under a proper charge on this state of facts, and the jury should decide against defendant, believing it was a sale in the inhibited district, I apprehend that no court would disturb the finding of the jury on the ground that the evidence was not sufficient.

No one will seriously controvert the fact that the intent of the parties is the gist of the sale. Without the concurrence and co-operation in the intent, there can never be a sale of any species of property. Then, the intent being a question of fact, this is an issue that can be proved like other issues. Of course, if the contract is a written contract, you cannot vary the terms thereof by parol evidence, as between vendor and vendee. C. O. D. shipments are not written contracts, but verbal acts, so to speak; and they must be looked at in the light of human experience, in passing upon the evident intent of the parties. Benjamin, Sales, § 390. In the above propositions I am also supported by Benjamin in his work on Sales (§ 399), that under no circumstances does an ordinary C. O. D. shipment pass the title, nor does the shipment, where a bill of lading is attached to a draft, until the money is paid for the goods. The different phases of the rule are there admirably stated.

In *Joseph v. Cannon*, 11 Tex. Civ. App. 295, 32 S. W. 241, we have this very proposition of law very positively laid down: "Where the seller, without any agreement for credit, fills an order for goods, and ships them to the buyer, accompanied by a bill and invoice showing the terms to be cash, the sale is not complete until payment is made, and the consignee does not acquire title by receiving the goods without payment; nor would a subsequent deed of trust by him, for the benefit of creditors, convey the title to the trustee." This decision was

rendered by Collard, Associate Justice, and is an affirmance of a case tried before Judge Henderson, my associate upon this bench, who was then district judge. Judge Henderson filed his conclusion of law and fact, and upon said conclusions the case was affirmed. Among other conclusions by him are the following: "A sale is a mutual agreement constituted by an offer to sell on terms by one side, and the acceptance by the other; and the acceptance must be responsive to the very terms stated in the offer. Second. If one of the terms stated is for cash, and that is a condition precedent, that must be complied with before the title is vested in the vendee. And it makes no difference in such case if the goods have been delivered, or possession obtained by the vendee. The condition must be complied with before the title vests." This is rather strange language, in view of the opinion of the majority. Here we have a man shipping goods to another, accompanied by bill and invoice showing the terms to be cash, and yet it is not a consummated sale until said terms are complied with, although said property has passed into the hands of a trustee for the benefit of creditors. Then how can it be seriously contended that where the goods are not sent with bill and invoice, but sent C. O. D., the property passes to the consignee before he complies with the C. O. D. agreement? To my mind, it is too clear for discussion. This authority alone, independent of those hereafter referred to, conclusively shows the sophistry in the opinion of the majority.

In *Campbell Printing Press & Mfg. Co. v. Powell*, 78 Tex. 64, 14 S. W. 247 (opinion delivered by Chief Justice Stayton, of the supreme court), we have this very significant language bearing upon the question now under consideration: "The general rule in reference to personal property is that, when the seller delivers possession of the thing sold, he parts with the seller's lien; but the property in this case was not delivered with intent to pass the title, but rather as a bailment, by the express terms of the contract, title remaining in appellant, who expressly agreed to make title only when the purchase money was paid."

In *Scott v. Childers*, 24 Tex. Civ. App. 349, 60 S. W. 776, Templeton, J., delivering the opinion of the court (and writ of error was denied by the supreme court), uses this language: "The court in the general charge submitted the law upon the issue arising from the deposit of the deed from Childers to Vaughan with Word, to be held by him in escrow, in a manner not complained of by the appellant, and, at the request of the appellee, gave a special charge on this issue to the effect that if the cattle were delivered

by Childers to Vaughan in pursuance of the deed, and, if it was agreed between them that the title to the cattle would not pass until the conditions, if any, for which the deed was placed in escrow with Word, had been complied with, then the title would not pass, notwithstanding the delivery of the cattle. The court further charged the jury, in response to a question propounded by them, that 'the title to personal property would pass by delivery, unless you believe from the evidence that it was the agreement by and between the parties to the contract that there was some condition to be performed before the title should pass, and that said condition had not been performed, or that, if a delivery of said personal property had been made, that said delivery, if any, was made with the intention to waive the condition, if you believe from the evidence that there was any such condition.' The appellant objects to these special charges on the ground that they give too much prominence to the proposition that the delivery of the cattle would not pass title if there was an agreement that it should not pass until certain conditions were complied with. It is clear, as a matter of law, that the delivery would not have the effect to pass the title to the cattle from Childers to Vaughan if there was an agreement between them that the title should not pass until Vaughan had complied with certain conditions; and we do not think that the charges under consideration give unnecessary prominence to Childers' theory on this issue."

In *Leath v. Uttley*, 66 Tex. 82, 17 S. W. 401, the supreme court of this state says: "When he has not performed a condition precedent to the accrual of his title to personal property, having no title, he can convey none, even to a purchaser without notice." Judge Robertson, one of the most illustrious judges that has adorned the bench in Texas, delivered this opinion; and, while it is short, it lays down the principle very clearly as contended for by the writer. See also 24 Am. & Eng. Enc. Law, pp. 1047, 1052, 1065; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 558, 2 Atl. 586; *Griffith v. Morrison*, 58 Tex. 51.

In *Sinker v. Comparet*, 62 Tex. 470, we find the principle laid down as follows: "It would seem that when goods are sold at a fixed price, to be paid on a certain day, and delivery is made upon an agreement, express or implied, that, until the price is paid, the title is to remain in the vendor, payment becomes a condition precedent, and, until payment, the title to the property is not vested in the purchaser."

Mr. Mechem, in his work on Sales, § 740, says: "The delivery to the carrier, to pass

the title, must be unconditional, and made with the intention that the title shall pass thereby. Of this intention, where the facts are in dispute, the jury is to judge. Consigning the goods without restriction to the purchaser, or assigning and transmitting to him the bill of lading, are strong evidences of an intention to pass the title, and cannot be controlled by secret determinations to the contrary." And again, in § 774, in the same work, we find this language: "Where the seller takes a bill of lading which expressly stipulates that the goods are to be delivered at the point of destination to himself, or agent, or to his order or assigns, there is the clearest possible evidence upon the face of the transaction that, notwithstanding such an appropriation of the goods as might have been sufficient to transfer the title to the buyer, the seller has determined to prevent this result by keeping the goods within his own control." Section 777: "This reservation of the title by the seller may be prompted by any one of a number of motives, and it may have a variety of effects. Its ordinary purpose undoubtedly is to coerce payment of the price by retaining title until payment. In addition to this main purpose and effect, it may have several incidental or collateral effects. It may, for example, determine when and where the title has passed and the sale has been completed, within the purview of local statutes forbidding or restricting sales, as in the common case of the statutes forbidding or restricting sales of intoxicating liquors." The text on this last proposition cites a long list of authorities too numerous to collate,—among others, *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363. In this latter case the very converse doctrine to that laid down by the majority of the court is discussed and approved by Burgess, J., and the opinion collates various decisions of his own court and other states supporting that position.

The majority opinion collates a great array of authorities establishing that an ordinary shipment of goods passes the title at the point of shipment. I see no pith or point in this suggestion. There has never been any controversy as to this proposition. In that instance there is no character of condition attached to the shipment. The title, of course, passes to the consignee upon placing the property with the carrier, subject, alone, to the right of stoppage *in transitu* on the part of the consignor.

The opinion of the majority also discusses the constitutionality of the statute passed by the legislature which makes a C. O. D. shipment a sale at the point of destination, and declares this statute un-

constitutional. This may be correct, were it not for the fact that the statute itself merely announces the common-law rule on C. O. D. shipments,—that is, a condition precedent to the consummation of the sale precludes the sale,—and the legislative declaration is a mere re-enunciation of this plain provision of the common law.

The majority also hold that the clause of the statute which inhibits soliciting orders for whisky in a local-option district is unconstitutional, but they cite no provision of the Constitution to support it. The constitutional provision on local option authorizes the inhibition of a sale in local-option territory. This, I take it, carries with it the necessary, incidental, and subsidiary power to pass all legislation necessary to make the inhibition effective; and hence I say no constitutional objection exists to making inhibition of soliciting orders for whisky in a local-option territory, and fixing a penalty for its violation.

The majority also insist that the Supreme Court of the United States have held that the local-option law of this state cannot interfere with interstate commerce shipments, and that, therefore, to hold the contrary would make purely state shipments subject to a different law from that of interstate shipments. There is no reason in this for the position the majority occupy. State drummers can be taxed now, but interstate drummers cannot, because it interferes with interstate commerce. Yet I apprehend that the majority would not insist on the repeal of a tax upon state drummers by sheer force of the fact that interstate drummers could not be made to pay a tax.

Were it not for the length of this opinion, I would discuss many other phases of the majority opinion, but I shall proceed now, in a brief way, to review the decisions of this court:

In the *Bruce Case*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683, the proposition is laid down that the sale is at the point of shipment, in an ordinary C. O. D., but a contract signed with the purchaser by Bruce, in the shape of an order to Bruce, precluded the prosecution for a C. O. D. shipment by Bruce from Weatherford to Gordon, in Palo Pinto county. If it was not a violation of the law, why did he insist upon the consignee sending him a bogus order, such as the statement of facts indicates? It was clearly done in order to evade the local-option law, and could have been for no other purpose. The blank was prepared by Bruce, furnished to the consignee, who merely filled it out, and then it constitutes an absolute defense for Bruce against any prosecution. This case was tried before the court without the intervention of a jury.

The court had a right, under the conflict in the evidence, to decide—which he necessarily had to do in order to find the defendant guilty—that the order from the consignee to the defendant was a bare subterfuge resorted to for the purpose of evading the local-option law. But, if it is not a subterfuge, as the court in the Bruce Case holds, then said decision recognizes the contention I make,—that is, that the intent of the parties must be gathered from the evidence,—and, according to the bogus order, his real purpose and intention was not to part with the property until the same reached Gordon, in Palo Pinto county. The case, instead of being reversed on the proposition that the evidence might change the *locus* of the sale, was really reversed because of the insufficiency of the evidence, as I construe the opinion. This case and that of *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007, were rendered before I came upon the bench.

Weathered v. State (Tex. Crim. App.) 1 Tex. Ct. Rep. 655, 60 S. W. 876, appears to have been a memorandum decision, and was really decided upon another question than that of C. O. D., in this: There were two local-option laws adopted. One was valid, and the other not. The record shows appellant objected to the introduction of the valid law, which objection was sustained. This, of itself, should and did reverse the case. It is true that Judge Davidson, in writing the opinion, cites the above cases to support the C. O. D. proposition. But this case was agreed to on the first proposition.

It is stated by the majority of the court that the writer hereof agreed to the C. O. D. proposition in *Treadaway v. State*, 42 Tex. Crim. Rep. 466, 62 S. W. 574. I take it that any candid mind, in reading the same, will find that the point at issue there was not a C. O. D. sale at all. The property had reached the destination, and *Treadaway* merely borrowed the money from a third party to pay the whisky out, and let such third party have the whisky in payment of the loan. The opinion of the majority says that this authority was followed in various other decisions.

It is insisted by the majority that the word "sale" must be taken in the legal signification that it had at common law. Yet in *Bruce v. State*, 39 Tex. Crim. Rep. 26, 44 S. W. 852, we find this statement: "The term 'sale,' as used in the local-option statute, is not to be construed according to its strict contractual sense. It means the actual sale to the person buying at the counter, whether he purchased for himself, or as agent of another."

In *Davidson v. State*, 44 Tex. Crim. Rep. 1 L.R.A. (N.S.)

586, 73 S. W. 808, the facts show that defendant testified in his own behalf that he gave the jug of whisky to the hackman at Guthrie to be delivered to Dan Roberts at Benjamin. The jug had a card attached to it, and on the card was the following: "To Dan Roberts, in care of Dan Berry." This jug was a two-gallon jug of whisky, closed up in a box, and marked on the outside of the box, "Dog Poison." Defendant marked the box in this way so no one would molest it. He delivered the box to the mail carrier from Guthrie to Benjamin, but did not pay the mail carrier to bring the box to Benjamin. When he put the whisky in the box at Guthrie, he charged \$9 to Dan Roberts, as he was the person who had ordered the same from him. The box was sent by express, and was not shipped C. O. D. "Berry was not my agent, and at no time did I ever request him to act as my agent in the delivery of any whisky to Dan Roberts or anyone, and I did not have Dan Berry or anyone else soliciting any orders for whisky in Benjamin about the 15th of April. . . . The next day after I sent the whisky to Benjamin, I wrote the witness Dan Berry a note, in which I stated to him to collect the money for me for the whisky sent Roberts." The court holds the letter of instruction, which accompanied the whisky and was delivered to Berry, and under which he acted, clearly constituted him the agent of appellant in delivering the whisky and receiving pay therefor. "The acts of Berry were performed at Benjamin, in Precinct No. 1 of Knox county. He was evidently not authorized to deliver the whisky without receiving pay therefor, as the letter of instructions directed to him clearly indicates that he acted in that matter for appellant, who lived at Guthrie, King county, and he sent the whisky to Dan Berry, to be delivered to Dan Roberts when he paid for the same; that is, as we understand the letter of instructions to Berry, appellant was not willing to intrust the matter to Roberts, the purchaser of the whisky, nor was he empowered to deliver the same to him, unless the money therefor was paid to Berry, who was authorized to receive and remit it to appellant, the consignor of the whisky. This, as we understand it, was a sale consummated at Benjamin." It is true, the court states that the above facts are not like those of *Bruce v. State*, which, they say, "depended on its own peculiar circumstances." Now, in what respect is this case peculiar from an ordinary C. O. D.? Davidson sent the whisky to Roberts in care of Berry, with instructions to collect the money when Roberts received the whisky. He does so. Under these facts, the court holds that Dav-

idson is guilty of selling whisky in Benjamin.

In *Rills v. State* (Tex. Crim. App.) 3 Tex. Ct. Rep. 227, 64 S. W. 1047, the *Treadaway Case*, 42 Tex. Crim. Rep. 466, 62 S. W. 574, is followed. The fact is recognized that the *Treadaway Case* had nothing whatever to do with C. O. D., because not predicated upon the doctrine laid down in the *Bruce Case*. And the same may be said of *Kirby v. State* (Tex. Crim. App.) 80 S. W. 1007.

The majority opinion, however, attempts to reconcile the case of *Bogle v. State*, 42 Tex. Crim. Rep. 390, 55 S. W. 830, with the other authorities. But a casual reading of it will show it is at variance,—not only at variance but it violates the rudimentary principles of the law of sales, in this: Where the consignor places goods upon the car without any character of reservation of title, to be shipped to the consignee, the title passes when the goods are placed with the carrier. The *Bogle Case* had no character of reservation of title, as the statement of facts shows; but the shipment was merely an ordinary shipment of goods, without any character of reservation, from Dallas to Greenville. The opinion shows this, and the excerpts from the original statement of facts contained in the opinion of the majority do not change the principle laid down in the case itself.

The above are all the authorities of this court, I believe, passing upon the question of C. O. D., except *Sinclair v. State* (Tex. Crim. App.) 77 S. W. 621, and *James v. Com.* 102 Ky. 108, 42 S. W. 1107, cases cited in the majority opinion, to which I do not agree. Nor, as stated above, have I ever agreed to the proposition stated in the *Bruce Case*, 39 Tex. Crim. Rep. 26, 44 S. W. 852.

It is earnestly insisted that the Supreme Court of the United States, in *Norfolk & W. R. Co. v. Sims*, 191 U. S. 446, 48 L. ed. 256, 24 Sup. Ct. Rep. 151, has held with the majority of this court. I do not think so. This decision was a pure announcement of the doctrine laid down in numerous authorities holding that the shipment is interstate commerce. It is true, they incidentally discussed the matter; but that part of the opinion is *dicta*, and a close scrutiny of the same shows they do not intend to hold that the sale is completed and title to the property passes at the point of shipment.

So I believe that the above shows that the supreme court of this state, various decisions of other courts, and the elementary authorities sustain the proposition that a shipment with bill of lading attached to a draft is a sale at the point of destination, upon the payment of the draft by the consignee. The legislature, through the con-

stitutional provision authorizing the same, has passed a law inhibiting sales in a local-option district. The question arises, then, as to where the sale is consummated. The majority of this court hold that the sale is at the point of shipment, under an ordinary C. O. D. This, I take it, is not in accord with reason or philosophy, and a violation of all the rules of sale. A C. O. D. is a condition precedent to the sale. The sale takes place upon compliance with the condition, and, if the condition is complied with in the inhibited district, then the sale takes place there, and the party would be guilty of making the sale in the local-option district. To hold otherwise renders nugatory and void, and to a large extent destroys, the local-option law of this state,—a law of sufficient importance to have been made a constitutional provision,—and converts the express offices of this state into saloons for the convenient distribution of whisky in prohibited districts to all parties who desire to violate the law. While this would not be a conclusive reason against a converse decision, yet the results of that decision are so at variance with the clear import of the intent of the legislature, and so out of harmony with the decisions of other courts, and so out of harmony with the elementary authorities and principles of the law of sales, that I enter this, my dissent.

RHODE ISLAND SUPREME COURT.

JEREMIAH W. HORTON et al.

v.

CITY COUNCIL, ETC., OF NEWPORT.

(... R. I.)

1. Local self-government—regulation of police force.

The right of local self-government is not infringed by a statute regulating the police force of a city.

2. Same—payment of salaries.

The state may require municipal corporations to pay the salaries of local police of-

Case Note.—The unique character of the early settlements in Rhode Island, and the manner in which the state government came into existence, make the question of the right to local self-government in that state of peculiar interest. Unlike other colonies, these settlements were made without a charter of any kind, on land to which the Crown of England had no title, and which was bought from the Indians. The settlers organized their own government, and these organizations were really independent sovereignties, and were the precursors or forefathers of the state. The fact that the state was formed by a confederation of these

icers, although such officers are officers of the state, and appointed under its authority.

3. Constitutional law—legislative control of police.

Where the legislature has exercised control over the police of a municipal corporation, the further right to do so is not denied by the adoption of a constitutional provision that it shall continue to exercise the powers it has hitherto exercised.

4. Same—payment of salaries.

Legislative control of the local police, and requiring the payment of their salaries out of local funds, are not forbidden by the provisions of the 14th Amendment of the United States Constitution.

(May 22, 1905.)

PETITION for writ of mandamus to compel the payment of the salaries of

independent sovereign towns, each possessing well-defined, self-instituted, governmental powers, legislative, judicial, and executive, lends considerable force to the contention that by such union they abandoned to the state only such powers as were expressly delegated, and that they still retained their original right to regulate their own local affairs. But this contention was denied by the supreme court of that state in the case of *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, 47 Atl. 312, so far as the question of the power of the general assembly to create a board of police commissioners for a city, with power to appoint a chief of police, is concerned. The court denied that the Constitution of the state must be interpreted according to an unwritten theory of local self-government, which so entered into its provisions as to make it controlling in construing them. But its decision was expressly limited to the question whether the appointment of a chief of police for the city of Newport, by this board of police commissioners, infringed the city's right of local self-government, and it was held that it did not, on the theory that a police officer performs a state, and not purely a municipal, duty. The question of the right to impose on the municipality the burden of paying the salaries of local police officers was left untouched. The facts and arguments furnished by the history of Rhode Island in support of this claim of the right to local self-government are summarized in a note to the case of *Newport v. Horton*, in 50 L. R. A. 330, prepared by Amasa M. Eaton, of Providence, R. I.; and these historical facts and arguments are set out in detail, at much greater length, in a series of articles contributed by him to the *Harvard Law Review*. See 13 *Harvard Law Rev.* 441, 570, 638, and 14 *Harvard Law Rev.* 20, 116.

The whole question of the power of the legislature to impose burdens upon municipalities, and to control their local administration and property, is treated in a note in 48 L. R. A. 465, which shows that the weight 1 L.R.A. (N.S.)

petitioners as police commissioners of the city of Newport. Judgment for petitioners.

The facts are stated in the opinion.

Messrs. William B. Greenough, Attorney General, and William P. Sheffield, Jr., for petitioners:

R. I. Pub. Laws, chap. 804, § 9, does not violate the principles of local self-government, so called.

New Orleans v. Clark (Jefferson City Gas-light Co. v. Clark) 95 U. S. 644, 24 L. ed. 521; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; 1 Dill. Mun. Corp. 42-105; *Re North Smithfield*, 26 R. I. 164, 58 Atl. 628; *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, 47 Atl. 312.

The legislature can, in so far as funds are

of authority sustains the right of the state to control the local police of a municipality, on the ground that the police is a matter pertaining to governmental functions, as distinguished from the purely private functions of the municipality. See *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 560, 19 N. E. 224; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Diamond v. Cain*, 21 La. Ann. 309; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102.

So in the later case of *Americus v. Perry*, 114 Ga. 871, 67 L. R. A. 230, 40 S. E. 1004, an act creating a board of police commissioners with exclusive control of the police officers of the city, naming the first members of the board, prescribing the manner in which their successors should be chosen, and setting forth their powers and duties, was held not to be an unconstitutional deprivation of local self-government.

And in *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, it is held that no unconstitutional deprivation of local self-government is made by a statute creating a board of fire and police commissioners for cities of the metropolitan class, and placing the power of appointment thereto in the governor, since the power to create municipal corporations, which is vested in the legislature, implies the power to impose upon them such limitations as the legislature shall see fit. This case overrules *State ex rel. Atty. Gen. v. Moores* (State ex rel. *Smyth v. Moores*), 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175, where it was held that the right of local self-government was inherent, and was one of the rights retained by the people at the time of the adoption of the organic law. Yet even the overruled case recognized that "the authorities quite uniformly agree that the preservation of the public peace is essentially a matter of public concern," and that the instrumentalities by which the

not raised for, or appropriated to, a special purpose, appropriate them to defray the expenses of government, or to any use which it deems to be for the public welfare.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375; Young v. Kansas City, 152 Mo. 661, 54 S. W. 535; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421; Philadelphia v. Field, 58 Pa. 320; People ex rel. Springfield v. Power, 25 Ill. 187; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508; Guilford v. Chenango County, 13 N. Y. 143; Agawam v. Hampden County, 130 Mass. 530; Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) *supra*; Creighton v. San Francisco, 42 Cal. 446; People ex rel. Blanding v. Burr, 13 Cal. 353; Williams v. Eggleston, *supra*; Cooley, Const. Lim. 3d ed. 230, p. 261.

It is not material that the commissioners are not appointed by the city.

Williams v. Eggleston, Mobile County v.

Kimball, State ex rel. Bulkeley v. Williams, and Philadelphia v. Field, *supra*; New York v. Tenth Nat. Bank, 111 N. Y. 447, 18 N. E. 618.

The legislature may impose upon a particular locality the burden of an improvement, or of the performance of a governmental function by which it is thereby benefited.

Prince v. Crocker, State ex rel. Bulkeley v. Williams, People ex rel. Springfield v. Power, Philadelphia v. Field, Williams v. Cammack, Mobile County v. Kimball, and Williams v. Eggleston, *supra*.

Mandamus is the proper remedy to compel the payment of the salaries of the police commissioners.

McBride v. Grand Rapids, 47 Mich. 236, 10 N. W. 353; Speed v. Detroit, 100 Mich. 92, 58 N. W. 638; 19 Am. & Eng. Enc. Law, 2d ed. p. 798, note 3; 14 Am. & Eng. Enc. Law, p. 180, note 3; Spelling, Inj. & Extr. Rem. 2d ed. § 1492.

Mr. J. Stacy Brown for respondents.

Parkhurst, J., delivered the opinion of the court:

This was a petition for a writ of man-

same is effected are agencies of the state; but the court said: "Conceding that the legislature, unless inhibited by the Constitution, may provide the mode of selecting police officers, yet it has no power or authority to deprive the municipality of the right to select officers whose duties are solely of a local nature, such as officers connected with the fire department." The overruling case, however, does not make this distinction, but sustains the statute as a whole. The effect of this decision must be to reinstate State ex rel. Simeral v. Seavey, 22 Neb. 454, 35 N. W. 228, which sustained a similar statute, and which was overruled by State ex rel. Atty. Gen. v. Moores (State ex rel. Smyth v. Moores) *supra*.

But an act of the legislature appointing members of a police force in a city was held, in O'Connor v. Fond du Lac, 109 Wis. 253, 53 L. R. A. 831, 85 N. W. 327, to be an unconstitutional interference with local affairs, where the Constitution provided that all towns and village officers whose election or appointment is not provided for by the Constitution should be elected by the electors of such cities, towns, and villages, or appointed by such authorities thereof as the legislature shall designate for that purpose.

And in Speed v. Crawford, 3 Met. (Ky.) 207, members of a police board of a city were held to be officers of the city; and an act providing for their appointment by the chancellor or governor was held to be unconstitutional.

So, the right of local self-government is held, in Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15, to be violated by an act which provides that the police board of a certain city shall consist of four commis-

sioners, of whom two shall belong to the political party having the highest representation in the common council and the other two to the party having the next highest representation, and that each member of the common council shall vote for but two of the four commissioners to be chosen; since the minority which is thus given power to appoint two of the commissioners is not a city authority within the meaning of the state Constitution, empowering the legislature to designate the local authority who shall appoint local officers.

And People ex rel. Bolton v. Albertson, 55 N. Y. 50, denies the right of the legislature to establish a police force for a city where the Constitution requires that city officers shall be elected by the electors of the city. The court states that the purpose of the constitutional provision was to secure to the civil and political divisions of the state the right of local self-government, and that the police powers are among the most important conferred upon city governments.

In Lovington v. Wider, 53 Ill. 302, and Wider v. East St. Louis, 55 Ill. 135, the constitutionality of an act vesting the control of the police department of certain cities in commissioners appointed by the governor with the consent of the senate, and authorizing them to incur indebtedness on behalf of the city, was denied; but these decisions rest upon an express provision of the Illinois Constitution as to the power of municipalities to tax for corporate purposes.

The cases generally concede the right of legislative control over the exercise by a municipality of purely governmental functions; but the line which distinguishes matters with respect to which a city exercises

damus, brought by Jeremiah W. Horton, John H. Wetherell, and Frederick B. Coggeshall, police commissioners of the city of Newport, against the city council and city treasurer of the city of Newport, to compel the payment of the salaries of the petitioners for the month of February, A. D. 1905, as provided in § 9 of chapter 804 of the Public Laws.

The petition in the first clause sets forth the creation and establishment of a police commission for the city of Newport under chapter 804 of the Public Laws of Rhode Island. The second clause recites the appointment, election, and qualification of Jeremiah W. Horton, Frederick B. Coggeshall, and John H. Wetherell, under, respectively, chapters 804, 1032, and § 63 of chapter 809 of the Public Laws. The third clause recites the 9th section of chapter 804, as follows: "The annual salary of each of the members of said board shall be \$1,000 and of the clerk \$500, payable monthly by said city." The 4th clause alleges that there is due to each of said petitioners the sum of \$83.33 as his salary for the month of February, 1905; and the 5th clause alleges that it be-

came the duty of the city treasurer of the city of Newport to pay out of the funds of the city the said sum of \$83.33 to each of the petitioners as his salary for the month of February, 1905. The 6th clause alleges two resolutions passed by the city council of Newport, directing the city treasurer of said city to pay no funds from the city treasurer for the salary of the petitioners, and the refusal of the city treasurer, in obedience to said resolutions, to pay said salary or any part thereof to the said petitioners, or to any of them. The prayer of said petition asks for a writ of mandamus to issue against the city council and city treasurer of said city, ordering the city council to revoke said resolution and directing the city treasurer to pay said salary.

The court granted an alternative writ, returnable on the 24th day of March, at which time the defendants filed their answer; the only part of which, material to determination of the present question, is embodied in the 7th clause: "Seventh. And the respondents, further answering, say that said § 9 of chapter 804, referred to in the third paragraph of said bill or petition, is unconstitu-

governmental functions, as an agent of the state, from those as to which it acts in its private corporate capacity, is not always well defined. Dillon, *Mun. Corp.* vol. 1, § 58, states the distinction thus: "The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of waterworks the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large."

The case of *Horton v. Newport* seems to be the first to decide squarely and directly the right of the state to require municipal corporations to pay the salaries of local police officers. Some of the statutes regulating the local police, which have been sustained, have made provision for the payment of salaries by the municipalities; but these provisions have not been discussed in passing on the validity of the acts.

The right of the legislature to fix the salaries of firemen employed by a municipality is denied in *Lexington v. Thompson*, 113 Ky. 540, 57 L. R. A. 775, 101 Am. St. Rep. 361, 68 S. W. 477, on the ground that this is a matter of local government, never delegated to the legislature. But the court concedes the right of the legislature to control the police, as being officers of the state, though it says nothing about the power to fix their salaries and impose the payment thereof on the municipality.

The power to impose upon a municipality the payment of salaries of police officers appointed by the state is impliedly questioned 1 L.R.A. (N.S.)

in *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267, where the court, after holding unconstitutional an act providing for a board of metropolitan police and a fire board, to be appointed by the legislature, said: "If the act related alone to the management of the police department, and the state was proposing to take upon itself the burden of maintaining the department as well as its management, . . . then a very different question would be presented."

And in *Wider v. East St. Louis*, *supra*, the court said, in denying the constitutionality of an act vesting control of the police department of certain cities in commissioners appointed by the governor, that the police force organized by the police commissioners appointed under the act would doubtless have a legal right to serve, if they chose to do so, gratuitously, and to that extent the law might be upheld. But this decision rested upon an express provision of the Illinois Constitution as to the right of cities and towns to tax for corporate purposes.

But the power of the legislature to fix the salary of a city recorder was sustained in *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500.

And in *Speed v. Detroit*, 160 Mich. 92, 58 N. W. 638, legislative power to fix the salary of a city counselor was upheld.

So it has been held that the legislature may require a city to pay out of its treasury the salary of the stenographer of courts in the city having jurisdiction in cases of felony. *Young v. Kansas City*, 152 Mo. 661, 54 S. W. 535.

tional, null, and void, for that: (a) That said § 9 throughout infringes the rights of local self-government, fundamental and historic in the state of Rhode Island, enjoyed and preserved from the settlement of its four towns to the adoption of the Constitution, which the Constitution itself recognizes. (b) That said section throughout, and particularly the portion thereof set forth in the third numbered paragraph of the said bill or petition, infringes the Constitution of the state of Rhode Island, and is contrary to article 1, §§ 2, 23. (c) That said portion of said § 9 also infringes article 4, § 10, of the Constitution of the state of Rhode Island. (d) That said section throughout infringes article 14, § 2, of the amendments to the Constitution of the United States."

1. As to the claim that § 9, chap. 804, of the Public Laws of Rhode Island "infringes the rights of local self-government," it has already been decided by this court, in *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, 47 Atl. 312: "Our conclusion is that the right of a city to the sole control of its police force has not been so reserved as to bring it within article 1, § 23, or article 4, § 10, of the Constitution; that the act to establish a board of police commissioners for the city of Newport is not unconstitutional on the ground of interference with the right of that city to local self-government, so far as the appointment of a chief of police by said commissioners is concerned; that the petition, therefore, states no ground for relief."

Although the case of *Newport v. Horton*, *supra*, was confined to the single question of the appointment of a chief of police, that being the only question there raised, yet this very question, the chief of police being an appointee of the commissioners, involved the whole question of the validity of the appointment of the commissioners themselves, and the historical discussion of the rights of local self-government and of the question of the authority of the general assembly in regard to the control of the police was so fully set forth therein that the scope of that opinion is broad enough to cover the whole question of legislative power in the matter of police. After a full discussion of the status of the towns under the original or parliamentary charter of 1643-44, and of the powers of the general assembly to control the towns under the charter of Charles II., of 1663, and of the authorities, it is stated (p. 208 of 22 R. I., p. 338 of 50 L. R. A., and p. 316 of 47 Atl.): "The clear weight of authority sustains the right of the legislature to control police; and equally is it sustained by sound reason." The whole question of "the right of the leg-

islature to control police" is therefore fully settled in this state by the foregoing case.

2. The further question here raised is as to the right of the legislature to require the payment of the expenses of the police department by the city of Newport; the respondents contending that, inasmuch as the police commissioners and their appointees are held to be state officers, the state should pay them out of the general state funds, and has no right to require that the city shall pay them out of its funds; and that this is an infringement of the same constitutional rights as above set forth. It would appear upon general principles that, if the general assembly has the right to "control police," although their duties are confined to a certain locality, it would have the equal right to provide for the payment of the expenses of the local police department out of the local funds of the municipality, and that such payment could lawfully be required only out of such funds; and, upon examination of the authorities cited, such is found to be the law.

In the leading case of *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572, decided in 1860, after most elaborate argument by very able counsel, this same question of the legislative power to appropriate local funds for the support of the police department was most fully and ably discussed, and the court sustained the act, in this particular, as well as generally. Thus, on page 397 of 15 Md., 74 Am. Dec. 572, Martin, J. (superior court), says: "The 15th section of the bill presents the question as to the authority of the legislature to confer upon the commissioners the means of raising the money necessary for the execution of the duties imposed upon them, without which, of course, the board would be inefficient and powerless. That portion of the 15th section which confers on the commissioners the authority to estimate what sum of money will be necessary to enable them to discharge the duties imposed on them, and the obligation of the mayor and city council to raise, by assessment and levy upon the assessable property of the city, the sum thus estimated by the board, is not obnoxious to any valid objection, as a question of power. But the commissioners are authorized to issue certificates of indebtedness, in the name of the mayor and city council, in the manner, upon the terms, and for the purposes indicated by the bill, upon the contingency of the mayor, register, comptroller, or other proper disbursing officer failing to comply with the requisitions of the board; and the validity of this power has been contested and defended with great ability by the respective counsel." And on page 493 of 15 Md., 74 Am. Dec. 572, *Le Grande*, Ch.

J. (court of appeals), after an elaborate opinion, says: "The opinion of the learned judge who decided this case in the superior court shows the bestowal of great care and his usual ability in its preparation. The views there taken are in full concurrence with those herein presented. The judgment pronounced by him must be affirmed." The judges were unanimous.

So, in *Young v. Kansas City*, 152 Mo. 661, 54 S. W. 535, where an official stenographer of the criminal court of Kansas City was required to be paid out of the city treasury, it is said (p. 665 of 152 Mo., p. 536 of 54 S. W.): "We have, then, a court of the state created by law to hear and punish crime in Kansas City. That it was and is entirely competent for the legislature to require the salary of an official of that court to be paid out of the treasury of Kansas City and be a charge upon the revenues of said city, we have no sort of doubt." See also *State ex rel. Police Com'rs v. County Court*, 34 Mo. 546, where legislative power of appropriation of county funds for payment of the expenses of the police department was fully argued and sustained.

So, as to the general power of the legislature for the appropriation of funds of county, town, or city for the purpose of paying for local improvements or for the payment of disputed claims, etc., see *New Orleans v. Clark* (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 654, 24 L. ed. 521, 522; *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Kelly v. Pittsburgh*, 104 U. S. 78, 81, 26 L. ed. 658, 659; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; *Chicago B. & Q. R. Co. v. Otoe County*, 16 Wall. 667, 21 L. ed. 375; *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421; *Philadelphia v. Field*, 58 Pa. 320; *Perkins v. Slack*, 96 Pa. 270; *People ex rel. Springfield v. Power*, 25 Ill. 187; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Guilford v. Chenango County*, 13 N. Y. 143; *Agawam v. Hampden County*, 130 Mass. 528, 530; *Prince v. Crocker*, 166 Mass. 347, 359, 32 L. R. A. 610, 44 N. E. 446; *Creighton v. San Francisco*, 42 Cal. 446; *People ex rel. Blanding v. Burr*, 13 Cal. 353; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *New York v. Tenth Nat. Bank*, 111 N. Y. 447, 15 N. E. 618.

In most of the cases cited by the parties the question of the payment of salaries and expenses of the police department seems not to have been raised, but to have been treated as involved only as incidental to the general question of legislative control.

In *Ingersoll on Public Corporations*, the 1 L.R.A. (N.S.)

latest text-book on the subject (1904), it is stated (§ 64, p. 199): "In the absence of constitutional inhibition, the legislature has unlimited power to control over those municipal officers who are charged with the performance of governmental functions devolved upon it, but cannot interfere with those officers who perform functions of a distinctly municipal character. This power is illustrated in many of the states by the creation of what is known as the 'metropolitan police' for the larger cities. This police force is usually appointed and controlled by a board of commissioners, chosen either by the legislature or governor of the state, as an exercise of the sovereign power of legislation and patronage." Also (§ 65, p. 205): "It may also create and appoint a board of police commissioners, and regulate the compensation for them and for the police officers of the municipality, and compel their payment out of the municipal treasury. In short, it has been repeatedly adjudicated that the legislature has the same power over the revenues of the municipality that it has over the funds of the state, and may thus direct their application to such purposes as it deems appropriate for the public welfare."

No case is cited by the respondents, nor has any case come to the attention of the court, wherein it is held that, in the absence of an express prohibition in the Constitution of a state, the legislature has not full control of the police department of any municipal or local subdivision, and, incidental to such full control, the power to provide for payment of salaries and expenses. On the contrary, the cases cited by the respondents in their brief without exception, so far as they at all relate to the question of legislative control of the department of police, or of any of the officers appointed by a police commission, sustain the position heretofore set forth. The case of *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100, which was a suit by a police officer appointed by police commissioners, for wages at a rate fixed by the commission, against the city of Exeter, is under a constitutional provision which is remarkably like the provisions of the Rhode Island charter of 1663, which then set forth the powers of the general assembly of Rhode Island with relation to the appointment of officers and commissioners, and which are hereafter more fully discussed. Under similar provisions similar cases have been decided in many other states, and all of them sustain the same position in regard to the legislative power in question. See *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Burch v.*

Hardwicke, 30 Gratt. 32, 33, 32 Am. Rep. 640; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 149, 48 L. R. A. 465, 35 Atl. 24, 421; State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177; State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102.

The respondents in argument seem to rest very confidently upon the opinion in the case of *Ex parte Anderson* (Tex. Crim. App.) 10 Tex. Ct. Rep. 852, 81 S. W. 973. In this case the "commissioners" objected to, and the validity of whose appointment was held to be unconstitutional, were said to "dominate and have sole control over the city council in regard to the police department, fire department and the sanitary and street department; and over all franchises and privileges to use the streets of the city for any purpose, or otherwise to exercise any public privilege or advantage in said city, and to prevent the issuance of any bonds by said city for any purpose whatever." They had also various additional powers in regard to legislation, etc.; and it appears from the whole case that the powers granted to these commissioners practically took away all the powers of the mayor and aldermen. The opinion refers to numerous provisions of the Texas Constitution expressly guaranteeing the right of local self-government to the towns and cities, and, among others (p. 978 of 81 S. W., and p. 857 of 10 Tex. Ct. Rep.), those of article 3, § 56, where it is provided that "the legislature shall not . . . pass any local or special law, . . . regulating the affairs of counties, cities, towns, wards, or school districts; . . . creating offices, or prescribing the powers and duties of officers in counties, cities, towns, election, and school districts," etc. From all which it appears that the act in question creating these commissioners and prescribing their powers and duties was in violation of numerous express provisions of the Texas Constitution.

In a number of other cases cited upon the respondents' brief, the opinions expressly discriminate between local affairs like a fire department or department of streets, sewers, etc., which are not subject to direct legislative control, and state functions, such as those exercised by the police. For example: In *Lexington v. Thompson*, 113 Ky. 540, 57 L. R. A. 775, 101 Am. St. Rep. 361, 68 S. W. 477, it is expressly stated on page 557 of 113 Ky., page 780 of 57 L. R. A., page 371 of 101 Am. St. Rep., and on page 482 of 68 S. W.: "The better opinion as to police systems seems to be that, inasmuch as the state is charged primarily with the preservation of public peace and the protection of life and property in the cities as well as in the rural districts, the city police is, in a large measure at least, a part of the 1 L.R.A. (N.S.)

state constabulary, and its members perform the functions of state officials in the exercise of delegated state sovereignty. Therefore, in so far as the police systems of our cities form a part of the state government, they are subject to legislative control."

The same principle is set forth in *State ex rel. Geake v. Fox*, 158 Ind. 126, 56 L. R. A. 893, 63 N. E. 19; *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L. R. A. 244, 93 Am. St. Rep. 222, 89 N. W. 204; *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267.

The remaining cases cited by the respondents upon this point relate to various attempts on the part of the legislature in different states to control through commissions such matters as fire departments, highway departments, and other matters of purely local cognizance, and do not in any way militate against the position with regard to legislative control of the police. Respondents in their brief and argument insist very confidently and very strongly that chapter 804, Pub. Laws, is in violation of article 4, § 10, of the Constitution of the state, to wit:

"Sec. 10. The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this Constitution."

Respondents attempt to show, by historical references to various acts and charters, that this control of police in municipalities was not a power which the general assembly had ever exercised, and that, consequently, it was a power which was reserved to the people. It appears, however, upon examination of the charter of 1663 (2 R. I. Col. Rec. 1664-1677, pp. 9, 10), that the general assembly constituted by that charter was given full power "to elect and constitute such offices and officers, and to graunt such needfull commissions, as they shall thinke fitt and requisite, ffor the ordering, managing and dispatching of the affaires of the sayd Governour and Company, and their successours; and from tyme to tyme, to make, ordeyne, constitute or repeal, such lawes, statutes, orders and ordinances, formes and ceremonies of government and magistracye as to them shall seeme meete for the good and welfare of the sayd Company, and ffor the government and ordering of the landes and hereditaments, hereinafter mentioned to be graunted, and of the people that doe, or att any tyme hereafter shall, inhabitt or bee within the same; soe as such lawes, ordinances and constitutiones. soe made, bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, consid-

ering the nature and constitutione of the place and people there; and alsoe to apoynt, order and direct, erect and settle, such places and courts of jurisdiction, for the heareinge and determininge of all actions, cases, matters and things, happening within the sayd collonie and plantatione, and which shall be in dispute, and depending there, as they shall thinke fitt; and alsoe to distinguish and sett forth the severall names and titles, duties, powers and limitts, of each court, office and officer, superior and inferior; and alsoe to contrive and apoynt such formes of oaths and attestations, not repugnant, but, as neare as may bee, agreeable, as aforesayd, to the lawes and statutes of this our realme, as are conveniente and requisite, with respect to the due administration of justice, and due execution and discharge of all offices and places of trust by the persons that shall bee therein concerned; alsoe to regulate and order the waye and manner of all elections to offices and places of trust."

An act passed in 1664, at the very first session of the general assembly after receiving the said charter, related to the police of the several towns (see 2 R. I. Col. Rec. p. 27), as follows: "It is ordered, that each towne is impowered to apoynt a day for election of their towne officers, and to elect as to chouse Towne Counsell men, soe many as to make vp sixe with the Assistants of each towne, as alsoe Clarke, Treasurer, Constable and Sargant; and that the sayde officers shall receive their ingagemment from one of the Assistants." Whereby it appears that the first provision for election of police or peace officers was for election by the freemen at town meeting.

In 1669 an act was passed, requiring each respective town in the colony to "erect, build, make, and maintain at their own Charge . . . one good and sufficient Pair of stocks or Cage, for the punishing and securing of Offenders, in such Place or Places of each respective Town, as shall be to them most convenient." R. I. Pub. Laws, 1767, p. 210. This a plain instance of the exercise of legislative control over local municipal expenditure, even if the amounts involved are not large.

A notable instance of the regulation and control of the police is seen in the charter of the city of Providence of 1832, where the "administration of police" is vested in the "mayor and aldermen," and not in the freemen. Even in the charter of the city of Newport, passed May, 1853 (Laws 1853, pp. 21, 22), the only provision which covers the appointment of police and their compensation is as follows, from § 4: "The city council shall appoint all necessary officers, define the duties, and fix the compensation 1 L.R.A. (N.S.)

of officers, in cases where such duties, fees, and compensation shall not be defined and fixed by this charter or the laws of the state." Further references almost without number might be detailed to show how, in relation to various matters of public interest, though of local application, the general assembly has assumed and exercised control, many of which are given in the opinion of Stiness, Ch. J., in the case of *Newport v. Horton, supra*.

That a municipal charter is subject at all times to such change, modification, or repeal as the legislature shall see fit to impose is not only fully set forth in many of the cases cited, *supra*, but is very convincingly and strongly stated in *Philadelphia v. Fox*, 64 Pa. 169, wherein, at page 181, it decides as follows: "The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change. Indeed, the legislature of this commonwealth, under the Constitution, could not by contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. It cannot alienate any part of the legislative power which, by the Constitution, is vested in a general assembly annually convened. *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480. If the legislature were to attempt to erect a municipality with a special provision that its charter should be unchangeable or irrevocable, such provision would be a nullity; for acts of Parliament derogatory from the power of subsequent Parliaments bind not. 1 Bl. Com. 90. That such political institutions have not, and cannot have, any vested rights as against the state, is strikingly illustrated and exemplified in *Dunmore's Appeal*, 52 Pa. 374, where it was held by this court that municipal corporations, being creatures of legislation, have no constitutional guaranty of trial by jury and such trial may be denied them." It is needless to say, in view of all these matters, that the court in this instance does not find that the act in question is in violation of article 4, § 10, of the Constitution, but, on the contrary, finds that this exercise of legislative power is well within the provisions of the Constitution.

The respondents also claim, in their answer to the alternative writ, that the section of the act in question (Pub. Laws, chap. 804, § 9) also infringes article 14, § 2, of the Amendments to the Constitution of the United States. We do not find that this position is insisted upon, either in the brief of the respondents or in the argument before the court; nor do we find any case cited

where it is held that such an act as this, which is here in question, is in any manner an infringement of the said provisions of the United States Constitution. On the contrary, several of the cases above cited incidentally hold that such acts, being within the direct legislative control, under the Constitutions of the several states, are not obnoxious to the provisions of article 14 of the Amendments to the Constitution of the United States. See, in this connection, *Williams v. Eggleston*, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Kelly v. Pittsburgh*, 104 U. S. 78, 81, 26 L. ed. 658, 659; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421; *Giozza v. Tiernan*, 148 U. S. 662, 37 L. ed. 602, 13 Sup. Ct. Rep. 721; *Powell v. Pennsylvania*, 127 U. S. 679, 683, 32 L. ed. 254, 256, 8 Sup. Ct. Rep. 992, 1257; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553.

TENNESSEE SUPREME COURT.

J. S. FITE, Superintendent of Shelby County Workhouse, Appt.,
v.

STATE OF TENNESSEE ex rel. NICK SNIDER.

(.... Tenn.)

x. Convict—credit for good behavior.

Conferring on a board of commissioners the power to fix the credits which shall be allowed convicts for good behavior is an unconstitutional delegation of legislative power.

Case Note.—The objections made to the constitutionality of statutes providing for the allowance of credits on a prisoner's term for good behavior are: (1) That they encroach upon the province of the judiciary; (2) that they operate as an exercise of the pardoning power; and (3) that they are a delegation of the legislative power.

That an act (May 1, 1861) providing for a graduated deduction from the term of every prisoner having no infraction of rules recorded against him is unconstitutional as interfering with judgments of the judiciary, was held in *Com. ex rel. Johnson v. Hallowsay*, 42 Pa. 446, 82 Am. Dec. 526, by a divided court. It is said: "The trial, conviction, and sentencing of criminals are judicial duties; and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record."

This reasoning was criticized in *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 651, 4 N. E. 81, as failing to distinguish between the judicial duties proper and those acts relating to the mode and manner of executing a sentence. The further argument, quoted 1 L.R.A. (N.S.)

2. Statute—void in part.

An entire statute will not be annulled by the insertion therein of an unconstitutional provision if it is so far independent of other provisions that the object of the statute will not be affected by its absence.

3. Court—convict—time allowance.

The courts will not recognize a deduction from the sentence of a criminal of time for good behavior, which has been allowed under authority of an unconstitutional statute.

(May 22, 1905.)

APPEAL by defendant from a judgment of the Criminal Court for Shelby County in favor of relator in a habeas corpus proceeding to secure his release from custody, to which he was alleged to be entitled because of time credits. Reversed.

The facts are stated in the opinion.

Mr. L. T. M. Canada for appellant.

Mr. Charles T. Cates, Jr., Attorney General, for appellee:

The vestiture of power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state.

State v. Dalton, 109 Tenn. 544, 72 S. W. 456; *State ex rel. Johnson v. McClellan*, 87 Tenn. 52, 9 S. W. 233; *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285, 50 N. W. 310; *State ex rel. Bishop v. State Bd. of Corrections*, 16 Utah, 478, 52 Pac. 1090; *Com. ex rel. Johnson v. Hallowsay*, 42 Pa. 446, 82 Am. Dec. 526; *Re Convicts*, 73 Vt. 414, 56 L. R. A. 658, 51 Atl. 10.

McAlister, J., delivered the opinion of the court:

The question involved in this case is in respect to the constitutionality of a certain

in *FITE v. STATE EX REL. SNIDER*, that the law operates to impair the judgment of the court, since they could not know, in measuring the sentence, how many days of abatement would be earned, is commented on in *Re Linden*, 112 Wis. 523, 88 N. W. 645, where it is said: "It seems plain that the court might well have taken into account the probability of good-time allowance, which is rendered reasonably certain by such statutes, and have measured the sentence pronounced accordingly."

On the other hand, *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 81, sustains a law providing for determinate sentences, and leaving their termination, between the expiration of the minimum and maximum terms, to the discretion of the board of managers. The court thus argues: "It is among the admitted legislative powers to define crimes; to prescribe the mode of procedure for their punishment; to fix by law the kind and manner of punishment; and to provide such disciplinary regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best.

provision of the workhouse law embodied in Shannon's Code, § 7423, namely: "The board of commissioners may, on recommendation of the superintendent deduct, for good conduct, a portion of the time for which any prisoner has been sentenced, or a portion of the fine, if he or she be working out a fine."

The subject-matter of the inquiry arises on the petition of one Nick Snider, prisoner in the county workhouse of Shelby county, for the writ of habeas corpus to be discharged from said confinement upon the ground that a proper credit and allowance for good time under said act would entitle him to his liberty. The record reveals that the prisoner was under confinement in said workhouse under the judgment of the criminal court of Shelby county, on the 17th day of November, 1903, upon a conviction of unlawfully carrying a pistol, and the assessment of a fine of \$50 and confinement in said workhouse for a period of eleven months and twenty-nine days. On the 14th of March, 1904, in accordance with the recommendation of the superintendent of said workhouse, the board of workhouse commissioners directed that the relator, Snider, be relieved of eight months of his term of imprisonment on account of his good conduct.

It further appears that on March 28, 1904, said board of workhouse commissioners directed that the sum of \$45 of the fine of \$50 imposed upon the relator by judgment of the criminal court be remitted. Thereafter, on the 1st of April, 1904, said board of workhouse commissioners, in view of the credits allowed on fine and sentence of said Nick Snider, relator, ordered his

discharge from the county workhouse upon payment of all costs, which was accordingly done.

It appears, however, that the judge presiding over the criminal court of Shelby county, conceiving that the action taken by the board of workhouse commissioners was beyond their authority, issued an order directing the superintendent of the workhouse to hold relator in custody until he had served out his term of imprisonment and paid the fine imposed, or had secured or worked out said fine in the manner directed by law. Thereupon the relator filed his petition for the writ of habeas corpus, which being heard by the judge of the second circuit court of Shelby county, it was adjudged that the relator was illegally restrained of his liberty, and he was ordered to be discharged, and the defendant, Fite, as superintendent of the Shelby county workhouse, was taxed with all costs of proceeding.

The said Fite, superintendent, aforesaid, appealed, and has assigned the following error: "The orders of the board of workhouse commissioners of Shelby county relieving relator of \$45 of the fine of \$50 imposed upon him, and reducing jail sentence from eleven months twenty-nine days to three months and twenty-nine days, were beyond the authority vested in said board of workhouse commissioners, and were null and void, because: "(1) The statute under which said board claimed authority to make said orders is unconstitutional, in that it attempts to confer the pardoning power upon said board, in violation of § 6 of article 3 of the Constitution of the state; and (2) it is also violative of § 1 of article 6 of the

In many instances the legislature fixes the penalty, as, for instance, in murder in the first and second degree; and this has never been regarded as an infringement of the judicial power. The law might fix a definite sentence for each crime without such infringement. The statute vests in the courts in some instances a discretion between a maximum and minimum penalty, or between alternative penalties; but this discretion might be taken away without infringing upon the exclusive power of the judiciary."

And it has been held in *State v. Page*, 99 Kan. 664, 57 Pac. 514, that Kan. Gen. Stat. 1897, chap. 134, which provides that the board of managers of the state reformatory may grant an absolute release before the expiration of the sentence, in view of the good conduct of the prisoner, does not confer judicial power, since it does not give power to adjudge and condemn to imprisonment.

The same objection has been made to statutes providing for the parole of convicts. It was overruled in *Fuller v. State*, 122 Ala. 32, 45 L. R. A. 502, 82 Am. St. Rep. 17, 26 So. 1 L.R.A. (N.S.)

146, discussing § 5462, Code 1896, which provides that the governor may authorize the discharge of any convict from custody, and suspend his sentence upon terms, without granting a pardon. The court says: A "parole does not in any wise displace or abridge the sentence. It merely stops its execution for a time only, it may be, or indefinitely, it may prove. It suspends, not destroys."

In *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894, the power conferred by § 8 of the Indiana reformatory act (Acts 1897, p. 69) on the board of managers, to release upon parole persons confined upon indeterminate sentences, after the expiration of the minimum term, was said to be not judicial, but purely ministerial or administrative. From this conclusion, however, two judges dissented.

A similar statute (Mass. Stat. 1895, chap. 504) has been held not to take the determination of the time of imprisonment from the courts. *Murphy v. Com.* 172 Mass. 264, 43 L. R. A. 154, 70 Am. St. Rep. 266, 52 N. E. 505.

Constitution of the state in that it attempts to confer upon said board judicial power to review, revise, and modify valid judgments of criminal and circuit courts of this state."

The provisions of the workhouse law material to be mentioned in this investigation are embodied in chap. 123, § 18, p. 271, of the act of 1891, compiled in Shannon's Code in § 7423, namely: "The board of commissioners may, on recommendation of

the superintendent, deduct, for good conduct, a portion of the time for which any prisoner has been sentenced, or a portion of the fine, if he or she be working out a fine. Should any prisoner escape, he or she shall forfeit all deductions that have been allowed, and, when recaptured, shall be made to work out the costs of the same in addition to the other costs in the case. The commissioners may discharge any prisoner when satisfied from the certificate of the physi-

On the other side of the question is the case of *People v. Cummings*, 88 Mich. 249. 14 L. R. A. 285, 50 N. W. 310, in which it is said: "It is in the power of the legislature to fix all punishment for crime, and to provide for a minimum and maximum punishment, and to give the courts in which the prisoners are convicted a discretion to fix a term between these limits; but it cannot be contended for a moment that this discretion can be given to any other person or persons. To do so would imperil the liberties of the citizen by putting his punishment for wrongs committed into the arbitrary power of unauthorized persons, without any right of remedy in the courts."

All of the foregoing cases, except *Com. ex rel. Johnson v. Halloway*, are distinguishable from *Ex parte Darling*, 16 Nev. 98, 40 Am. Rep. 495, where it was held that *Neyada Stat.* 1881, 109, establishing certain credits for good behavior, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, as interfering with the judiciary.

The Illinois act of June 26, 1895, which provides that the warden may certify to the prison board that a prisoner serving under indeterminate sentence has shown himself so reliable and trustworthy that he may safely be given final release; and that, when the board shall decide that said prisoner is entitled to his final discharge, it shall cause a record of the case to be made and sent to a judge of the court that sentenced the prisoner, who shall enter an order for the final discharge, which, on being approved by the governor, shall constitute a full discharge,—is not open to objection on the ground that it authorizes the board to perform a judicial act. *George v. People*, 167 Ill. 464, 47 N. E. 741.

Various reasons are given for holding that the class of statutes under discussion does not infringe upon the power to pardon.

It is said in *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190 that a statute providing for fixed commutations for good behavior enters into and becomes a part of the judgment, and, hence, does not interfere with the power to pardon. That such deduction becomes an essential legal element in the sentence itself is held in *Opinion of Justices*, 13 Gray, 618, and *Re Canfield*, 98 Mich. 644. 57 N. W. 807.

The reason given for a like conclusion in *Com. ex rel. Johnson v. Halloway*, 42 Pa. 446, 82 Am. Dec. 526, is that "a pardon oper-

ates directly on the crime, and only indirectly on the criminal. He is discharged from further punishment under the operation of a pardon, because the offense is blotted out for which he was consigned to punishment."

The power conferred on the board of managers of the state reformatory by *Kan. Gen. Stat.* 1897, chap. 134, to grant an absolute release before the expiration of the sentence, in view of the good conduct of the prisoner, is not the executive power of pardon, not being the power to remit guilt, nor to restore to civil rights. *State v. Page*, 60 Kan. 664, 57 Pac. 514.

In this connection, reference may also be made to the case of *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894, in which it is said, in discussing whether the release of a prisoner on parole is the exercise of the pardoning power, that pardon is the remission of guilt, and the act of the board in shortening the sentence leaves the conviction of guilt unaffected.

That an act establishing credits for good behavior amounts to an exercise of the pardoning power so far as it applies to sentences previously pronounced, is decided in *State ex rel. Johnson v. McClellan*, 87 Tenn. 52, 9 S. W. 233, quoted in *FITE v. STATE EX REL. SNIDER*. The validity of such a law with respect to its retroactive operation is discussed in *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 829; 4 N. E. 81, where it is said that the only party who could object is the prisoner, who cannot, where it is clearly for his benefit.

The third objection, that such statutes unlawfully delegate legislative power, sustained in *FITE v. STATE EX REL. SNIDER*, does not seem to have been raised heretofore. That the legislature, in the exercise of its power to prescribe punishments, may give the courts a discretion between a maximum or minimum penalty, is generally admitted. See the quotations hereinbefore taken from *State ex rel. Atty. Gen. v. Peters* and *People v. Cummings*, in the latter of which a reason is given why this discretion should not be given to any other person or persons.

In the following cases statutes allowing credit for good time have been construed and applied without question as to their validity: *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *Re Kness*, 58 Kan. 705, 50 Pac. 939; *Re Fuller*, 34 Neb. 581, 52 N. W. 577; *State ex rel. Filer v. Patterson* (N. J. L.) 22 Atl. 802; *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *Re Clawson*, 5 Utah, 358, 15 Pac. 328; *Ex parte Nokes*, 6 Utah, 106, 21 Pac. 458.

cian in charge that he or she is physically unable to do labor or for any cause when they may deem it best for the institution and the public good."

The argument of the attorney general is that the exercise of the power conferred upon said board of workhouse commissioners is both violative of § 6 of article 3 of the Constitution of the state, vesting in the governor the pardoning power, and is also in contravention of § 1, art. 6, of the Constitution, vesting all judicial power in the courts of this state, because the necessary effect of the exercise of said power by the board of workhouse commissioners is to constitute said board a judicial tribunal for the purpose of reviewing, modifying, and reversing the judgment of courts of competent jurisdiction acting under the power vested in them by the Constitution of the state.

We have several cases in this state in which intimations were thrown out touching the constitutionality of such acts, but no case in which the precise point now presented was involved. In *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456, the court was dealing with the power of the circuit judge to relieve a convict of imprisonment imposed by a valid judgment rendered at a former term. In its opinion this court said: "The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved. The circuit judge's action in remitting the imprisonment and releasing the costs adjudged against the defendant cannot be sustained under § 7226 of Shannon's edition of the Code, or act 1891, chap. 123, § 18 p. 271 (Shannon's Code, § 7423), authorizing the discharge of convicts confined in workhouses under certain circumstances."

In *State ex rel. Johnson v. McClellan*, 87 Tenn. 52-55, 9 S. W. 233, the act of 1885 (Acts 1885, chap. 15, p. 87), allowing to convicts certain specific credits on their terms of imprisonment in consideration of good conduct, was involved; but it appeared in that case that the judgment under which the prisoner was serving had been rendered prior to the passage of the act of 1885, and for that reason the court expressed no opinion touching its constitutionality. In that case, however, the court said as follows: "The act of 1885 (passed at the extra session June 12th) . . . is also referred to, and it is insisted that the relator was and is en-

titled to the benefit of that act; but such cannot be its effect, though it purports to be for the benefit of those then as well as thereafter confined in the penitentiary, because to the extent of provision for those then confined it is an attempted exercise of the pardoning power, which is vested alone in the governor under the Constitution, and is void."

Again, in the case of *Rogers v. State*, 101 Tenn. 425, 47 S. W. 697, the question as to the constitutionality of this section of the workhouse law was raised, but not decided, as the case went off on another point.

There seems to be much authority on this subject in other states of the Union, which we find, upon examination, is not altogether harmonious.

The supreme court of Michigan, in *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285, 50 N. W. 310, in passing upon the constitutionality of a statute of that state providing for indeterminate sentences and the disposition, management, and release of criminals under such sentences, says as follows: "It is not clear from the reading of this statute whether the board of control is given the power of absolute discharge from imprisonment or not. If so, it would be clearly unconstitutional, as the exercise of such power would certainly involve one of two things, and perhaps both. It would be the exercise of judicial power in determining the term of imprisonment of a citizen or an act of grace, to wit, the bestowing of a pardon and release of a prisoner before his term of imprisonment had expired. The judicial power of this state by the Constitution is vested in certain specified courts, . . . and the pardoning power is vested absolutely in the governor of the state." The court then proceeded to hold that this act provided for the exercise of the pardoning power, and also for the exercise of judicial power by said board of control.

In *Com. ex rel. Johnson v. Holloway*, 42 Pa. 446, 82 Am. Dec. 526, it was held that such legislation was not an interference with the pardoning power, for the reason that "pardon operates directly on the crime, and only indirectly on the criminal." But it was further held by a divided court that such diminution of sentence by reason of good conduct was an interference with judicial power, and therefore void. In the midst of its opinion the court said as follows: "From what judicial sentence may not the legislature direct 'deductions' to be made, if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest ju-

dicial functions?" Further on the court says: "In respect to one of the relators, who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act? The court could not have taken the act into account in measuring the sentence because they could not know how many days of abatement the prisoner would earn."

In *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 81, the supreme court of that state, dealing with a kindred statute, held: "It was not an interference with the executive or judicial powers conferred on these departments by the Constitution of the state."

In *State ex rel. Bishop v. State Bd. of Corrections*, 16 Utah, 478-480, 52 Pac. 1090, a similar question arose, and the supreme court of that state held the act unconstitutional, as being in violation of the governor's constitutional prerogative of pardon. That court said: The power to either pardon or commute can only be exercised by that authority in which it is vested by the Constitution. On the other hand, such statutes allowing good time as credit on sentences have been upheld. Opinion of Justices, 13 Gray, 618; *State v. Austin*, 113 Mo. 538, 21 S. W. 31; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *Re Fuller*, 34 Neb. 581, 52 N. W. 577; *Ex parte Nokes*, 6 Utah, 106, 21 Pac. 458; *State ex rel. Filer v. Patterson* (N. J. L.) 22 Atl. 802.

The Congress of the United States, it appears, has also provided for credits on sentences of Federal convicts confined in state penitentiaries where there is no statute of the particular state providing for such allowances. U. S. Rev. Stat. §§ 5543, 5544, U. S. Comp. Stat. 1901, p. 3721.

We are of opinion, upon an examination of the authorities and upon principle, that such legislation, where the credits are specifically defined by statute, and where the provisions of the statute operate alone upon sentences of convicts who have been imprisoned subsequent to the passage of the statute, is not an invasion of the constitutional prerogative of the governor. Said Chief Justice Marshall in *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640: "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." It releases the offense and obliterates it in legal contemplation. Per Justice Field in *Osborn v. United States*, 91 U. S. 474, 478, 23 L. ed. 388, 390. A full and absolute pardon 1 L.R.A. (N.S.)

releases the offender from entire punishment prescribed for his offense, and from all the disabilities consequent upon his conviction. *Ex parte Garland*, 4 Wall. 380, 18 L. ed. 371.

Again: "A pardon discharges the individual designated from all or some specified penal consequences of his crime. It may be full or partial, absolute or conditional." *Bouvier, Law Dict. title, Pardon.*

We think it quite obvious that an act of the legislature specifically defining credits for the good conduct, in existence at the date of the judgment against the convict, becomes a part of the sentence, and inheres into the punishment assessed. In California a statute providing in express terms that certain credits or deductions from a term of imprisonment shall be allowed for good conduct, without requiring any action on the part of the governor for this purpose, was held not to be unconstitutional as an infringement on his power to pardon, as it does not take away or interfere with such power in any way. In the opinion of the court the statute simply fixed the term of imprisonment in certain cases and upon certain conditions, and this provision entered into and became a part of the judgment of the court below. *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190.

In *Re Canfield*, 98 Mich. 644, 57 N. W. 807, it was held that the right of a convict to a prescribed reduction from his sentence upon compliance with the rules of the prison, which were prescribed by 2 How. Anno. Stat. (Mich.) § 9704, was one of which he could not be deprived, and that the act of 1893, the effect of which was to deprive a person sentenced under the prior statute of this right in part by reducing the amount of his credits, is to that extent an *ex post facto* law, because its effect is to increase, and not to mitigate, his punishment. It was held, therefore, that the prisoner was entitled to credit upon the basis of the statute under which he was sentenced.

Such, however, would not be the effect of an act of the legislature passed subsequent to the conviction of a particular convict, for as held in *State ex rel. Johnson v. McClellan*, 87 Tenn. 52-55, 9 S. W. 233, that would be a clear invasion of the prerogative of the governor. The scale of the punishment for the violation of a particular statute is fixed, in the first place, by the legislature, and in the next, it is administered by the court or jury. The power of the governor under the Constitution is exercised, of course, with reference to penalties and punishments inflicted by particular statutes, and, when judgment is pronounced upon the convict assessing his punishment by implication of law, he is entitled to the provisions of a

statute prescribing credits for his good behavior; but the credits are in the nature of a payment by the state to the convict for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes and misdemeanors during his imprisonment. Such statutes are prompted by the highest motives of humanity, and are looked upon with favor both by state and Federal legislatures.

The constitutional infirmity of § 18 of the workhouse law of 1891, now under review, is that no specific credits are provided as a reward for good behavior of the convict. The whole matter is left to the arbitrary discretion of the board of workhouse commissioners. It is plainly a delegation of legislative authority, which renders this part of the workhouse law unconstitutional and void. In this respect § 18 of the workhouse law is wholly unlike the Acts of 1869-70 and 1885, which specifically prescribed the credits that are to be allowed, and which statutes have been enforced from time to time by the courts.

As already seen in *State ex rel. Johnson v. McClellan*, 87 Tenn. 52, 9 S. W. 233, the act of 1869-70 was recognized by the court as a constitutional enactment, and it was accordingly applied in fixing the unexpired term of imprisonment of relator in that case. It may be remarked in this connection that the acts of Congress in allowing credit for good time specifically prescribed the scale by which they are to be graduated. But, while § 18 of the workhouse law is, for this reason, unconstitutional and void, it is so independent of the other provisions of the act as not thereby to affect their constitutionality. See *State ex rel. Hays v. Cummins*, 99 Tenn. 682, 42 S. W. 880. If the legislature had fixed a scale of credits for allowances of good time to workhouse prisoners, this section of the act would stand within constitutional limitations; but without it, it is clearly void as a delegation of legislative authority. So, if the legislature had fixed some graduated scale for the reduction of fines assessed against the prisoner, then the board of workhouse commissioners might have carried out the legislative authority. But, as already seen, § 18, of the workhouse act authorizes the commissioners to remit a portion of the fine without fixing any basis for its remission.

As the law now stands, the remission of fines and reduction of terms of imprisonment of convicts confined in the county workhouses of the state are wholly without authority, and subject such officials granting them to individual liability for malfeasance in office. It is the duty of the courts and executive officers of the state to disregard, 1 L.R.A. (N.S.)

as well as to resist with all their official authority, the exercise of unlawful functions and assumed power by those who are acting in open violation of the statutes and Constitution of the state. It is very plain that under the existing laws, and until their amendment by the legislature, the governor alone is clothed with authority to remit fines and penalties and to reduce the terms of imprisonment of convicts confined in the county workhouse under judgments of the circuit and criminal courts of the state.

The judgment of the circuit court will therefore be reversed, the cause remanded, and the prisoner committed to the sheriff of the county, to be returned to the official in charge of the county workhouse, to serve out his fine and imprisonment assessed by the criminal court of Shelby county.

TENNESSEE SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, Appt.,

v.

HUSTON GREER, by Next Friend.

(.... Tenn.)

Infant—contract—telegram—binding effect.

A minor is bound by a provision in a contract for the transmission of a telegram, that suit must be brought for its breach within sixty days.

(October 21, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Claiborne County in plaintiff's favor in an action brought to recover damages for failure promptly to transmit and deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. Hughes & Hughes, for appellant:

The clause providing for the company's nonliability where claim is not presented within sixty days is reasonable and valid.

27 Am. & Eng. Enc. Law, 2d ed. p. 1046; Western U. Tele. Co. v. Courtney, 113 Tenn. 482, 82 S. W. 484.

Such rule is binding on a minor.

Mead v. Phenix Ins. Co. 68 Kan. 432, 64

Case Note.—No other decisions have been found on the binding effect upon an infant of a stipulation in a contract for sending a telegram, limiting the time within which suit for breach must be brought; but identically the same question, in principle, has arisen in respect to such limitations contained in insurance contracts.

The minority of the beneficiaries of an accident insurance policy was held, in *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676, not to give them any

L. R. A. 79, 104 Am. St. Rep. 412, 75 Pac. 475; Suggs v. Travelers' Ins. Co. 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676; Guthrie v. Connecticut Indemnity Asso. 101 Tenn. 643, 49 S. W. 829.

The contract for sending the telegram was a contract for necessities, and, for that reason, Greer would be bound by it.

Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255; Englebert v. Troxell (Englebert v. Pritchett), 40 Neb. 195, 26 L. R. A. 177, 42 Am. St. Rep. 605, 58 N. W. 852.

Messrs. Shields, Cates, & Mountcastle also for appellant.

Messrs. Jesse L. Rogers, John P. Davis, and G. W. Montgomery for appellee.

Neil, J., delivered the opinion of the court:

This action was originally brought before a justice of the peace under a warrant stating the cause of action to be "for failure to promptly and properly send and deliver a certain telegram." There was a judgment rendered against the company by the justice of the peace, and from this judgment an appeal was prosecuted to the circuit court. In that court a judgment was rendered in favor of the plaintiff below for \$200, and from this latter judgment the company prayed and obtained an appeal to this court.

The facts, so far as necessary to be stated, are as follows:

In January, 1905, the defendant in error, then a boy seventeen years old, left his father's home in Claiborne county, this state, without his father's knowledge or consent, and went thence to Louisville, Kentucky, and from that city to Decatur, Illinois. When he reached Decatur he only had about \$1 or \$1.50 in his possession. He

tried to obtain work, but could get nothing to do. He then went to the telegraph office and deposited a telegram, addressed to his uncle, "Bud" Greer, at New Tazewell, Tennessee, the station nearest his father's home. This message was as follows, viz.:

Decatur, Ill.

To Bud Greer.

New Tazewell, Tennessee:

Send me fifteen dollars. Can't come home until I get it. See mama.

Huston Greer.

For the transmission of this message Huston Greer paid the company's charge, 59 cents. After he deposited the message he went to a hotel, where he remained all night, and returned the next morning to the telegraph office for a reply, but received none. After he had paid the charge for the message and his hotel bill he had only 10 cents left. With that he bought something to eat. After his money was all gone he went to police headquarters, and told the officials in charge that he was out of money and had no place to stay. Thereupon he was admitted to the jail, where he remained and was lodged and fed, and kindly treated for ten days. At the expiration of this time he received sufficient money to bear his expenses, and was released from confinement and returned home. The money, however, was sent in response to a letter which he wrote and mailed to his father while he was in jail. The telegram, when it reached the sendee, read "Decatur, Alabama," instead of "Decatur, Illinois." A second telegram, sent the next day, met the same fate. The result was that defendant in error's home people were misled into be-

exemption from a stipulation in the contract requiring action on the policy to be brought within one year after the right accrued.

A provision of the same kind, in a life insurance policy made for the benefit of minors, was held to be effective and binding on them when an action for them was brought on the policy, in the case of O'Laughlin v. Union Cent. L. Ins. Co. 3 McCrary, 543, 11 Fed. 280.

In another case of a life insurance policy or benefit certificate, in which one of the beneficiaries was an infant, who died within the year within which the policy required action thereon to be brought, the court held not only that the stipulation of the policy was binding on an infant plaintiff, but that such contract stipulation limiting the time of action was not affected by a statutory exception in favor of minors, or by another provision of the statutes extending the time limited for commencement of an action if the person entitled to bring it dies before the expiration of such time. The court said 1 L.R.A. (N.S.)

that these statutory provisions respecting "the time limited for the commencement of the action" referred to the time limited by law, and not to contract stipulations. Fey v. I. O. O. F. Mut. L. Ins. Soc. 120 Wis. 358, 98 N. W. 206.

To the same effect, it has been held, in an action on a fire insurance policy taken in the name of a minor, that a stipulation in the policy limiting the time for suit or action thereon to a period of twelve months after the fire was binding on the infant; and that in all such cases the contract limitation of the policy controls the general statute of limitations, and is good even against minor beneficiaries. Mead v. Phenix Ins. Co. 68 Kan. 432, 64 L. R. A. 79, 104 Am. St. Rep. 412, 75 Pac. 475.

There seems to be no ground of distinction in principle between these decisions upon the effect of these stipulations in insurance policies upon infant plaintiffs and the same kind of a provision in a contract for a telegram.

lieving that he was in Decatur, Alabama, and made inquiries accordingly, the consequence of which was the ten days' delay complained of.

The blank form upon which the message was written contained on its face a stipulation that the terms on the back of it were assented to. One of these terms was expressed in the following language: "The company will not be liable for damages or statutory penalty in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The present suit was not brought until after the sixty days had expired.

Sundry errors are assigned by the company as follows:

That the court erred (1) in refusing to withdraw from the jury all evidence concerning the payment of money by defendant in error's father for the purpose of ascertaining his whereabouts; (2) in refusing to withdraw all evidence concerning the defendant in error's having gone to jail in Decatur, Illinois; (3) in instructing the jury that defendant in error could recover for grief, disappointment, or other injury to his feelings; (4 and 5) in submitting to the jury the question of punitive damages; (6 and 7) in refusing to charge the jury, in accordance with the request of plaintiff in error, that the defendant in error, although a minor, was bound by the sixty-days clause above set out; (8) in refusing to set aside the verdict on the ground that it was excessive, evincing partiality, prejudice, or passion.

In the view we take of the case, it is necessary that we consider only the sixth and seventh assignments.

In this state it has been held that the sixty-days clause is a reasonable and valid one. *Manier v. Western U. Teleg. Co.* 94 Tenn. 446, 29 S. W. 732; *Western U. Teleg. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484. And the great weight of authority elsewhere is to the same effect. *Albers v. Western U. Teleg. Co.* 98 Iowa, 51, 66 N. W. 1040; *Russell v. Western U. Teleg. Co.* 57 Kan. 230, 45 Pac. 598; *Webbe v. Western U. Teleg. Co.* 64 Ill. App. 331; *Western U. Teleg. Co. v. Meredith*, 95 Ind. 93; *Western U. Teleg. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222; *Lester v. Western U. Teleg. Co.* 84 Tex. 313, 19 S. W. 256; *Hill v. Western U. Teleg. Co.* 85 Ga. 425, 21 Am. St. Rep. 166, 11 S. E. 874; *Western U. Teleg. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L. R. A. 741, 742, 39 S. E. 443; *Western U. Teleg. Co. v. Dougherty*, 54 Ark. 221, 11 L. R. A. 1 L.R.A. (N.S.)

102, 26 Am. St. Rep. 33, 15 S. W. 468; *Western U. Teleg. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638; *Smith-Frazier Boot & Shoe Co. v. Western U. Teleg. Co.* 49 Mo. App. 99; *Kirby v. Western U. Teleg. Co.* 7 S. D. 623, 30 L. R. A. 621, 65 N. W. 37. But the regulation is not applicable when the suit is commenced within the specified time, under a writ or pleading which sets out the facts with sufficient fullness to call the attention of the company to the particular message and conduct complained of. *Western U. Teleg. Co. v. Courtney*, *supra*; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. And see *Western U. Teleg. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313; *Western U. Teleg. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302; *Western U. Teleg. Co. v. Ferguson* (Tex. Civ. App.) 27 S. W. 1048. The principle underlying the cases supporting the rule is that the nature of a telegraph company's business requires it to receive and transmit thousands of messages within a comparatively brief space of time. Many of the particulars concerning these transactions are necessarily of a temporary and fleeting nature, and it is just that an opportunity should be given it to inquire into the facts and circumstances attending a mistake in a message, or delay in delivery, while the matter is still within the memory of witnesses. *Western U. Teleg. Co. v. Mellon*, and *Kirby v. Western U. Teleg. Co.* *supra* (opinion of Fuller, J.). The reason applies as well where the suit is for a statutory penalty as where it is directly upon the contract. *Western U. Teleg. Co. v. Mellon*, *supra*; *Gray v. Western U. Teleg. Co.* 87 Ga. 350, 14 L. R. A. 95, 27 Am. St. Rep. 259, 13 S. E. 562; *Kirby v. Western U. Teleg. Co.*, *Western U. Teleg. Co. v. Yopst*, *Western U. Teleg. Co. v. Meredith*, *Western U. Teleg. Co. v. Jones*, and *Albers v. Western U. Teleg. Co.* *supra*; *Montgomery v. Western U. Teleg. Co.* 50 Mo. App. 591; *Kendall v. Western U. Teleg. Co.* 56 Mo. App. 192. And it is the same whether the transaction be with an infant or with an adult. If a contract should be made by an infant with a telegraph company, under such circumstances as appear in the present case, such contract would be for necessities, and binding upon him. He could not sue upon the contract and repudiate part of it. If the suit should be regarded as brought for the recovery of a penalty, or for damages in the nature of a statutory penalty, the result must be the same, since it has been held in this state that the sixty-days clause applies in such cases (*Western U. Teleg. Co. v. Mellon*, *supra*); it being regarded as a reasonable regulation of the business. Resting on the basis it does, no reason is

apparent why a minor should be excused from compliance with this regulation any more than an adult. Such persons must generally depend upon adult relatives or friends for the protection of their rights; and, where the law makes no saving or exception in their favor, the court can make none. Without doubt, owing to the great lapse of time and loss of evidence, the evils intended to be provided against by the rule would be very greatly intensified by establishing an exception in favor of persons under age and permitting them to sue after attaining their majority. Conceding that we have no power to ingraft this exception upon the rule, the serious evils that would result from so doing would far outnumber and outweigh the few instances in which the rights of infants against telegraph companies for breach of duty would be lost by the failure of relatives or friends to present their claims for them.

The sixth and seventh assignments having been sustained, the judgment must be reversed.

TENNESSEE SUPREME COURT.

H. C. SLOVER

v.

UNION BANK, Appt.

(.... Tenn.)

1. Limitation of actions—usury.

The statute of limitations does not begin to run against a right to recover usury, in case of a series of usurious transactions, until they are closed.

2. Action—legislative interference.

A provision in a statute of limitations that it shall not affect pending actions is

nugatory, since the legislature has no right to interfere with rights of action after suit has been brought on them.

3. Limitation of actions—prospective operation of statute.

A statute providing that no action shall be brought on a claim for usury after two years from the time the cause of action arose will be given a prospective effect; and it will therefore not affect rights of action which accrued prior to its passage.

(September 28, 1905.)

A PPEAL by defendant from a decree of the Chancery Court for Anderson County overruling a demurrer to a bill filed to compel repayment of usury. Affirmed.

The facts are stated in the opinion.

Messrs. C. J. Sawyer and D. K. Young for appellant.

Mr. J. H. Wallace, for appellee:

A statute will be so construed as to operate prospectively only, unless the words used, or the plain design of the framers of the law, being too clear to admit of any doubt, require that it should have a retrospective effect.

Black, *Constr. & Interpretation of Laws*, p. 20; *Collins v. East Tennessee*, V. & G. R. Co. 9 Heisk. 841; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 249, 28 L. R. A. 796, 32 S. W. 5.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.

Cooley, *Const. Lim.* p. 449; *Wynne v. Wynne*, 2 Swan, 410, 58 Am. Dec. 66; 6 Am. & Eng. Enc. Law, 2d ed. p. 952; *Bishop, Written Laws*, p. 73.

Messrs. Cornick, Wright, & Frantz also for appellee.

Case Note.—The doctrine enunciated by the authorities quoted in *SLOVER v. UNION BANK* in relation to the constitutionality of statutes shortening the period of limitation is stated in *Buswell, Limitations & Adverse Possession*, § 14, as follows: "It is generally held that a statute of limitations may apply to contracts existing at the time of its passage, if, by its terms, a reasonable time is allowed to creditors within which to bring their actions upon such contracts." Continuing, the author quotes from *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365: "If the legislature may prescribe a limitation where none existed before, it may change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced."

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To the same effect is *Wood, Limitation of Actions*, § 11, Citing the following, among other cases in point: *Elliott v. Lochrane*, 1 Kan. 126; *State ex rel. Daviess County v. Clark*, 7 Ind. 468; *Pearce v. Patton*, 7 B. Mon. 162, 45 Am. Dec. 61; *Howell v. Howell*, 15 Wis. 55; *Fiske v. Briggs*, 6 R. I. 557; *Kilbourne v. Lockman*, 8 Iowa, 380; *Briscoe v. Anketell*, 28 Miss. 361, 61 Am. Dec. 553; *Holcombe v. Tracy*, 2 Minn. 241, Gil. 201; *De Cordova v. Galveston*, 4 Tex. 470; *Sampson v. Sampson*, 63 Me. 328; *Bigelow v. Bemis*, 2 Allen, 496; *Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; *Cranor v. School Dist. No. 2*, 151 Mo. 119, 52 S. W. 232, Aff'g. 81 Mo. App. 152; *Norris v. Tripp*, 111 Iowa, 115, 82 N. W. 610; *Gilbert v. Ackerman*, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753; *Osborne v. Lindstrom*, 9 N. D. 1, 46 L. R. A. 715, 81 Am. St. Rep. 516, 81 N. W. 72; *Clay v. Iseminger*, 190 Pa. 556, 42 Atl. 1039; *Culbreth v. Downing*, 121 N. C. 205, 61 Am. St. Rep. 661, 28 S. E. 294;

Wilkes, J., delivered the opinion of the court:

This cause is before us upon a decree of the chancellor overruling a demurrer and granting an appeal to the defendant.

The bill was filed to collect usury upon a series of transactions on the 20th of March, 1905. It charges that the last usurious interest was paid on the 1st of March, 1901, and that there was a final settlement between the parties on the 4th of March, 1902, of all the transactions between them involving the usury.

There was a demurrer filed, relying upon the statute of two years and the statute of six years; and it is insisted in this court that the demurrer should have been sustained on the ground that the action was barred by the statute of two years.

There being a series of usurious transactions, the statute of limitations would not begin to run until these transactions were closed; and a settlement was made between the parties on the 4th of March, 1902. On the 15th of April, 1903, the legislature of Tennessee passed an act in the following words, to wit: "No action shall be brought on any claim for usury after two years from the date of the payment of the debt upon

which such claim for usury shall be based: Provided that this act shall not affect any litigation now pending." Shannon's Code Supp. p. 692.

It is insisted that, under this statute, all rights of action for usury paid, which had accrued more than two years before the passage of the act and upon which no suit had been brought at the time the act was passed, were barred, and that the expression of reservation used in the statute, "Provided this act shall not affect any litigation now pending," was intended to preserve all rights of action upon which suit had been brought before the act was passed, but none other, and that all other rights of action which had accrued more than two years before April 15, 1903, should be cut off at once and extinguished. In other words, if the right of action had accrued under the previously existing laws on the 15th day of April, 1901, it should be at once summarily cut off and extinguished; and, in this connection, it is said that the statute of limitations is not a vested right, but is a remedy, and that the legislature has the right to change and limit such remedy as it might see proper.

It is said by Mr. Bishop, in his work on

Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566.

In Cooley, Const. Lim. 7th ed. p. 523, it is said: "All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so, it would be, not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action." See also Story, Const. 5th ed. § 1958, note 1; 8 Cyc. Law & Proc. p. 921.

"What shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." Cooley, Const. Lim. 7th ed. p. 523.

A retrospective statute which goes into effect thirty days after its passage does not allow a reasonable time. Berry v. Ransdall, 4 Met. (Ky.) 292.

Six months is not a reasonable limitation of the right to sue for the recovery of land. Pearce v. Patton, *supra*.

A reasonable time to sue is afforded when the statute shortening the period of limitation, which is approved on the 16th of February, does not go into effect until the 1 L.R.A. (N.S.)

1st of July succeeding. Stine v. Bennett, 13 Minn. 153, Gil. 138.

The following periods of time have been held to be reasonable; ten and a half months, in Terry v. Anderson, *supra*; nine and a half months, in Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; one year, in Krone v. Krone, 37 Mich. 308; six months, in Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; nine months, in Osborne v. Lindstrom, *supra*.

That the statute itself must provide a reasonable time for bringing suit, even though a period of several months elapses between its passage and the time when it goes into effect, is held in Gilbert v. Ackerman, *supra*. See also Ludwig v. Stewart, 32 Mich. 27.

But the opposite view is taken in Stine v. Bennett and Osborne v. Lindstrom, *supra*, in which the postponement of the date at which the law goes into effect is regarded as an expression of legislative intention to allow a reasonable time for the assertion of existing rights.

Statutes affecting the period of limitations are construed, wherever possible, as operating prospectively. "A change in the statute of limitations does not affect existing claims, unless such is clearly the intention of the legislature; and especially is this the case where actions are pending upon such claims when the statute is passed." Wood, Limitation of Actions, 3d ed. § 11, citing Hooker v. Hooker, 10 Smedes & M. 599; Battles v. Fobes, 18 Pick. 532; Wright v. Oakley, 5 Met. 400; King v. Tirrell, 2 Gray, 331.

Written Laws, p. 73: The legislature can at its pleasure, change a remedy, but not to the denial of all remedy, or even to such a reduction of it as would leave any essential part of the right practically unavailable.

Cooley, in his work on Constitutional Law, p. 340, says: "A statute of limitation takes away no right of property. Such a statute prescribes a reasonable time within which a party claiming legal rights, which another, withholds, shall commence legal proceedings for their enforcement; but all limitation acts must allow to claimants a reasonable opportunity to assert their rights in court, and one entirely and manifestly unreasonable in the time it gives is void."

In 6 Am. & Eng. Enc. Law, 2d ed. p. 952. it is said: The legislature has no "power, however, to cut off the remedy or bar suit upon an existing cause of action *instantly*, or without giving a reasonable time to prosecute."

In order to sustain the validity and constitutionality of this act, we are compelled to give it a prospective, instead of a retrospective, effect. In other words, if the right of action had accrued to any party before the passage of the act, to recover for the usury paid, such right would not be affected afterward by the passage of the act, even though the suit had not been brought before its passage.

The provision in the act that it shall not affect any litigation now pending is entirely nugatory and of no effect, since the legislature could not interfere with the rights of the claimant after suit commenced.

Striking out this provision, therefore, we have an act which changes the statute from six years to two years, without mentioning rights of action which had already accrued. We think, therefore, that the legislature must have meant to give the act a prospective, and not a retrospective, effect, and that rights of action which had accrued before the passage of the act were not cut off or affected by its operation, inasmuch as no time was given for the enforcement of such rights.

The chancellor was therefore correct in overruling the demurrer and requiring the case to proceed to trial upon its merits.

There are other grounds of demurrer which we think not well taken; but, as they are not pressed in this court, we do not consider them further.

The decree of the court below is affirmed, the cause is remanded for further proceedings, and the appellant will pay the costs of appeal.

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TENNESSEE SUPREME COURT.

HARLE MARTIN et al., Appts.,

v.

G. D. McCRARY et al.

(.... Tenn.)

1. Threshing engine—duty to avoid fire.

One who has contracted to thresh grain with a steam thrasher must, to avoid setting fires, use care commensurate with the risk or hazard.

2. Same—presumption of negligence.

Setting fire by sparks escaping from a threshing-machine engine raises the presumption of negligence, and casts the burden of showing care upon the owner of the engine.

3. Same—question for jury.

The jury must determine what is ordinary care to avoid setting fire from a threshing-machine engine, under all the circumstances of the case.

4. Same—measure of duty.

The owner of a threshing-machine engine does not fulfil his duty in regard to precautions to avoid setting fires by merely adopting a spark arrester in general use, and showing that the engine did not emit sparks any more copiously than was natural for an engine of similar kind and construction, where he had been in the habit of making use

Case Note.—In line with the holding in *MARTIN v. McCRARY*, that the owner of a threshing-machine engine does not necessarily fulfil his whole duty as to precautions to avoid setting fires by merely adopting a spark arrester in general use, is *Martin v. Bishop*, 59 Wis. 417, 18 N. W. 337, which holds that it is negligent to start an engine set about 65 feet from several stacks of grain, on a hot, dry day, during a high wind blowing towards the stacks, although the engine is provided with all the best appliances for preventing the escape of fire.

And *Collins v. Groseclose*, 40 Ind. 414, holds that it is the duty of one running a steam threshing engine under contract with the owner of the grain to stop work during the latter's temporary absence, where the wind increases to such extent as to make it apparent to an ordinarily prudent man that there is danger of setting fire to the stacks of grain.

And *Garrison v. Graybill*, 52 Mo. App. 580, holds that the proprietor of such an engine, who tells the owner of the grain, after one fire has been put out, that the engine can be operated safely with the damper down, is guilty of gross negligence, rendering him liable for loss of the grain by fire from the engine, where he subsequently has the damper opened without the owner's knowledge.

And *Teall v. Barton*, 40 Barb. 137, holds that the proprietor of a steam dredging machine, who continues to use wood as a fuel without any spark catcher or screen on the

of an additional spark arrester when working near material of the kind to which fire was set, and which was allowed to become out of order at the time the fire occurred.

5. Same—inspection of spark arresters.

The owner of a threshing-machine engine must make at least daily inspection of his spark arresters when he is working near combustible material.

(October 7, 1905.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Monroe County in favor of defendants in an action brought to recover the value of certain grain alleged to have been destroyed by defendants' negligence. Reversed.

Statement by Neil, J.:

Action by the owner of a wheat crop, against the owner of a steam thresher, for negligently setting fire to the wheat in the stack by means of sparks emitted from the engine, whereby the crop was destroyed.

The case was tried before the circuit judge without the intervention of a jury, with the result that he dismissed the plaintiffs' case, and rendered judgment against them for the costs of suit. From this judgment they have prosecuted a writ of error, also an appeal, and assigned errors.

smokestack, and without using any other extra precautions, after being told of the danger to farm buildings near from sparks and cinders that are carried over them by a high wind existing, is guilty of negligence rendering him liable for the loss of the buildings by sparks set from the engine.

And in *Dennis v. Harris*, 46 N. Y. S. R. 525, 19 N. Y. Supp. 524, the court states that it would be negligence to use an engine in pressing hay, without having a spark arrester on the smoke pipe, while the wind is blowing towards the barn, the door of which is open: although it refuses to set aside, as unjustified by the evidence, a finding that the spark arrester was in the smokestack at the time the fire was set.

But in *Gillingham v. Christen*, 55 Ill. App. 17, the court holds that it is not negligence *per se* to run a threshing-machine engine without a screen, nor to use wood in a burner intended for the use of coal.

And *Holman v. Boston Land & Secur. Co.* 20 Colo. 7, 36 Pac. 797, holds that the law requires from one operating a steam threshing machine only the exercise of reasonable means and efforts to furnish good and well-constructed machinery, adapted to the work, combining the greatest safety with practical use; and that he is not an insurer of the property, nor bound to have such safe machinery that, by the exercise of ordinary care, absolute security will be afforded. The smokestack in this case was provided with a cone, but not with a screen for arresting sparks.

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The circuit judge was requested, under the statute, to make written findings of fact and law; and he did so.

The facts found, so far as material, were as follows:

The defendants, having contracted to thresh plaintiffs' wheat, set their steam thresher at plaintiffs' stacks, and were engaged in threshing the grain, when a spark from the engine fell upon and set fire to a wheat stack, and destroyed the entire crop, to the value of \$166.75. This occurred July 22, 1904.

The spark arrester on the engine "was of the kind generally in use." However, some time prior to the beginning of the season for threshing wheat, defendants were using this engine in running a sawmill, and, while so using it, they, as a matter of precaution, inserted an inner screen under the spark arrester, composed of fine wire netting. This fine inner netting was resupplied to the engine from time to time, and had been thus replaced two or three times prior to the date of the fire in question. It is not customary, however, to use this fine netting. The evidence failed to show that it had ever been used in this manner by anyone other than the defendants. On the day the fire occurred, and after the fire, an examination of the engine disclosed that

And in *Quint v. Dimond* (Cal.) 82 Pac. 310, which was an action for damages by fire alleged to have been set by a harvesting engine on adjoining premises, the court holds that an instruction that, if the jury find that a traction engine properly constructed and fitted with a proper spark arrester will not throw sparks which will start fires when the engine is otherwise properly operated, and that the fire in question was set by such engine, they shall find that it was not properly operated, and that ordinary care was not exercised in its operation,—is erroneous, as making defendant absolutely liable if sparks from the engine caused the fire, though he was free from negligence; and as making the setting of the fire by the engine conclusive proof of negligence.

And *Planters' Warehouse & Compress Co. v. Taylor*, 64 Ark. 307, 42 S. W. 279, holds that a compress company was not negligent in continuing to operate its press, so as to render it liable for the destruction of adjacent property by fire set by sparks from its smokestack, by the mere fact that, after exhausting all known appliances to prevent the escape of sparks, it was impossible to prevent their emission in a manner endangering adjacent property, where the danger from such operation is not such a natural and probable consequence as to justify a finding that the business is a nuisance; although it is its duty to take such precautions, and use such means, to lessen danger and prevent injury, as a man of ordinary prudence, knowing the danger, would take.

there was a hole in the fine under netting, but none was seen in the spark arrester itself, and it was not deficient. Defendants examined the spark arrester and the fine wire screen under it a day and a half before the fire occurred, and at that time there was no hole in either of them.

No evidence was introduced showing that the engine in question emitted sparks more copiously "than was natural for any engine of similar kind and character." When the fire occurred the engine was running with the damper slightly up, but it was necessary to give it some draft to enable it to run at all. Defendant Peoples was with the engine at the time of the fire, but neither he nor any of his employees or servants had knowledge of the hole in the fine netting at the time.

His Honor added the following general findings upon the subject of negligence, viz.:

"Defendants had not been negligent in their duty to observe defects in the engine.

"Defendants were not negligent in the operation of the engine in question, and the accident complained of was not the result of the negligence of the defendants, either directly or through their servants."

Messrs. Young & Young for appellants.

Messrs. McCroskey & Peace for appellees.

Neil, J., delivered the opinion of the court:

The degree of care required by one threshing wheat with a steam thresher, in respect of setting fires, is the same as that devolved upon railway companies in the use of their engines. That rule, as laid down in *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429, is that "care commensurate with the risk or hazard" must be used. In the same opinion the degree of care required is thus characterized: "A degree of care and prudence commensurate with the danger to which this property is exposed by them in the lawful conduct of their business." In the same case it is further said: "They are authorized to . . . carry fire on them [the engines] for the purpose of generating steam; and, when they have them properly constructed and equipped with spark arresters and appliances of the latest and most approved character to prevent the escape of coals and cinders, in good repair, and carefully and skilfully handled, and observe such other precautions as the surroundings may call for to avoid the communication and spread of fire, they are not liable for property unavoidably destroyed by escaping sparks and cinders." Again it is said: "As the danger necessarily attending the use of fire in locomotives is far greater in

some places and upon some occasions than others, what is reasonable care in their equipment and management must always depend upon the facts and circumstances of each case. What would be ordinary care in the operation of them in the country, or in a wet season, might be gross negligence in a town or city, or in a drought, where and when the danger of communicating the fire is, in the very nature of things, much greater."

The burden of proof is upon the defendant in such cases to show that he, or it, as the case may be, has complied with all the requirements of the rule, since a presumption of negligence arises upon evidence introduced that a fire has been set by sparks escaping from an engine. *Ibid.* And what would or would not be ordinary care, under all of the circumstances proved in a given case, is always a question for the jury, or for the court when it sits without the intervention of a jury. *Ibid.*

Applying these principles to the present case, we are of the opinion that the defendants were liable for the injury done. It was not sufficient for them to show merely that the spark arrester in question was of the kind generally in use, and that the engine did not emit sparks any more copiously "than was natural for any engine of similar kind and construction." Operating, as they were bound to do, in the midst of dry and combustible material like wheat straw, they should have shown that their engine was, in respect of fire precautions, up to the state of the art at the time the fire occurred. Indeed, the defendants, by their conduct, clearly showed that they did not regard the spark arrester with which the engine was equipped as containing meshes sufficiently fine and close to enable them to work with reasonable safety in the midst of combustible material. since, when they used the engine in running a sawmill, in the midst, of course, of material easily ignited, like sawdust (and straw is even more combustible). they found it necessary to place a fine wire screen under the spark arrester, and to continue to renew this fine netting from time to time as it would wear out. That this netting was in fact necessary, when using the engine for such a purpose, is shown by the fact that sparks escaped and set fire to the wheat straw because of the hole in the surface of that netting referred to in the statement.

Treating the engine as properly equipped for the purpose to which it was put, by the combined use of the spark arrester and the under netting, the defendants were negligent in failing to make at least a daily inspection of the equipment referred to. It was not sufficient for the defendants to

show that neither they nor their servants had knowledge of the hole in the netting. They had the means of knowledge, and should have used those means.

The two general findings quoted at the close of the statement must be held findings of law, and, as such, they were incorrect, being, as we conceive, improper applications of the law to the special facts found.

It results that the judgment of the court below must be reversed, and judgment must be rendered here for the plaintiffs for the amount of the damages assessed, with interest and costs.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY,
Plff. in Err.,

v.

SOUTH FORK COAL COMPANY.

(139 Fed. 528.)

1. Railroad—liability for fires.

A railroad company is liable for negligently setting fire to lumber stacked with its consent on its right of way at the place usually occupied by lumber awaiting transportation, although it has not been delivered to it for that purpose.

2. Evidence—presumption, from collision of cars.

A presumption of negligence arises from a violent impact of a train against another which it is following upon the same track, so as to telescope several cars, and start a conflagration which sets fire to neighboring

property, which shifts the burden of showing care to the railroad company.

(June 21, 1905.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover the value of lumber alleged to have been destroyed by defendant's negligence. Affirmed.

Statement by Lurton, Circuit Judge:

This was an action by the South Fork Coal Company, a corporation, which was operating a sawmill near Oneida, Tennessee, for the loss by fire of a large quantity of lumber stacked upon the railway's right of way near its station at Oneida. The fire occurred October 23, 1902. The evidence tended to show that the lumber had been hauled from time to time from the mills of plaintiff and stacked on the right of way, several hundred feet from the station, but at a place customarily used for stacking lumber for shipment. On the night of October 23, 1902, there occurred a rear-end collision between two of the defendant company's freight trains at a point near this lumber. As a result certain cars containing tanks of oil were telescoped by the engine of the colliding train. The tanks were broken, and the escaping oil fired by fire from the engine. The fire thus started was communicated to the adjacent lumber. The defendant offered no evidence in explanation of the collision or upon any other matter, and at conclusion of plaintiff's evidence asked a peremptory instruction in its favor. This was denied, and the case submitted to the jury upon a charge found in the record, who found for the plaintiff.

Case Note.—An examination of the authorities shows that they fully support the decision in *CINCINNATI, NEW ORLEANS & TEXAS P. R. Co. v. SOUTH FORK COAL Co.* to the effect that a railroad company is liable for negligently burning lumber placed upon its right of way with its consent; as will be seen by a reference to the following cases:

Grand Trunk R. Co. v. Richardson, cited by the court, has been cited in *St. Louis, A. & T. R. Co. v. Fire Assn.* 55 Ark. 177, 18 S. W. 43, holding that it was not contributory negligence to place cotton near a railroad, on a private platform so close to passing engines that it was in danger of being ignited, where it was placed on such platform for the purpose of being shipped by the railroad company; and that the owner, in placing his property near the track of a railroad, assumed only the risk of fire following the proper and lawful use of locomotives, and did not assume the risk of the neglect of the company. The platform was a private one 1 L.R.A. (N.S.)

constructed by merchants, only a few feet from the railroad track, and was used for loading cotton; and the railroad company had received freight from it.

It has also been cited in *Sherman v. Maine C. R. Co.* 86 Me. 424, 30 Atl. 69, where it was held that a railroad company is not exonerated from liability for injury to goods from fire communicated by its locomotive engine, by the fact that the corner of the building in which the goods were stored, extended a few feet over one of the side lines of the roadway, by express license of the railroad company. This decision was under a statute making railroad companies liable for injuries caused by fire communicated by their locomotive engines. A similar decision was rendered in *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 438. The court, in the latter case, said: "The fact that a building, or other property, stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is

Argued before Lurton and Severens, Circuit Judges, and Wanty, District Judge.

Messrs. Edward Colston and Head & Anderson, for plaintiff in error:

The owner of the lumber was a mere licensee; and the railroad company owed such owner only the duty of not wantonly or wilfully destroying the lumber.

Post v. Buffalo, P. & W. R. Co. 108 Pa. 585; Missouri P. R. Co. v. Bartlett, 69 Tex. 79, 6 S. W. 549; Connelly v. Erie R. Co. 68 App. Div. 542, 74 N. Y. Supp. 277; Goodhue v. Grand Trunk R. Co. Montreal L. Rep. 6 S. C. 116; Fischer v. Bonner (Tex. Civ. App.) 22 S. W. 755; Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Nicholson v. Erie R. Co. 41 N. Y. 525; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Ivay v. Hedges, L. R. 9 Q. B. Div. 80; Hounsell v. Smyth, 7 C. B. N. S. 731; Sutton v. New York C. & H. R. R. Co. 66 N. Y. 243; Hart v. Cole, 156 Mass. 477, 16 L. R. A. 557, 31 N. E. 644; Sweeny v. Old Colony & N. R. Co. 10 Allen, 372, 87 Am. Dec. 644; Baltimore & O. R. Co. v. State, 62 Md. 487, 50 Am. Rep. 233; Illinois C. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43.

The court had no right to say that a collision between two freight trains of the same company, moving on a single track, would cast upon the company the burden of disproving negligence.

Patton v. Texas & P. R. Co. 179 U. S. 603, 45 L. ed. 364, 21 Sup. Ct. Rep. 275; Illinois C. R. Co. v. Coughlin, 65 C. C. A. 101, 132 Fed. 801; Nitro-Glycerine Case (Parrott v. Wells) 15 Wall. 537, 21 L. ed. 211.

It being lawful for the railroad company to use fire, it can be made liable only on the

ground of negligence; which must be alleged and proved by the plaintiff.

1 Wharton, Ev. § 360; Wharton, Neg. § 869; Ruffner v. Cincinnati, H. & D. R. Co. 34 Ohio St. 96; Gandy v. Chicago & N. W. R. Co. 30 Iowa, 420, 6 Am. Rep. 682; Philadelphia & R. R. Co. v. Yeiser, 8 Pa. 366; Huyett v. Philadelphia & R. R. Co. 23 Pa. 373; Fero v. Buffalo & State Line R. Co. 22 N. Y. 211, 78 Am. Dec. 178; Field v. New York C. R. Co. 32 N. Y. 345; Cotton v. Wood, 8 C. B. N. S. 568; Macon & W. R. Co. v. McConnell, 27 Ga. 482; Smith v. Hannibal & St. J. R. Co. 37 Mo. 292.

Messrs. James F. Baker and Jerome Templeton, for defendant in error.

Presumption of negligence arose from the fact of collision.

2 Shearm. & Redf. Neg. § 516; 1 Shearm. & Redf. Neg. § 59; Burke v. Louisville & N. R. Co. 7 Heisk. 462, 19 Am. Rep. 618; Horne v. Memphis & O. R. Co. 1 Coldw. 76; Simpson v. East Tennessee, V. & G. R. Co. 5 Lea, 457.

He who, by his negligence or misadventure, creates or suffers a fire upon his own premises, which, burning his property, spreads thence on to the adjacent premises of another, and destroys the property of the latter, is liable to him in an action for damages sustained.

5 Rupalje & Mack's Digest, § 79, p. 874; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 12, 41 L. ed. 615, 17 Sup. Ct. Rep. 243; 13 Am. & Eng. Enc. Law, pp. 410, 411; Webb v. Rome, W. & O. R. Co. 49 N. Y. 426, 10 Am. Rep. 389; Jacobs v. Andrews, 4 Iowa, 506; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Musselwhite v. Atlantic, M. & O. R. Co. 4 Hughes, 166, Fed. Cas. No. 9,972; Clark v. Kansas City, Ft. S. & M. R. Co. 64 C. C. A. 20, 129 Fed. 341; 13 Am. & Eng. Enc. Law, 2d ed. p. 464; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed.

injured by fire communicated from their locomotives."

In Boston Excelsior Co. v. Bangor & A. R. Co. 93 Me. 52, 47 L. R. A. 82, 44 Atl. 138, it was held that one piling wood on a railroad right of way with the permission of the company is entitled to the benefit of the statute imposing absolute liability on railroads for fires caused by them; and that the fact that the plaintiff was a licensee made his rights and the defendant's liability with respect to injury by fire precisely the same as they would have been if the plaintiff had been owner of the land.

The liability of a railroad company for the destruction by fire of timber piled on its right of way for shipment, under a custom acquiesced in by it, was sustained in Gulf, C. & S. F. R. Co. v. McLean, 74 Tex. 646, 12 S. W. 843.

It is not contributory negligence for the 1 L.R.A. (N.S.)

owner of wood to pile it on a railroad company's right of way with its consent, and the company is not relieved from liability for its destruction by fire. Pittsburgh, C. & St. L. R. Co. v. Noel, 77 Ind. 110; Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150.

But in a case where the license had expired it was held that, under a license to place telegraph poles on a railroad company's right of way for shipment and to await the purchaser's inspection, the railroad company is not liable for their destruction by fire, where the purchaser had inspected and rejected them, and a reasonable time had expired before the fire during which the plaintiff could have removed them. Fischer v. Bonner (Tex. Civ. App.) 22 S. W. 755.

356; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

Lurton, Circuit Judge, delivered the opinion of the court:

Under an exception to the refusal of the court to withdraw the case from the jury, and an exception to the charge and for refusal to charge certain requests submitted, just two questions are made. The first is, Would the railroad company be liable for a loss of the plaintiff's lumber by fire originating from a negligent collision between two of its trains? and, second, If that be conceded, was there prima facie evidence that the collision was the result of negligence in the management of its trains? The gravamen of the plaintiff's case is negligence, for the essential thing which it must establish is that its lumber has been lost through a negligent act of the railroad company. It must show that the negligent act of which it complains was the breach of some duty which, under the circumstances, was due to the plaintiff. *Standard Oil Co. v. Murray*, 57 C. C. A. 1, 119 Fed. 572, 575. What was the duty or obligation of the railroad company in respect of this lumber burned upon its right of way? It had not been delivered to the railroad company for carriage. Carrier liability is therefore out of the case. But it is not essential that contract relations shall exist in order to give rise to a duty by one to another. A duty may arise to one who is nothing more than a trespasser to use all reasonable exertion to avoid unnecessary injury after discovery of the peril. But, if the plaintiff was not a trespasser, the obligation of the railroad company to avoid injuring their property would stand upon a higher plane. There was evidence from which the jury might well find that the railroad company had consented that the plaintiff might stack its lumber upon its right of way, at the customary place for receiving lumber for shipment, and keep it there until it should desire or direct its shipment. The jury were told, if they found this to be so, that the railroad company would owe the plaintiff the duty of exercising reasonable care to avoid injury to its lumber by the operation of its trains. In contrast, the defendant insisted that, if the lumber was not placed upon the right of way for shipment, but to be kept there until the plaintiff could obtain a price satisfactory, the company would owe no duty "other than not to wantonly or willfully destroy or injure its lumber." This ignores all distinction between a rightful and wrongful use of the right of way, and puts the duty of the railroad company upon the same plane that it would have been if the plaintiffs had placed their lumber up-

on the railway premises without its knowledge or consent.

But there was evidence from which the jury could find, and, as matters now stand, from which they have found, that the railroad company assented to the use which was made of its right of way. If the company had assented to this use upon condition that the plaintiff should assume the dangers from sparks emitted from its engines, negligently or not, or from dangers incident to fire resulting from collision or otherwise, we are not prepared to say that the agreement would not have been valid, inasmuch as it was under no obligation to permit its premises to be so used, and might be unwilling to assume the risk incident to the proximity of the property to its tracks. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 99, 44 L. ed. 88, 20 Sup. Ct. Rep. 33, 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201, and *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843. But there is no pretense of any such agreement. The learned counsel for the railroad company have insisted that the mere fact that the plaintiff placed its lumber in such proximity to the railway track with knowledge of the danger of fire is an implied assumption of the risk of fire communicated from the engines of the company, and they have cited the cases of *Post v. Buffalo, P. & W. R. Co.* 108 Pa. 585, and *Missouri P. R. Co. v. Bartlett*, 69 Tex. 79, 6 S. W. 549. The *Post* Case was decided upon the ground of contributory negligence, and the conclusion much influenced by the fact that the plaintiff was a naked trespasser in so far as it had stacked a part of its lumber upon the right of way of the railroad company without the company's knowledge or consent. But the ground of the decision was that one who voluntarily places combustible property in such proximity to a railway, in time of great dryness, and where fires were of daily occurrence along the line of the road, attributed to sparks, was so grossly negligent as to be debarred of an action, although the company might have been negligent in the matter of proper spark arresters. *Missouri P. R. Co. v. Bartlett* went off upon the same ground, namely, that, if one voluntarily places property in a situation of great danger, his own negligence will prevent a recovery, although there may have been negligence in not properly guarding against the emission of sparks. The facts in both cases tending to show contributory negligence were very strong, and somewhat peculiar. It might be sufficient to pass over these cases without comment as not applicable here, inasmuch as the defense of contributory negligence is one to be affirmatively set up. No

such plea was filed, and no question of contributory negligence was touched in the charge, or by any request which was made. In so far as either opinion rests upon the ground that the plaintiffs had placed inflammable property upon the premises of the railway company without its knowledge or consent, at a time of great danger from engine sparks, we are not prepared to say that the plaintiffs were so free from culpable negligence proximately contributory to the loss as to entitle them to recover for ordinary negligence. But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction of his own property situated upon his own premises because he had exposed it to dangers which could come to it only through the negligence of the railroad company, they do not meet our approval. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 473, 23 L. ed. 356, 363; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Fero v. Buffalo & State Line R. Co.* 22 N. Y. 209, 215, 78 Am. Dec. 178; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 464, 19 Am. Rep. 618. The rights of persons to the use and enjoyment of their own property are held upon no such tenure as this. The principle would forbid the use of property for many purposes if in such proximity to a railroad track as to expose it to dangers attributable to the negligent management of its business. Upon principle, the case is not different if one places his property upon the premises of a railroad company without conditions, and with its assent. If he is not a trespasser, he is not beyond the protection of the law against injury due to the want of ordinary care. In *Grand Trunk R. Co. v. Richardson*, *supra*, the Supreme Court, and in *Ann Arbor R. Co. v. Fox*, 34 C. C. A. 497, 500, 92 Fed. 404, 497, this court, speaking by Judge Taft, held that the statutory liability of a railway company for fire communicated by sparks was not affected by the fact that the property burned was in part situated upon the railway right of way, by consent of the railway company. After saying that the risk of fire might be increased, Judge Taft said: "But the relation of the parties to the risk and danger is the same. It is an additional risk for each, but the loss must fall just where it would have fallen had a greater distance between the lumber and track been maintained; for they voluntarily assumed the burden from the increased danger."

By the ancient common law every man was obliged to keep his fire safe; and, if one was started upon his premises by the act of himself or anyone for whom he was responsible, and spread and injured his neigh-

bor, except by some inevitable accident which could not have been foreseen, he was responsible without regard to the question of negligent origin. In 1 Bacon's Abridgment, title "Action on the Case," F. at page 85 (1st Am. ed. of 1811), it is said: "It was formerly holden that, if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbor's, that he in whose house the fire first happened was liable to an action on the case on the general custom of the realm *quod quilibet ignem suum salve*."

But the same author states that, by the statute of 6 Anne, chap. 31, it was provided that the action should not lie if accidentally begun. See also *Rolle's Abr.* "Action on the Case," B, title, "Fire," and 2 *Shearm. & Redf. Neg.* §§ 665, 666; and *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 5, 15, 41 L. ed. 611, 613, 616, 17 Sup. Ct. Rep. 243. This statute of Anne constitutes a part of the common law of most of the states; and thus, when the matter is not the subject of regulation by state statute, the liability at common law is confined to a fire which was started through culpable negligence, which spreads and destroys property adjacent. *Shearm. & Redf. Neg.* § 665, and cases cited. We conclude, therefore, that the railroad company is liable to the plaintiff for the loss of its lumber, if same was stacked upon its premises with its consent, and was burned by a fire negligently started by itself upon its own premises. The measure of its obligation to avoid a negligent fire spreading to this lumber upon its own right of way is precisely the same as it would have been if it had been stacked near to, but off, its right of way.

That the fire, which was started by a collision between two railway freight trains, spread to plaintiff's lumber and consumed same, is beyond dispute. If that collision was a negligent one, it was the proximate cause of the destruction of plaintiff's property. There was no independent, intervening cause. But did the unexplained and undisputed facts in respect of this collision make a *prima facie* case of negligence? The contention now is that there was no evidence from which an inference of negligence could be drawn, and that the court erred in not directing a verdict for the defendant upon this ground, and also erred in saying to the jury that the evidence, in the absence of any explanation of the cause of the collision, would constitute *prima facie* evidence of negligence. The argument pressed upon us is that "there is no physical law that says that the collision of two freight trains, one following the other on the same track, may not occur from sheer accident." Counsel then suggest a number of ways in which

such a collision might occur without want of ordinary care. All this may be conceded without advancing the argument, for the simple question we have here is whether, from evidence of certain facts, the inference of negligence, in the absence of explanation, may be logically and legally drawn. That the plaintiff's case must stand upon the ground of negligence is clear. That negligence is an affirmative fact to be shown by him who alleges it must also be conceded. Neither can it be denied, until the contrary appears, that there is a general presumption that a railroad company, in the conduct of a lawful business upon its own premises, will exercise due care. The question is not whether such a collision may not have occurred without culpable negligence, but whether, in the particular case, the circumstances do not raise a presumption that it was due to the want of ordinary care. In other words, does not the very nature of the catastrophe itself supply evidence of negligence? It is not necessary to go so far as to say that evidence of the happening of an injury always affords evidence of negligence even in a passenger case. The inference justifiably to be drawn must depend upon the particular situation shown by the evidence from which, or by which, it is sought to make a *prima facie* case of negligence.

Take the facts of this case. Two trains following each other upon the same track, both under the management of the same company, come into such violent collision as to cause the rear engine to telescope a number of cars at the rear end of the forward train. Fire escaping from the engine fires the wreck, and the fire thus started spreads, and consumes plaintiff's property 40 or 50 feet away. According to all human experience, such a collision cannot occur without something abnormal. It may be that that abnormal cause may be one for which the defendant may not be legally liable; but the question is whether the burden of showing this to be the fact is not legally shifted to the defendant by evidence showing a state of things most unlikely to occur unless caused by the absence of due care. It cannot be unreasonable to ascribe to negligence the happening of a catastrophe, which was not likely to occur if due care had been exercised, until the cause is explained by other evidence. If, therefore, the nature of the accident is such as to make it altogether probable that it was caused by negligence, it makes a case which falls within the maxim, *Res ipsa loquitur*. Manifestly, a presumption of negligence does not arise upon mere evidence of an injury sustained. The inference logically as well as legally deducible is necessarily dependent

upon the nature of the accident, the surrounding circumstances which characterize it, and the relation of the parties. 21 Am. & Eng. Enc. Law, p. 521. Many accidents do not speak for themselves. The maxim, *Res ipsa loquitur*, does not, therefore, apply when the circumstances in evidence are of doubtful solution. That there should not be uniformity of opinion as to the applicability of the maxim is due, not only to the infinite variety of circumstances under which injuries are inflicted, but to differences in respect of the standard of diligence applicable in different situations. In cases between passengers and carriers it has been most often applied, and sometimes in such sweeping terms as suggest application only to an action for breach of contract, rather than one grounded upon tort. Thus, Mr. Justice Lamar, in *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 443, 35 L. ed. 458, 463, 11 Sup. Ct. Rep. 859, 862, says: "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, and *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier; and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight."

Now, it is clear that the learned justice did not mean that a presumption of negligence would arise upon mere proof of injury to a passenger, without any regard to the nature of the injury or the circumstances connecting the carrier with its infliction. Neither of the cases referred to by the learned justice, nor the one in which his observation was made, involved any question of the presumption of negligence from mere proof of an injury to a passenger; and it is not likely, as such actions stand upon the ground of negligence, that negligence would be inferred from nothing more than evidence that a passenger sustained an injury while upon his journey. The evidence should go further, and at least show that the carrier was connected with the cause of his injury. In other words, the presumption is one which arises not from the mere naked fact of an injury, but from the circumstances which characterize the injury. Thus, in *Stokes v. Saltonstall* the *prima facie* case of negligence was made upon evidence that the stage coach was upset, and the plaintiff injured. The fact that the coach was overturned while being driven by the carrier's servant, and a passenger injured, was evidence of the hap-

pening of a thing which does not happen under normal conditions, and made a case which required explanation.

In *New Jersey R. & Transp. Co. v. Pollard* there was evidence tending to show that Mrs. Pollard, by a sudden and unusual jolt, had been thrown against the arm of a seat and injured. In *Gleeson v. Virginia Midland R. Co.* a railway postal clerk was injured through a partial derailment of the train in consequence of coming in contact with a landslide. From the higher measure of care required from a carrier of passengers, a presumption of negligence may arise from evidence which would not be sufficient in other relations. But in principle there can be no difference between such cases and those in which a less degree of care is required for the exoneration of the party sued. In each action for a tortious injury the question as to what evidence will make a prima facie case of negligence and require an explanation from the defendant will depend upon the nature and circumstances of the injury and the measure of care due from the defendant. In passenger cases, as in other cases, the question at last is whether an inference of negligence may be logically inferred from the circumstances of the particular injury. *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820, 10 Am. St. Rep. 601, 17 Atl. 14; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *East Tennessee, V. & G. R. Co. v. Mitchell*, 11 Heisk. 400; *Sommers v. Mississippi & T. R. Co.* 7 Lea, 201; *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L. R. A. 297, 32 Atl. 350; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 113 Mo. 570, 18 L. R. A. 599, 21 S. W. 1; *Bonce v. Dubuque Street R. Co.* 53 Iowa. 278, 36 Am. Rep. 221, 5 N. W. 177; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 24 Am^d St. Rep. 748, 8 So. 142; *Feital v. Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *Carpue v. London & B. R. Co.* 5 Q. B. 747. Thus, a railroad is bound to use care to keep its track clear. An accident resulting from some obstruction upon the track is prima facie evidence that the obstruction was due to negligence. *Shearm. & Redf. Neg. § 516*. The mere fact of a collision between two trains has always been held, in suits by passengers, prima facie evidence of negligence. *Ibid.*; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Clark v. Chicago & A. R. Co.* 127 Mo. 197, 29 S. W. 1013; *Smith v. New York, S. & W. R. Co.* 46 N. J. L. 7; *North Chicago Street R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Little Rock & M. R. Co. v. Harrell*, 58 Ark. 454, 25 S. W. 117. So an injury resulting from derailment of a train is prima facie evidence 1 L.R.A. (N.S.)

of negligence, or the fall of a bridge, or the breaking of machinery. *Shearm. & Redf. Neg. § 516*, and cases cited. The opening of a railway carriage door upon slight pressure, whereby the plaintiff was thrown out, was held prima facie evidence of negligent construction of the door. *Gee v. Metropolitan R. Co.* L. R. 8 Q. B. 161, 175. But this presumption of negligence from the nature of an injury is one which has been applied in many other kinds of action grounded upon negligence.

The case of the *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 555, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653, 654, was an action by a wharfinger against a steamboat company for crushing his foot between the timbers of a wharf by the violent striking of a steamboat against the wharf while touching to receive freight from him. The court said: "As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was prima facie, and, if unexplained, sufficient evidence of negligence on their part; and the jury might properly be so instructed."

In *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 759, a brick fell out of a pier of a railway bridge, without any assignable cause except the slight vibration of a passing train, and injured the plaintiff upon a highway passing under. Held, evidence of negligence.

In *Byrne v. Boadle*, 2 Hurlst. & C. 722, 728, the plaintiff was walking in a public street past the defendant's shops, when a barrel of flour fell upon him from a window above the shop. Held, sufficient prima facie evidence of negligence to cast upon the defendant the burden of showing that the accident was not due to negligence. *Pollock, C. B.*, said: "The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can a presumption of negligence arise from the facts of an accident. Suppose in this case the barrel had rolled out of the warehouse, and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on chimneys, it

a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place, and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible; and, if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this: A man is passing in the front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant, who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff, who was injured by it, is not bound to show that it could not fall without negligence; but, if there are any facts inconsistent with negligence, it is for the defendant to prove them."

In *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596, 600, plaintiff, while passing in front of a warehouse in the dock, in discharge of his duty as a customs collector, was injured by bags of sugar falling upon him which were being lowered from above. An effort was made by counsel to distinguish the case from *Byrne v. Boadle*, cited above, because the place where the accident occurred was not, as there, a public highway, but a dock, the property of the company. Held, evidence of negligence; *Erle, Ch. J.*, saying: "There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

To same effect is the able opinion of Judge Morrow in *The Joseph B. Thomas*, 81 Fed. 578.

In the case of *The William Branfoot*, 3 C. C. A. 155, 9 U. S. App. 129, 52 Fed. 390, 394, the rule of evidence applied in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 552, 554, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653, and cited heretofore, was applied to a case of where a stevedore was injured by the fall of a stanchion. The opinion was by *Fuller, Ch. J.*, who, in affirming the judgment of the district judge, said: "It is plain that in his judgment a prima facie case was made out, not simply from the mere happening of the accident, but because the surrounding circumstances raised the

presumption that it happened in consequence of a failure of duty on the part of libellee. Undoubtedly there are cases where the very nature of an accident has been held of itself to supply the proof of negligence, but the conclusion was not rested on the mere naked, isolated fact of injury. The presumption of negligence was drawn from the fact of the injury, coupled with the circumstances surrounding its infliction, and characterizing the nature of the occurrence as attributable to want of the requisite care, or as demanding an explanation which the defendant alone could furnish."

It has been said that in action by employees for negligence injuries evidence of an accident carries with it no presumption of negligence. *Illinois C. R. Co. v. Coughlin*, 65 C. C. A. 101, 132 Fed. 801; *Patton v. Texas & P. R. Co.* 179 U. S. 663, 45 L. ed. 364, 21 Sup. Ct. Rep. 275; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707. The reason is the peculiar contract of such an employee by which he assumes the risks incident to his employment, including the negligence of his fellow servants. He must therefore show that the injury of which he complains was the result of a risk he did not assume. It is also said that the explosion of a boiler does not afford prima facie evidence of negligence. For this the cases of *Texas & P. R. Co. v. Barrett*, *supra*; *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864; *Cosulich v. Standard Oil Co.* 122 N. Y. 118, 10 Am. St. Rep. 475, 25 N. E. 259, and *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394, are cited. The case of *the Texas & P. R. Co. v. Barrett* was a suit by an employee, and, for reasons stated above, is not in point. *Marshall v. Welwood* follows *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, in simply holding that there is no absolute responsibility for the consequences of the bursting of a boiler, and that there must be evidence of some negligence to sustain a recovery. Neither case involved the question as to whether evidence of the fact that a boiler had exploded supplied evidence of negligence in the absence of explanation. *Cosulich v. Standard Oil Co.* was the case of the explosion of a tank of oil in a coal-oil refinery. Starting from the proposition that mere proof that fire had spread from the premises of one to those of another does not afford prima facie evidence of a negligent origin, the court held that evidence that it had started from the explosion of a tank of oil in process of distillation in a manufacturing establishment did not point to negligence or carelessness. *Huff v. Austin* does squarely hold that the explosion of an ordinary steam boiler does not make a prima facie case of negligence.

An opposite conclusion was reached by the Tennessee supreme court in *Young v. Bransford*, 12 Lea, 232, 241, where the question was considered in a careful opinion by Judge Cooper. In that case it was said: "The fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace as above, 'that from the mere fact of an explosion, it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler or some defect in its condition.'"

To same effect is *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411, 11 Fed. 438.

The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a *prima facie* case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. *Garrett v. Southern R. Co.* 49 L. R. A. 645, 41 C. C. A. 237, 101 Fed. 102; 13 Am. & Eng. Enc. Law, pp. 507, 508, and cases cited in notes. But evidence of escape of larger sparks than usual, or an unusual number of sparks, has been held *prima facie* evidence of want of due care. *Field v. New York C. R. Co.* 32 N. Y. 339, 345; *Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. 917; *Fitch v. Pacific R. Co.* 45 Mo. 322; *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 16 L. R. A. 299, 27 Am. St. Rep. 652, 22 Atl. 851. There are, however, many jurisdictions in which the mere fact of fire started by sparks is held, irrespective of statute, to be *prima facie* evidence of negligence. The cases may be seen in 13 Am. & Eng. Enc. Law, pp. 498 *et seq.*, and notes.

But, where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that that abnormal cause was not due to want of due care. Thus in *Memphis Consol. Gas & Electric Co. v. Letson*, 68 C. C. A. 453, 135 Fed. 969, we held that a *prima facie* case of negligence was made out upon evidence that the intestate received a fatal current of electricity when turning on an ordinary electric lamp, 1 L.R.A. (N.S.)

the current being supplied for lighting purposes by the defendant.

It is useless to multiply examples of the proper application of the presumptions arising from the circumstances of a particular accident. The court below tried the case carefully, and submitted the matters at issue under a sound charge, and the judgment must be affirmed.

WASHINGTON SUPREME COURT.

EX PARTE THOMAS BROWN.

(.... Wash.)

I. Imprisonment of insane person on acquittal.

Sentence to imprisonment according to the provisions of a statute that, when one is acquitted of the charge of murder on the ground of insanity, and that fact is stated by the jury, he may be sentenced to imprisonment, does not deprive him of his liberty without due process of law, nor of the bene-

Subject Note.—Confinement of one acquitted of crime by reason of insanity.

I. In general, 540.

II. Necessity of finding as to continuance of insanity, 543.

III. Place and nature of confinement, 545.

IV. Removal to place of confinement, 546.

V. Time for which sentenced, 546.

VI. Right to, and proceedings for, discharge after restoration to sanity, 547.

VII. Summary, 549.

I. In general.

Nearly all the states and territories, as well as England and Canada, have statutes in regard to the confinement of one acquitted of crime by reason of insanity existing at the time the offense was committed; but the question as to the right to confine one so acquitted, or as to the validity of the statutes authorizing such confinement, has seldom been directly before the courts, though it has been discussed in several other cases in which it has been indirectly involved.

The right to confine one who is still insane, and who is dangerous to the public peace and safety, until such time as he can be released with safety, providing that the present existence of such insanity or dangerous condition is properly shown, has apparently never been questioned; and it would seem that no objection thereto could be successfully raised.

Thus, in 1 Hale, P. C. p. 35, it is said that, if a person of nonsane memory commit homicide during his insanity, and continue so until the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to jail, there to remain in expectation of the King's grace to pardon him;

fit of the constitutional rights, to appear and defend in person or by counsel, and to trial by jury, where he has had a fair trial upon the issue of insanity, tendered by him in support of his plea of not guilty, and he has produced no evidence of a return of a lucid interval.

2. Same—cruelty of punishment.

No cruel punishment is inflicted by committing one who has been acquitted of the crime of murder on the ground of insanity to prison, where it appears to the court that his discharge from custody will be manifestly dangerous to the peace and safety of the community.

3. Same—uncertainty of committal.

The committal of a person acquitted of murder on the ground of insanity to prison until the further order of the court is not void for uncertainty.

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although in such case it is prudent to swear an inquest *ex officio* to inquire whether his madness was feigned.

And in *Rex v. Little*, Russ. & R. C. C. 430, defendant, who was accused of a misdemeanor, was found to have been insane at the time of the commission of the offense, and also at the time of the trial, and was acquitted on account of such insanity. The trial judge ordered him to be kept in strict custody in jail till His Majesty's pleasure should be known, in accordance with the provisions of 39 & 40 Geo. III. chap. 94, § 2, and the judges, on consideration of the question, held such order to be right.

And in *People v. Griffen*, 1 Edm. Sel. Cas. 126, defendant, having been acquitted because of insanity at the time the offense was committed, and such insanity being certified to still continue, was ordered into safe custody, and to be sent to the state lunatic asylum, in pursuance of N. Y. act April 7, 1842, for the organization of such asylum. It does not appear that any objection to such order was taken.

And in *Bonfanti v. State*, 2 Minn. 124, Gil. 99, the court had before it for consideration the correctness of a construction placing on defendant the burden of proving the plea of insanity, set up by him. The court decided that such instruction was correct, basing its decision on Minn. Rev. Stat. § 259, p. 570, providing that, if the defense to an indictment be the defendant's insanity, the jury must be instructed, if they acquit him on that ground, to state such fact in their verdict, and § 211, p. 562, providing that, when any person shall be acquitted of an offense by reason of insanity, the jury, in giving their verdict, shall state that it was given for such cause, and thereupon the discharge of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison. The court states that the later statute very sensibly provides that the jury shall not acquit of the crime with-

APPLICATION for a writ of habeas corpus to secure the release of petitioner from the custody of the sheriff of Lewis County, to which he had been committed as an insane criminal. Denied.

The facts are stated in the opinion.

Messrs. Maurice A. Langhorne and Foreney & Ponder, for petitioner:

Section 6959, 2 Ballinger's Anno. Codes & Statutes, is squarely in conflict with the 14th Amendment to the Constitution of the United States, as well as in conflict with §§ 3, 14, 21, and 22 of art. 1 of the state Constitution, inasmuch as it attempts to confer arbitrary power upon a court to commit indefinitely to prison without first according that fair and impartial trial imperatively demanded by the Constitution.

State ex rel. Blaisdell v. Billings, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W.

out convicting of insanity, so that the court, if of opinion that the insanity is continuing may dispose of his person without further delay.

And in *Hadaway v. Smith*, 71 Md. 319, 18 Atl. 589, which was an action by a married woman to recover land mortgaged by her without joinder by her husband, while he was confined in an insane asylum after a special finding by the jury, on a trial for assault with intent to kill, that he was insane at the time of the commission of the offense and still was insane, the court stated that the court before which the criminal trial was had thereupon ordered him to be confined in the hospital for the insane until he should recover and be discharged in due course of law, and that such proceeding was expressly authorized by Md. Code, art. 59, §§ 4, 5.

And in *Lower Augusta Twp. v. Northumberland County*, 37 Pa. 143, which was an action of assumpsit by a county against a township for the amount of a bill paid by the former for the board of an insane person committed to the state lunatic asylum by the court of quarter sessions, the statement was made that such person was indicted for attempting to set fire to a sawmill, and acquitted, as she was evidently insane; and that, on the following day, a petition alleging her insanity was presented to the court, the grand jury found her insane, and a jury to determine the question of her sanity also found her insane, whereupon an order was made committing her to such asylum.

And in *United States v. Lawrence*, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577, it was proved that the defendant had shot at the President of the United States under the insane delusion that he himself was King of England and of the United States as an appendage to England, and that the President stood in his way in the enjoyment of his right, and that the shooting was done under such delusion. The jury found him not guilty by reason of insanity, and the

206, 794; Doyle's Petition, 16 R. I. 537, 5 L. R. A. 359, 27 Am. St. Rep. 759, 18 Atl. 159; Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; Cooley, Torts, 2d ed. p. 206, note 1; 10 Am. & Eng. Enc. Law, 2d ed. p. 290.

The guaranty of due process of law secures to every citizen, except in matters of taxation, a judicial trial before he can be deprived of life, liberty, or property.

State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; Boyd v. Ellis, 11 Iowa, 97; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636.

The term "due process of law" means a course of proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.

Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572; Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Ex parte MacDonald, 76 Ala. 603; Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728.

The guaranty secures to everyone the protection of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.

10 Am. & Eng. Enc. Law, 2d ed. p. 296; Griswold College v. Davenport, 65 Iowa, 633, 22 N. W. 904; Re Ah Lee, 6 Sawy. 410, 5 Fed. 899; Hood v. State, 44 Ala. 81; Tiedeman, State & Federal Control of Persons & Property, p. 128; State ex rel. Blaisdell v. Billings, 55 Minn. 474, 43 Am. St. Rep. 524, 57 N. W. 206, 794; State ex rel. Kelly v. Kilbourne, 68 Minn. 320, 71 N. W. 396; Hovey v. Elliott, 167 U. S. 409, 42 L. ed.

court remanded him, being of opinion that it would be extremely dangerous to permit him to be at large while under such delusion.

And in Com. v. Meriam, 7 Mass. 168, defendant, who was charged with murder, was shown to have been occasionally deranged for several years before committing the offense; after the death of the person for whose murder he was indicted, he was committed to the house of correction as a person whom it was dangerous for the safety of the people to permit to go at large. After the finding of the indictment, he was brought from the house of correction to the courthouse for trial, and acquitted on the ground of insanity, whereupon the court committed him to the custody of the sheriff to be remanded to the place from which he had been brought, to remain until discharged by due order of law.

But the form for the judgment of acquittal on the ground of insanity found in White's Anno. Code Crim. Proc. (Tex.) § 925, p. 587, contains a provision that, upon such finding by the jury, the defendant shall "be immediately discharged from all further liabilities upon the charge for which he has herein been tried, and that he go hence without day."

On the other hand, a discharge from commitment of one so acquitted, if he has been restored to sanity at the time of the trial, or as soon thereafter as he shall have been so restored, would also seem unquestionable,—at least unless there is danger of a relapse into insanity.

Thus, in 1 Hale, P. C. p. 36, it is said that, if a person, during his insanity, commit homicide or petit treason, and recover his understanding, and, being indicted and arraigned for the same, he ought to be acquitted: and that it makes no difference whether the frenzy is fixed and permanent, or whether it was temporary by force of disease, if the act were committed while under such distemper.

And in State v. Klinger, 46 Mo. 224, defendant's attorney stated to the jury that, if they had a reasonable doubt as to the 1 L.R.A. (N.S.)

defendant's sanity at the time of the commitment of the homicide, they should give him the benefit of the doubt, and that §§ 43, 45, of the chapter in the Missouri statutes in reference to the lunatic asylum had provided a way for his disposal, as it would be the duty of the court to issue an order restraining him in custody until he could be sent to the insane asylum. The trial court, however, at once stated that that was a question for the consideration of the court alone after a verdict, and that, if defendant were acquitted for insanity at the time of the homicide, the court would not send him to the insane asylum if satisfied that he was not insane at the time of the acquittal, as the court would never make an order to send a sane man to the asylum. There was no claim that defendant was insane at the time of the trial, and the court said, on appeal, that the statute restraining prisoners acquitted for insanity had reference solely to insanity existing at the time of the trial, when it was a question solely for the court, with which neither the jury, nor the counsel, have anything to do.

And the statutes of every state which require a finding as to the continuance of the insanity at the time of the trial of one so acquitted provide for his commitment only in case he is then found to be insane; and the customary provision of the different statutes in case he is then insane is for confinement until he becomes sane.

But in Gleason v. West Boylston, 136 Mass. 489, which was an action by the treasurer of the commonwealth for support in a state insane asylum, of one acquitted of murder, by reason of insanity at the time of committing the offense, the court stated that, under Mass. Stat. 1873, chap. 227, providing that, when one indicted for murder or manslaughter is acquitted by reason of insanity, the court shall order him to be committed to one of the state lunatic hospitals during his natural life, with power in the governor and council to discharge him when satisfied that he may be discharged without danger to others, it was the duty

215, 17 Sup. Ct. Rep. 841; *Crain v. United States*, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Eddy v. People*, 15 Ill. 386; *Hathaway v. Clark*, 5 Pick. 490; *Conkey v. Kingman*, 24 Pick. 115; *Wait v. Maxwell*, 5 Pick. 219, 16 Am. Dec. 391; *State ex rel. Larkin v. Ryan*, 70 Wis. 676, 36 N. W. 823; *Re Janes*, 30 How. Pr. 446; *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280.

Before the person alleged to be insane can be deprived of his liberty or his property, there must be accorded to him an opportunity to appear and defend.

No one has a right to confine an insane person for an indefinite period until he shall be restored to reason, except under the

of the trial court to order his commitment without inquiry as to his mental condition at the time, as, under such statute, the defense of insanity was not one entitling him to an unconditional acquittal, but that he must be detained in confinement until it should appear to the governor and council that he might be discharged without danger to others, his commitment not being for the purpose of treatment, but because his being at large would be dangerous to the peace and safety of the community.

And in *People ex rel. Mooney v. Walsh*, 21 Abb. N. C. 299, 15 N. Y. Civ. Proc. Rep. 19, 1 N. Y. Supp. 143, defendant before trial was found to be insane, and committed to the insane asylum to remain until restored to his right mind. After remaining about three months, he was reported restored, and brought to trial, on which trial he was acquitted on the ground of insanity when the offense was committed. The trial court thereupon, under the provision of N. Y. Code Crim. Proc. § 454, that the court must, if the person so acquitted is in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane, ordered him to be committed to the insane asylum, notwithstanding the contention that, having previously been sent to an insane asylum until restored to his right mind, and having been so restored and put on trial as a sane man, he could not be committed to an asylum immediately at the close of the trial, as insane. A motion to compel the sheriff having him in custody to make a return to a writ of habeas corpus for his release was subsequently denied on the ground that the writ had not been personally served upon him.

In *Reg. v. Oxford*, 9 Car. & P. 525, the jury, in addition to finding that defendant was insane at the time of committing the offense, also stated that there was no satisfactory evidence of the existence of an essential element of the crime charged. The court directed them to retire and separately determine whether such element did in fact
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sanctions, and upon compliance with the formalities, of the law.

Colby v. Jackson, 12 N. H. 526; *Van Deusen v. Newcomer*, 40 Mich. 90; *Re Bryant*, 3 Mackey, 489; *Com. ex rel. Stewart v. Kirkbride*, 2 Brewst. (Pa.) 419; *Territory ex rel. McCann v. Gallatin County*, 6 Mont. 297; *State ex rel. Kiel v. Baird*, 47 Mo. 302; *Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662; *De Hart v. Condit*, 51 N. J. Eq. 611, 40 Am. St. Rep. 545, 28 Atl. 603; *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 539, 57 N. W. 200, 794.

The judgment of commitment under which the petitioner is held is void for the reason that the sentence of imprisonment must be certain.

15 Am. & Eng. Enc. Law, 2d ed. p. 180; 1 Bishop, New Crim. Proc. § 1297; 21 Am.

exist, and also whether defendant was guilty or not guilty; and, while they were out, the judges considered what could be done if the jury found the defendant not guilty under the facts, and they concluded, though they stated that they did not mean to be bound by what they said, that in such case they could not order the defendant to be kept in custody, notwithstanding the further finding of the jury that he was insane. The jury, however, on returning into court, found defendant not guilty because of insanity, and the court ordered him to be detained in prison.

In *Clearfield County v. Cameron Twp. Poor District*, 135 Pa. 86, 19 Atl. 952, the only point before the court was the liability over to the county, of the township in which one acquitted of a crime on the ground of insanity had his last legal settlement, for his maintenance in an insane asylum to which he was committed. The court, however, said that a commitment to the asylum for the insane, of one charged with a criminal offense and acquitted on the ground of insanity at the time of the alleged offense, was not a sentence of the court, as, if it was, the courts would be sentencing the innocent, which they do not often knowingly do; but that such commitment was only part of the duty cast on the court.

In *Hadfield's Trial*, 27 How. St. Tr. 1281, the jury found defendant, charged with shooting at the King, not guilty by reason of insanity when the act was committed, such finding being made on the suggestion of one of the counsel for the Crown, who stated that such a finding would be a legal and sufficient reason for his future confinement. At the close of the report of such case, the statement is made that this gave rise to the act of 39 & 40 Geo. III. chap. 94, by virtue of which the defendant was continued in custody.

II. Necessity of finding as to continuance of insanity.

The statutes of the different states vary

& Eng. Enc. Law, p. 1073; *Davis v. Catron*, 22 Wash. 183, 60 Pac. 131.

Hadley, J., delivered the opinion of the court:

The petitioner made original application in this court for a writ of habeas corpus directed to the sheriff of Lewis county. He asserts that he is unlawfully detained and imprisoned. His petition shows that he was regularly tried in the superior court of said county on the charge of murder in the first degree, to which charge he had interposed the plea of not guilty. The verdict returned was as follows: "We, the jury, find the defendant not guilty by reason of insanity." Immediately after the return of the verdict, on the 1st day of May, 1905,

the trial court ordered the sheriff to return the petitioner to the county jail to await the further order of the court. He was accordingly detained in jail until the 8th day of said month, when the trial judge ordered him to be brought into court. The petition alleges that the court thereupon, without any hearing or trial, and without giving the petitioner any opportunity to be heard in his own behalf, arbitrarily and of its own motion announced that, because of the verdict of the jury, which established that the petitioner was not guilty by reason of insanity, the court considered that his discharge and going at large would be manifestly dangerous to the peace and safety of the community. It is further shown that, for the above reasons, an order was

materially in their requirements as to a finding as to the continued existence of insanity at the time of the trial.

In some states the jury are required by their verdict to find as to defendant's insanity not only at the time the offense was committed, but also at the time of the trial. In other states another jury may be summoned, or, according to the statutes in other states, proceedings may be taken against the defendant to determine whether he still continues insane. The statutes in all, or nearly all, of these cases provide that the verdict of acquittal shall be prima facie evidence of defendant's insanity. Other statutes provide that the court shall ascertain, or be satisfied, that the defendant's insanity still continues. The larger number of statutes provide, like the Washington statute, for defendant's confinement if the court considers his going at large to be dangerous to the public peace and safety. Still other statutes direct the confinement of defendant without any provision whatever as to a finding as to his present condition other than may be implied in a further provision in some of such statutes for his confinement until restored to his right mind.

Many of these statutes were evidently passed for the purpose of subjecting to imprisonment persons who escaped conviction by falsely setting up a plea of insanity. No statute, however, providing for the confinement of one found not guilty of crime by reason of insanity at the time the offense was committed can properly be sustained in the absence of any provision for a finding as to the continuance of the insanity at the time of the trial. It would also seem that those statutes which, like the Washington statute, provide for the confinement of one so acquitted if the court consider him dangerous to the public peace and safety cannot be upheld if they are so construed, as was done in *EX PARTE BROWN*, as to authorize the court to order a person so acquitted to be imprisoned on a mere arbitrary finding by the trial court that his discharge and going at large will be manifestly dangerous to the public peace and safety, based solely on the verdict of acquittal on the ground of insanity and the 1 L.R.A. (N.S.)

proceedings in the criminal trial, together with the presumption of the continuance of insanity once shown to exist, without any judicial hearing as to his present condition. The contrary holding in *BROWN v. UNQUHART*, that such statute does not authorize the trial judge to commit the defendant to jail after such verdict of acquittal without a new arraignment on a formal complaint and an opportunity to defendant to be heard, and that an imprisonment on an order made without them is without due process of law and in violation of the Federal Constitution, seems to be supported by the better reasoning and weight of authority so far as direct adjudications go.

Thus, in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, the court passes upon the validity of Mich. Laws 1873, act No. 168, requiring the court to sentence to confinement in the insane hospital of the state prison one acquitted of murder or other high crimes on the ground of insanity at the time of committing the offense, the statute containing no provision for any finding as to the continuance of the insanity. The court holds the statute unconstitutional on the ground that, under it, the "prisoner is sent into confinement without any legal investigation into his condition at that time when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man." The statute has since been changed so as to require the court to inquire and ascertain whether defendant's insanity in any degree continues, before ordering him into custody.

And in *Re Boyett*, 136 N. C. 415, 67 L. R. A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, the court holds N. C. Pub. Laws 1899, chap. 1, § 85, providing that, when anyone accused of murder shall have been acquitted on the trial on the ground of insanity, the court before which such proceedings are had shall, in its discretion, commit such person to the hospital for the dangerous insane, to be kept in custody therein for treatment and care as therein provided, void as depriving defendant of liberty without due process of law in that no provision for legally determining his mental condition at the

entered to the effect that the petitioner shall be, by the sheriff, confined in the county jail until the further order of the court. The sheriff made return to the petitioner by way of answer. The answer avers that the petitioner was charged with murder in the first degree, for the killing of his father; that he pleaded and urged as a defense to said charge insanity caused by epilepsy, cruel treatment by his father, and the degeneracy of the latter prior to the birth of the petitioner; that he offered proof, during the trial, of continuous and permanent insanity from said causes; and that his demeanor during the trial appeared to be consistent with his claim of general insanity. The above alleged facts are not controverted by the petitioner.

time of his commitment is contained therein. The court says: "It is well settled that a person acquitted by a jury upon the ground of insanity existing at the time of the commission of the act is entitled to all of the protection and constitutional rights as if acquitted upon any other ground." The court further says that the trial judge, in strict compliance with the statute, exercised a sound discretion in ordering his commitment, but that the difficulty lies in the fatal infirmity of the statute in authorizing such commitment without notice to the prisoner, or giving him an opportunity to be heard, or for investigation as to his present mental state.

But in *Jenisch's Case*, 3 Abb. N. C. 200, defendant had been indicted for murder of her infant child. The defense of insanity was set up, and commissioners in lunacy were appointed to determine as to her insanity. They found her to have been insane and irresponsible, by reason of epilepsy, at the time of the commission of the offense, but made no finding as to the continuance of the insanity. The presiding justice, without any written opinion, approved their finding, and ordered her removal to the state lunatic asylum. State commissioner in lunacy, Ordronaux, in a note to the report, states that the commissioner inserted no finding as to the continuance of the insanity, because the statute did not require it, and because the continuance of the insanity arose as a conclusion of law, the report of the commissioners being made less than two months after the commission of the offense, and there having been another seizure in the intervening time.

And see, also, *Gleason v. West Boylston*, 136 Mass. 489, and *People ex rel. Mooney v. Walsh*, 21 Abb. N. C. 299, 15 N. Y. Civ. Proc. Rep. 19, 1 N. Y. Supp. 143, *supra*, I. No appeal from the latter decision, however, seems to have been taken, and no attempt to bring the validity of such commitment to any other court was made than the ineffectual attempt, in the supreme court at chambers, to compel the sheriff to make a return to the writ of habeas corpus for his release, and, in the former, as there
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The court acted on the authority of a statute of this state which is set forth in § 6959, 2 Ballinger's Anno. Codes & Statutes. It is as follows: "When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept; other-

said, the validity of the statute was not directly raised, the question before the court being the liability for the expenses of the support in an insane hospital of one committed thereto after acquittal of homicide by reason of insanity.

In *Rex v. Little, Russ. & R. C. C. 430*, the statement was made that the defendant was found to have been insane both at the time the offense was committed and at the time of the trial, and in *Lower Augusta Twp. v. Northumberland County*, 37 Pa. 143, *supra*, I., the statement was made that a jury impaneled to determine the present sanity of a defendant, acquitted by reason of insanity, found her insane before an order for her committal to the lunatic asylum was made.

But in *Reg. v. Oxford*, 9 Car. & P. 525; *Hadfield's Trial*, 27 How. St. Tr. 1281; *United States v. Lawrence*, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577; *People v. Griffen*, 1 Edm. Sel. Cas. 126; and *Com. v. Meriam*, 7 Mass. 168, *supra*, I.—no statement appears as to any finding of present insanity having been made.

III. Place and nature of confinement.

The statutes of nearly all the states provide for confinement in the insane asylum, or hospital, of one acquitted of crime by reason of insanity, if still insane. A few, like the Washington statute, provide for confinement in prison, or in jail. A few others provide for commitment to the care of the sheriff; others, for their being kept in strict custody, without any provision as to the place; and a few, for their being kept in such place as the court shall direct. A few, also, contain a provision in the alternative, like the Washington statute, authorizing the court to give such person into the care of his friends on their giving proper security. And the Vermont statute authorizes the court to put to such reasonable labor as he is capable of performing, and to subject to such reasonable discipline as his condition and circumstances require, one so acquitted who is sent to the state prison.

No objection to any statute because of

wise he shall be discharged." The petitioner contends that the statute violates the following portion of the 14th Amendment to the Constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is further insisted that the statute violates the following provisions of §§ 3, 14, 21, and 22 of article 1 of our state Constitution:

"Sec. 3. No person shall be deprived of life, liberty, or property without due process of law."

"Sec. 14. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

the place in which a person so acquitted was ordered to be confined seems to have been raised prior to *EX PARTE BROWN*, which holds that no cruel punishment is inflicted by committing to prison one acquitted of the crime of murder on the ground of insanity, stating that, although such confinement is ordinarily in an asylum, there is no reason why the court may not require that those whose dangerous tendencies have been manifested by the perpetration of acts imperiling the safety of the community shall, after a full hearing establishing the fact of insanity, be confined in prison while that condition continues.

In most of the cases cited in this note the commitment was to a lunatic asylum, but in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, *supra*, II., the commitment was to the state prison hospital; in *Reg. v. Oxford*, 9 Car. & P. 525, *supra*, I., the commitment was to prison; in *Rex v. Little, Russ. & R. C. C.* 430, *supra*, I., the commitment was to jail; in *Com. v. Meriam*, 7 Mass. 168, *supra*, I., the prisoner was remanded to the house of correction; in *United States v. Lawrence*, 4 Cranch, C. C. 518, Fed. Cas. No. 15,577, *supra*, I., the report merely states that the prisoner was remanded; and in *Hadfield's Trial*, 27 How. St. Tr. 1281, *supra*, I., a note at the close of the report states that, by virtue of the act of 39 & 40 Geo. III. chap. 94, passed after the trial, the prisoner was continued in custody.

Most of the statutes provide for keeping the prisoner in "strict custody;" and *Com. ex rel. Bickel v. Bennett*, 18 Phila. 432, holds that the authorities of an insane asylum have no discretion, as they have in case of other patients, to permit one to leave the asylum without a keeper, who, after being acquitted of murder on the ground of insanity, has been sent to such asylum under an order of the court requiring her to be kept in "strict custody" so long as she continues of unsound mind.

IV. Removal to place of confinement.

Clarion County v. Western Pennsylvania Hospital, 111 Pa. 339, 3 Atl. 97, holds that 1 L.R.A. (N.S.)

"Sec. 21. The right of trial by jury shall remain inviolate," etc.

"Sec. 22. In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appear in all cases," etc.

Has the petitioner been deprived of due process of law in the premises? He was tried before a jury, to whom he himself

only the court or law judge of the county in which an accused was tried and acquitted on the ground of insanity has jurisdiction to appoint a commission to remove him to the hospital for the insane, under Pa. act May 14, 1874, P. L. 160, providing that application for such removal may be made to any judge learned in the law, of "any court within this commonwealth having immediate cognizance of the crime with which such prisoner is charged."

V. Time for which sentenced.

Most of the states provide by statute for confinement until restoration to sanity. Some, however, provide for confinement until further order of the court, and some until the prisoner is discharged by due course of law. In England the confinement is to be until His Majesty's pleasure is known, and in Canada until the pleasure of the lieutenant governor is known. In a few states the confinement is to be until the prisoner is discharged by the governor, or by an act of the legislature. And in Massachusetts one acquitted of murder or manslaughter by reason of insanity is to be committed during his natural life, with a provision that he may be discharged by the governor, with the advice and consent of the council, when they are satisfied that he may be discharged without danger to others.

In *Com. v. Meriam*, 7 Mass. 168, *supra*, I., the defendant was remanded to the house of correction until he should be discharged by due order of law; and in *Gleason v. West Boylston*, 136 Mass. 489, *supra*, II., the defendant was committed to the insane asylum for life in accordance with the provisions of the Massachusetts statute *supra*; but in neither case does there seem to have been any objection on the part of defendant, nor in any other case reported until that of *EX PARTE BROWN*, in which the court holds that an imprisonment to continue until the further order of the court is not void for uncertainty or indefiniteness as to time; as the statute provides no time for the duration of the imprisonment, and it was the undoubted intention of the legislature

submitted the issue that he was insane when the crime was committed. He was permitted to fully introduce his evidence upon that subject, and the jury were instructed as to their duty in the premises. The verdict returned was in his favor upon the issue which he tendered, and he was therefore accorded due process of law and the right of trial by jury upon that subject. The jury found that he was insane, and it was the manifest duty of the court to enter some kind of a judgment upon the finding of the jury. The petitioner erroneously assumes that it was a judgment entered in a new and original proceeding without due process of law and without opportunity for a hearing. It was, however, a judgment rendered upon the ver-

dict of a jury which had been regularly returned in a proceeding wherein all constitutional rights had been accorded. Should it have been a judgment of discharge, according to petitioner his liberty? He does not allege that he is now sane. The solemn verdict of a jury, after due trial, establishes that he was insane when the killing occurred. The record before us shows that the character of insanity considered was not of a temporary sort, but was, rather, progressive and permanent in its nature, by reason of epilepsy and congenital conditions. "The presumption being that general insanity, once shown to exist, still continues, unless of a temporary sort, like the delirium of drunkenness or a fever, the burden of proof to establish

that the imprisonment should not be continued after the restoration to sanity, and that the court should so retain control of its order in the premises that it might afterwards modify it to suit changed conditions of mind or body as they might be made to appear.

VI. Right to, and proceedings for, discharge after restoration to sanity.

The statutes of most of the states provide, as said in *V., supra*, for confinement until the prisoner is restored to sanity, showing an intent that he shall be discharged as soon as it is made to appear that he has been thus restored. In some states, however, it is provided that he shall be discharged when it appears that the public peace and safety will not thereby be endangered; and in a few states confinement in case of one acquitted of murder is to be for life, unless discharged by the governor or by act of the legislature. There seems, however, no justification for keeping the prisoner in custody after his restoration to sanity is shown.

Thus, in *EX PARTE BROWN* the court says that it was the undoubted intention of the legislature that imprisonment should not be continued after restoration to sanity.

And in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, *supra*, II., the court says that it would be attributing more than folly to the legislature to assume that they would intentionally pass a law which would leave a sane man liable to perpetual imprisonment where he has been acquitted of crime.

But see *Gleason v. West Boylston*, 136 Mass. 489, *supra*, I. In this case, however, as was said before, the question at issue was not the validity of the statute, but merely the liability for the expense of his support while in the asylum.

Com. ex rel. Bickel v. Bennett, 18 Phila. 432, holds that, under Pa. act March 31, 1860, § 66, the finding of the jury that defendant was insane at the time of the commission of the offense is evidence of her continued insanity, on an application for her discharge on the ground that she is no longer of un-

sound mind, in the absence of evidence of any substantial change in her condition.

The same case also holds that a person acquitted of murder on the ground of insanity, who, previous to such homicide, had made at least two dangerous attacks on other persons, one of them with a deadly weapon, is not entitled to a discharge on the ground that she is no longer of unsound mind, where the managers of the hospital do not certify that she is safe to be at large, and no such change appears to have taken place in her condition, and for such length of time, as to make it seem to the court safe for her to be at large, under Pa. act April 20, 1869, P. L. 79, providing that, where any person is acquitted on the ground of insanity, if the judge is satisfied that the paroxysm of insanity in which the criminal act was committed was preceded by at least one other such paroxysm, the prisoner shall not be discharged in cases of homicide, or attempted homicide, unless, in the unanimous opinion of the superintendent and managers of the hospital, and the court before which he or she was tried, he or she has recovered and is safe to be at large.

Comparatively few of the statutes provide as to the nature of the proceedings for the discharge of one restored to sanity. In Connecticut the prisoner, or the officers of the institution in which he is confined, are authorized to petition for his discharge; and in Maryland the court is specially authorized to discharge him on habeas corpus proceedings; while in Georgia and North Carolina a special act of the legislature is necessary for his discharge in case of murder; and in Massachusetts, in such case, he may be discharged by the governor, with the advice and consent of the council, when he is satisfied, after a hearing, that such person may be discharged without danger to others. It would seem clear, however, that there must be some provision for a direct application to the judicial department by the prisoner or his friends if the statute is to be upheld, and this has been the holding in all the cases where the question has been directly before the court.

a lucid interval c. mental restoration rests upon the party who asserts it." Schouler Wills, 3d ed. § 189, and cases cited. In the chapter on the subject of "Insanity" in volume 16, Am. & Eng. Enc. Law, 2d ed. under the discussion of the continuance of insanity of a permanent nature, at page 604 of said volume, the following statement of the rule as to presumption is made: "When habitual insanity in the mind of the person whose act is in question is once established, then the party who would take advantage of the fact of restoration to a sane condition, or of an interval of reason, must prove it, for insanity of that character is presumed to continue until the contrary is shown." Decisions from 26 of the American states are cited in support of the above text, as well as a long list of English decisions. With such an array of citation, it would seem that the rule is well established, and that a review of the decisions is unnecessary. We have examined a number of the au-

thorities cited, and find that they fully sustain the rule announced by the text writer—that, when insanity of a permanent character is once established, it is presumed to continue, and the presumption prevails until the contrary is shown; the burden of showing which is upon him who asserts sanity. Therefore, inasmuch as it was a fact established after a full hearing, that the petitioner was insane at the time of the homicide, the presumption is that the same condition continues, and the burden is upon him to show to the contrary. The record does not show that he has ever offered to make such showing to the court below, but rather that he demands his release as an absolute right.

We have thus seen that, as to the issue of insanity, the petitioner was accorded the constitutional rights of due process of law, trial by jury, and the privilege of appearing and presenting his case in person and by counsel. The additional constitutional objection urged is that no cruel punishment

Thus, in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, the statute provided that no person committed to the insane hospital of the state prison after acquittal of murder, or other high crimes, on the ground of insanity, could be discharged, unless the prison inspectors summoned the circuit court judge of the circuit from which he was sent, and the medical superintendent of the Kalamazoo insane asylum, to determine his condition as to sanity. The court states that there is nothing in such law which could compel the performance of the functions necessary to release a sane person committed to the insane asylum; that the prison inspectors could act, or not, as they saw fit, and that neither the prisoner, nor his friends, could compel action, the statute practically leaving the person confined to depend upon the uncontrolled pleasure of such inspectors; and accordingly held the statute to be in violation of the constitutional provision securing to everyone the protection of due process of the law.

And in *Re Boyett*, 136 N. C. 415, 67 L. R. A. 972, 103 Am. St. Rep. 944, 48 S. E. 789 the court considers the constitutionality of N. C. Pub. Laws 1899, chap. 1, § 67, providing that no person acquitted of murder on the ground of insanity, and committed to the hospital for the dangerous insane, shall be discharged therefrom without the passage of an act by the general assembly authorizing his discharge. The court says that it is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer; that the judicial department of the government cannot, by any legislation, be deprived of this power, or relieved of this duty; and that every citizen must be afforded a prompt, complete, and adequate remedy by due process for every

unlawful injury to his person or property; and that it was inconceivable that a person restrained of his liberty must await the action of the legislature before having the cause thereof inquired into.

But in *Gleason v. West Boylston*, 136 Mass. 489, *supra*, I., the court states that a person committed to the lunatic hospital for life, on acquittal of murder by reason of insanity, must, under Mass. Stat. 1873, chap. 227, be detained in confinement until it appears to the governor and council that he may be discharged and set at large without danger to others, and does not suggest in any way that such statute is unconstitutional; but that question was not before it at the time, the only issue being, as heretofore said, the liability for the expenses of such person's support while in the lunatic hospital.

In *Brown v. Urquhart* the remedy by habeas corpus was accepted without question as being the proper one for raising a right to discharge on the ground that the defendant is not then insane. And in *Re Boyett*, 136 N. C. 416, 67 L. R. A. 972, 103 Am. St. Rep. 944, 48 S. E. 789, *supra*, the same remedy was held to be a proper one.

And in *People ex rel. Mooney v. Walsh*, 21 Abb. N. C. 299, 15 N. Y. Civ. Proc. Rep. 19, 1 N. Y. Supp. 143, the defendant was tried after he had been reported restored to sanity by the authorities of an insane asylum to which he was committed after indictment and before trial, and on such trial he was acquitted on the ground of insanity when the offense was committed, whereupon the court again ordered him to be committed to the insane asylum, notwithstanding the contention on his part that the court, having tried him as a sane person, could not immediately thereafter commit him to an asylum as insane. A habeas corpus pro-

shall be inflicted. The statute authorizes the court, among other things to commit one acquitted by reason of insanity to prison. No particular prison is specified, and it may be reasonably inferred that any prison coming within the committing jurisdiction of the court trying the cause may be selected, such as the county jail of the proper county or the state penitentiary. In this instance the commitment was to the county jail. May the state, in the exercise of its sovereignty and in its endeavor to protect its people from dangerous insane characters, provide for their confinement in a prison? It is the policy of the state to confine such persons, but it is ordinarily done in an asylum, and not in a prison, so called. We know of no reason, however, why the state may not classify insane persons, and require that those whose dangerous tendencies have been manifested by the perpetration of acts imperiling the safety of the community shall, after a full hearing establishing the fact

of insanity, be confined in prison while that condition continues. While confinement of any character may in a sense contain elements of cruelty, yet the safety of the people requires that such persons shall be confined.

It is urged that the order of the court is void for uncertainty, in that it is indefinite as to time. The imprisonment is to continue until the further order of the court. The order conforms to the statute in that particular. No time is specified in the statute for the duration of the imprisonment. In the nature of the subject treated by the statute, it must be so. It was the undoubted intention of the legislature that imprisonment shall not be continued after restoration to sanity, and that the court shall so retain control of its order in the premises that it may afterwards modify it to suit changed conditions of mind or body as they may be made to appear. Such an order is analogous to one disposing of the custody of the children in

ceeding for his discharge was instituted, and a motion to make the sheriff having him in custody make a return to the writ was subsequently denied on the ground that the writ had not been personally served upon him, no objection being made that the writ of habeas corpus was not a proper proceeding.

But in *Re Underwood*, 30 Mich. 502, the court held that habeas corpus was not the proper remedy to inquire into the legality of imprisonment of one acquitted of murder by reason of insanity under a commitment by the trial judge to a lunatic asylum, but that the question must be raised by writ of error or other appropriate remedy.

In *People v. Griffen*, 1 Edm. Sel. Cas. 126, the superintendent of the state lunatic asylum, to which one acquitted of murder on the ground of insanity had been committed, reported to the judge before whom the trial was had that such person had been restored to sanity, and that the public would not be endangered by his release, and applied for an order for his discharge, which order the judge granted, requiring, however, a petition from the prisoner for such release, and a statement from the superintendent and one of the managers of the asylum as to the nature and progress of the disease since his reception into the asylum, and his present condition.

And *Luken's Petition*, 11 Pa. Dist. R. 146, 27 Pa. Co. Ct. 3, was a petition for a discharge from a state lunatic asylum to which the petitioner had been committed on acquittal on the ground of insanity. The district attorney urged that the proper remedy was by habeas corpus. The court held that the right of a prisoner held in custody, as petitioner was, to petition for his discharge, was at least doubtful, and that he should refuse to entertain the petition.

if it were not that the certificates and the evidence left no doubt that the petitioner was entirely sane; but, as there was no question as to his restoration to sanity, and the proper officials had had notice of the proceeding, the court ordered him to be discharged.

VII. Summary.

The right to confine one acquitted of crime by reason of insanity if the insanity still exists at the time of acquittal seems never to have been questioned. The right to a discharge if the insanity no longer exists at the time of the acquittal would seem equally true, though the Massachusetts statute providing for confinement of one acquitted of murder or manslaughter by reason of insanity, without any provision for inquiry as to the continued existence of the insanity, has been stated by the supreme court, in a case in which the validity of the statute was not directly involved, to require commitment by the trial court, even though the defendant is sane at the time of the acquittal. Before the defendant can properly be committed, it is also necessary that the continuance of the insanity at the time of the acquittal shall be found in some proper judicial manner, though a finding by the jury does not seem to be necessary. The ordinary provision is for confinement in an insane asylum, though the provision for confinement in prison, contained in some statutes, seems never to have been held improper. It is further necessary to the validity of such a statute that it shall contain a provision for a direct application to the judicial department for a discharge, by the prisoner or his friends, on his restoration to sanity; and a proceeding by habeas corpus is a proper method of making such application.

J. H. H.

a divorce proceeding, which is made to continue until further order of the court, and subject to modification with changed conditions. Although the fact of insanity has been regularly established, and that condition is presumed to continue until the contrary is shown, yet the petitioner has the undoubted right at any time to assert that he is restored to sanity, and to demand that the court shall duly investigate that subject. The statute in no way attempts to prevent such a demand upon his part, and cannot be held to be invalid on the ground that it prevents him from exercising such privilege. The petitioner cites *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, in support of his contention against this legislation; but an examination of that case discloses that the Michigan statute provided that one acquitted on the ground of insanity should remain confined in an asylum until an investigation as to his restoration should be set in motion by the prison inspectors. The court said: "It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors." Under that statute, the prisoner could take no step on his own initiative, but was left entirely to the will of others. Such a provision manifestly violated a personal right. But our statute makes no such attempt to prevent the exercise of a fundamental privilege. The petitioner quotes extensively in his brief from a note in *Cooley on Torts*, 2d ed. pp. 206, 207. The quotation does not, however, conflict with our argument above,—that, with the presumption of insanity continuing, confinement is enforceable when the law does not attempt to prevent a judicial investigation as to restored sanity, and which may be initiated at the pleasure of the one confined. We find no constitutional objections to the statute, and the order of the court is in strict conformity with its provisions.

For the foregoing reasons, we think the petitioner has not shown sufficient grounds for his discharge, and the writ is denied.

Mount, Ch. J., and Fullerton, Crow, and Rudkin, JJ., concur.

NOTE.—After the rendition of the above decision petitioner presented a petition to District Judge Hanford, of the United States court, who, after holding that the decision of the state court was not binding on the Federal court, and setting out the provision of the statute under which the state court had presided, continued as follows (139 Fed. 849):

I disapprove of that part of the argument
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made before this court in support of the petition which denounced this law. On the contrary, I regard it as legitimate and wise. It would certainly be unwise to discharge from legal restraint a person acquitted of a criminal charge by reason of insanity, if, in the opinion of the court in which the case was tried, the defendant, by reason of insanity, will probably be a menace to the peace and safety of the community. The court in which such a trial has been concluded is the appropriate tribunal to assume the responsibility of dealing with the defendant in a manner to protect the community from such mischievous conduct as may be expected to follow his release from restraint. The court, however, in the exercise of the power and discretion conferred by this statute, must dispose of the defendant upon due consideration of the facts and conditions existing subsequent to the time of acquittal, and, instead of punishing him by imprisonment for the injurious act constituting the basis of the criminal charge of which he has been acquitted, must find sufficient ground for committing him to prison in a then manifest necessity to restrain him in order to protect the community; and the conclusion of the court should be arrived at by means of orderly proceedings, and as a result of a judicial hearing, in which the defendant shall have a full opportunity to submit a legal defense if he has one. It is my opinion that the constitutionality of this law depends upon the true interpretation of its provisions. If this statute must be construed, as it seems to have been by the supreme court of this state, as a law authorizing the judge of the trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity, without a new arraignment upon a formal complaint or information setting forth the specific facts constituting cause for committing him to jail, and an opportunity given to controvert the averments of such complaint or information, or interpose a lawful defense, it is, in my opinion, unconstitutional and void. But I deem such an interpretation of the law to be unwarranted. The authority to commit to prison, conferred upon the court by this statute, is predicated upon the rendition of a verdict of acquittal on the ground of insanity, and other facts, viz., the actual insanity of the defendant, and probability that the peace of the community will be endangered by permitting him to go at large. This point may be concisely stated thus: The law does not authorize a judgment adverse to the defendant upon the verdict alone. This law is one section of the Criminal Code of this state, originally enacted by the legislature of Washington territory at its first session. See *Laws of Washington Territory*, 1854, p. 121, § 126. It does not, in terms, except cases which may be prosecuted under it from the general provisions of the same statute, intended to insure orderly proceedings and a fair trial, and conviction preliminary to the rendition of any judgment

of the court under which an offender may be imprisoned. To assume that this section confers extraordinary power upon the courts to condemn a man, after he has been acquitted of crime, without an accusation, and without a fair trial, requires reconstruction, so that there shall be read into it words conferring that power, or excepting cases arising under it from the provisions of the same statute prescribing the procedure to be observed in dealing with offenders. That, however, would be construction of the law, in the sense of building or creating law by the addition of matter not conceived by the legislature, instead of construing the law in a way to effect the object intended, and the product would be a strange and noxious excrescence upon the jurisprudence of the country. Neither administrative officers, nor the courts, have any authority to construct laws by adding to the statutes, or reading into their provisions new or original ideas. The interpretation of all statutes should be harmonious with the general plan of our government and the explicit requirements of the Constitution, unless the words of the statute plainly express a contrary intention of the legislature. To make my meaning plain, I will, for an illustration, refer to § 1836 of Pierce's Code, which is the law defining criminal libel and prescribing the punishment therefor. Without any suggestion of judicial proceedings, this section declares that every person who composes, dictates, publishes, or wilfully circulates a libel, or in any way knowingly and wilfully aids or assists in doing so, shall be imprisoned in a county jail. If, by virtue of this particular section of the Criminal Code of this state, sheriffs were authorized to seize violators and imprison them without indictment, arraignment, plea, or trial and conviction and sentence duly pronounced by a court of competent jurisdiction, all newspaper men in this state would spend most of their time in jail, and the liberty of the press would soon become a mere phantasm; and to enforce the libel law in such an unheard-of manner would not be more despotic and subversive of constitutional rights than would be the substitution of a judge's fiat condemning an untried victim as a maniac in place of a judgment rendered pursuant to customary and lawful proceedings.

I consider that this law can be administered and full effect given to its provisions according to the intention of the legislature in its enactment without overstepping the limitations of power ordained by the Constitution. Therefore the court is not required, nor authorized, to pronounce it unconstitutional. I also consider that the law was not so administered by the superior court in rendering its judgment, and that the imprisonment of the petitioner with sanction of the judiciary of the state, without arraignment and a fair opportunity to defend himself against charges lawfully preferred, and to produce evidence in his defense, is deprivation of liberty by the state, without due process of law, and violates the national 1 L.R.A. (N.S.)

Constitution, and for that reason his application for a writ of habeas corpus will be granted.

WASHINGTON SUPREME COURT.

ELIZABETH NOLAN, Appt.,
v.

DENNIS DWYER et al., Exrs., etc., of
John M. Nolan, Deceased, Respts.

(.... Wash.)

1. Divorce decree—vacating.

A decree for divorce cannot be vacated after the death of one of the parties.

2. Void decree—effect on property rights.

A void decree of divorce will not affect the property rights of the parties.

(November 7, 1905.)

A PPEAL by defendant from an order of the Superior Court for King County refusing to set aside a decree for divorce. Affirmed.

The facts are stated in the opinion.

Messrs. J. W. Langley and Robert D. Hamlin, for appellant:

A void judgment may be set aside on motion at any time.

Case Note.—**NOLAN v. DWYER** is the first reported decision of a Washington court on the question of the right to vacate a decree of divorce after the death of one of the parties. The application to set aside the decree was denied in this case on the ground that an action for divorce is a purely personal action, that nothing is sought to be affected but the marital status of the husband and wife, that the distribution of property in such an action is merely incidental, and that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated. A similar contention was made in *Israel v. Arthur*, 6 Colo. 85, where it was argued that, inasmuch as a decree of divorce concerned only the marriage relation of the parties thereto, after the death of one party there was no one who could represent him; and that, if the decree were adjudged erroneous, the court would be without jurisdiction to retry the cause, for the reason that the bonds of matrimony had been dissolved by death and the marriage relation no longer existed. In reply, the court said: "If a decree of divorce affected the marriage relation only, there would be great force in the argument. But when it is considered that the decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally, notwithstanding the death of one of the parties, and regardless of the fact that the primary relief sought by the bill

Freeman, Judgm. 3d ed. § 98; Hallett v. Righters, 13 How. Pr. 43.

Death of one of the parties is no bar to vacating judgment in divorce proceedings.

Boyd's Appeal, 38 Pa. 241.

In the absence of any statute, the court has the right to set aside a void judgment. The power is inherent in the court itself.

Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Dane v. Daniel, 28 Wash. 164, 68 Pac. 446; Re College Street, 11 R. I. 472; Morrison v. Berlin, 37 Wash. 600, 79 Pac. 1114.

A court may, at any time, vacate or set aside a judgment which is void, as, for example, a judgment rendered where there was a lack of the necessary jurisdiction.

17 Am. & Eng. Enc. Law, 2d ed. p. 825; Hanson v. Wolcott, 19 Kan. 207; Hurlburt v. Reed, 5 Mich. 30; Keaton v. Banks, 32 N. C. (10 Ired. L.) 381; Ladd v. Mason, 10 Or. 308; Re College Street, *supra*; Craddock v. State, 15 Tex. App. 641; Midkiff v. Lusher, 27 W. Va. 439; State Ins. Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611; Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216, 44 N. W. 675; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243; Heffner v. Gunz, 29 Minn. 108,

and afforded by the decree has been confirmed by death."

NOLAN v. DWYER stands almost alone, since the authorities, as shown by the note in 57 L. R. A. 583, where the subject is treated at length, are practically unanimous that, in the absence of statutory qualifications, a decree of divorce may be vacated for lack of jurisdiction or for fraud, notwithstanding the death of one of the parties thereto, where property rights are involved. See Shafer v. Shafer, 30 Mich. 163; Boyd's Appeal, 38 Pa. 241; Wren v. Mossa, 7 Ill. 72; Danforth v. Danforth, 111 Ill. 236; Israel v. Arthur, *supra*; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Rine v. Hodgson, 9 Ohio Dec. Reprint, 275; Fritz v. Fritz, 6 Ohio N. P. 258; Brown v. Grove, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; Lawrence v. Nelson, 113 Iowa, 277, 57 L. R. A. 583, 85 N. W. 84.

Even after the lapse of thirty years from the time the divorce was granted, and long after the death of the successful party, a decree of divorce in favor of a husband was set aside, in Gambe v. Gambe, 22 Pa. Co. Ct. 23, at the suit of the wife, because of lack of jurisdiction.

So, in Fidelity Ins. Co.'s Appeal, 93 Pa. 242, a decree of divorce was vacated for fraud in obtaining it, notwithstanding the rule to vacate it was not filed until thirteen years after the decree was entered, and until after the death of the party obtaining it.

And in case of the death of one of the parties pending an appeal from a judgment granting divorce it is held that the action

12 N. W. 342; Parker v. Elder, 8 Kan. 461; Foreman v. Carter, 9 Kan. 679; McKelway v. Jones, 17 N. J. L. 347.

Messrs. Boyle & Warburton, for respondents:

An action for divorce is a personal action, and ceases with the death of either party.

Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; Watson v. Watson, 1 Hun, 267, 47 How. Pr. 240; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Barney v. Barney, 14 Iowa, 189; O'Hagan v. O'Hagan, 4 Iowa, 518.

Dunbar, J., delivered the opinion of the court:

This case is appealed from the order of the superior court of King county refusing to vacate a judgment in a divorce case. The divorce action was brought by John M. Nolan, and the decree was granted on November 20, 1899. On April 6, 1905, the appellant appeared in this action by motion and affidavits in support of the same, and sought to have the decree of November 20, 1899, set aside and vacated. The plaintiff, John M. Nolan, having died in January, 1905, his executors were substituted as parties plaintiff. The contention of the appellant

does not abate where property rights are involved. Nickerson v. Nickerson, 34 Or. 1, 48 Pac. 423, 54 Pac. 277; Thomas v. Thomas, 57 Md. 504; Danforth v. Danforth, *supra*; Mead v. Mead, 1 Mo. App. 247.

Even in states where there are statutory provisions forbidding the review of a judgment of divorce after the term in which granted, it is usually held that such statutes do not prevent the vacation of a decree after the death of one of the parties, if the court granting it had no jurisdiction; although some cases decide that fraud in any other matter than in obtaining jurisdiction is not sufficient to justify a review in defiance of the statute. See Richardson v. Stowe, 102 Mo. 33, 14 S. W. 810; Rine v. Hodgson, *supra*.

In some cases a decree of divorce has been set aside after the death of one of the parties without anything being said as to the effect of the death on the right to set aside the decree. So, the question of the validity of a divorce often arises after the death of one of the parties in collateral proceedings; and in such cases the effect of the death has usually not been directly passed upon, the validity of the decree being decided on its merits, or the attempt to impeach it being defeated by laches or estoppel. In such cases the question of the validity of the decree is often raised by one not a party to the divorce proceedings.

Where the courts have refused to set aside, after the death of one of the parties, a decree of divorce obtained by fraud, it has usually been because of laches in bringing the action to vacate the decree, or because

is that the court acted without competent jurisdiction of the party defendant in the divorce proceeding, and that the judgment was therefore void. We will not enter into an investigation of the question presented as to whether or not the service in the divorce proceeding was sufficient to give the court jurisdiction of the person of the defendant, for the reason that there are no proper parties to this proceeding, and in the nature of things, the plaintiff having died, that the question of divorce cannot be relitigated. It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental, and it is clearly incontestable that upon the death of either party, whether before or after the decree, the subject of the controversy is eliminated. If the death of the plaintiff in this case had occurred before judgment, it will not be urged that there could have been a substitution of his executors to represent him in the prosecution of the case. Such a proposition, for manifest reasons, would not be entertained by a court for a moment. What additional authority

or power did they have to represent him in the same case, when he died after judgment? Manifestly none. They cannot stipulate with reference to the decree. They cannot consent to setting aside the judgment. There is no conceivable particular in which they represent the deceased or the heirs with reference to the subject-matter of the action in the slightest degree. The very nature of the action renders this impossible. In the light of this fact, a service upon them of a motion to vacate the judgment is farcical, and the case proceeded, if it proceeded at all, without notice and on a purely *ex parte* basis.

An argument of necessity is presented by the appellant to the effect that it is impossible, in view of the death of the plaintiff, to get service on anyone else. But this argument defeats itself, for, if there is anything which is the subject of litigation, there must of necessity be someone who is interested in that thing and represents it, and upon whom service can be made. If there is no such thing, it is equally plain that there is no subject of legal controversy. Something has been said of the inherent jurisdiction of the court to set aside void de-

of estoppel by having accepted the benefits thereof; though in a few cases (as in *Watson v. Watson*, 1 Hun. 267, 47 How. Pr. 240; *Groh v. Groh*, 35 Misc. 354, 71 N. Y. Supp. 985; and *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831) the court has refused to entertain a proceeding to set aside a decree on the ground that the party seeking to have the decree vacated had not pursued the proper remedy.

In case of a divorce obtained by fraud, it would seem, as stated by *Nelson on Divorce & Separation*, § 1054, that "the same rule of public policy that requires the decree to be vacated, although a second marriage has taken place, will require the same relief although one of the parties is dead;" though "the fact that the party is dead who is alleged to have procured the decree by fraud should justify the court in requiring clear and satisfactory evidence of the fraud, for the dead can make no denials or explanations."

The only cases in which the right to vacate a decree of divorce after the death of one of the parties is denied where property rights are involved and the party seeking to set aside the decree has not estopped himself or been guilty of laches, are *Owens v. Sims*, 3 Coldw. 544, and *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064. In *Owens v. Sims* the court refused to review a decree of divorce against a wife after the death of the husband, on the ground that by his death the suit had abated and passed beyond the limits of revivor. But, as in *Tennessee* there is a statute providing that the only method for reviewing a decree of divorce shall be by appeal, and as in this case the 1 L.R.A. (N.S.)

time for appeal had expired, so that the suit must have been dismissed even if both parties had been living, it is possible that, in the absence of the statute, the court might have reached a different conclusion as to the effect of the husband's death. And in *Kirschner v. Dietrich* the judgment of divorce was silent on the question of property, though a question of property was suggested by the husband in the answer which he asked leave to file; and there is some indication in the opinion that, if there had originally been an issue as to property rights, the decision as to the right to reopen the decree might have been different, since the court, in deciding that the effect of the wife's death upon the action was not changed by the question of property, suggested by the husband in the answer which he asked leave to file, said that, "if there was originally no issue on the subject," the action could not be revived for the purpose of having a question of property rights adjudicated.

In *Barney v. Barney*, 14 Iowa, 189, it was held that, where complainant in a divorce suit died after a decree in her favor, but before the expiration of the time for an appeal, the action ended at her death, and could not be revived. But in this case no property rights were involved and no fraud was alleged. And the same court, in the case of *Lawrence v. Nelson*, 113 Iowa, 277, 57 L. R. A. 583, 85 N. W. 84, allowed a decree of divorce to be set aside after the death of the successful party because of lack of jurisdiction in the court granting it.

crees. Inherent jurisdiction is no more potent than jurisdiction that is conferred by statute, and it is as much prescribed by orderly methods. It is not a loose, arbitrary, and unlicensed jurisdiction that the court can exercise without restraint, untrammelled by the observance of the methods prescribed by law, but it is simply jurisdiction, and no more. In fact, the court should be more careful, if any distinction is to be made, in the exercise of jurisdiction which is evolved from the decisions of courts, and therefore in a measure self-assumed, than in the exercise of jurisdiction that is conferred by the lawmaking power. But there is no jurisdiction in courts, inherent or otherwise, to adjudicate the rights of litigants without notice, actual or constructive. It is suggested that, if the court, upon an examination, finds that the judgment was void for want of service, it will vacate the judgment for the purpose of clearing its records of void judgments. But the parties to an action have as much right to be heard upon that question as on any other. Our statute provides (Pierce's Code, § 362; Ballinger's Anno. Codes & Statutes, § 4886a) that, when a party to an action has appeared in the same, he should be entitled to at least three days' notice of any trial, hearing, motion, application, sale, or proceeding therein, etc. If this court should enter a judgment of vacation without having jurisdiction of the parties to the judgment, it would be guilty of the same illegal action with which the lower court is charged. So far as the property rights are concerned, if there are any, if the judgment is void, such rights are in no way affected by it, and all the avenues are open for the determination of such rights, where the parties affected can all be heard.

The judgment is affirmed.

Mount, Ch. J., and Root, Rudkin, Hadley, and Crow, JJ., concur. Fullerton, J., concurs in the result.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON ex rel. A. S. GIBSON et al.

v.

SUPERIOR COURT FOR PIERCE COUNTY et al.

(.... Wash.)

Injunction—appeal—supersedes.

The right to supersedeas pending appeal does not extend to an appeal from an order enjoining continued operation of a shooting gallery and mechanical musical instruments.

(May 29, 1905.)

1 L.R.A. (N.S.)

PETITION for a writ of mandamus to compel the Superior Court for Pierce County to fix the amount of, and accept, a supersedeas bond to stay proceedings under an order enjoining petitioners from continued prosecution of a business alleged to be a nuisance. Denied.

The facts are stated in the opinion.

Messrs. Williamson & Williamson and J. W. A. Nichols, for relators:

If the order is one changing the status of the parties, then it can be superseded.

State ex rel. Commercial Electric Light & P. Co. v. Stallcup, 15 Wash. 263, 46 Pac. 251; State ex rel. Byers v. Superior Court, 28 Wash. 408, 68 Pac. 865.

Mr. H. H. Johnston for respondents.

Fullerton, J., delivered the opinion of the court:

On April 14, 1905, one John Grantham brought an action in the superior court of Pierce county to enjoin the relators from operating, in connection with their business, a shooting gallery and two certain instruments known respectively as a "tonophone" and an "orchestron," alleging that their operation constituted a public nuisance specially injurious to himself. At the time of commencing his action Grantham applied for a temporary injunction pending the final determination of the action. Notice of this application was given the relators, and a hearing had thereon, at which hearing the court granted the injunction applied for, in which it restrained the relators from operating the shooting gallery and the tonophone and orchestron until the final determination of the action. The relators gave notice of appeal from the order, and applied to the court to fix the amount of the bond it would require to supersede the order pending the appeal. The court declined to fix the amount of the bond on the ground that the order was not one that could be superseded. The relators thereupon applied to this court for a writ of mandate to compel the trial court to fix the amount of such bond.

From the petition for the writ, and the return thereto, it is gathered that Grantham for some years last past has held a lease upon a part of a certain building in the city of Tacoma in which he has conducted a hotel and lodging house under the name of "Hotel Gordon;" that, about a year preceding the commencement of this action, the predecessors in interest of the relators leased the remaining part of the building (being a room on the ground floor), and fitted it up for the exhibition of pictorial views enlarged and made attractive by means of electrical contrivances. The tonophone was put in at or near the time the business was first opened,

the shooting gallery was put in about December 4, 1904, and the orchestration about one week prior to the commencement of the action. It will be observed, therefore, that the order of the court had the effect of changing the *status quo* of the parties, as it prohibited the relators from conducting a part of their business and from operating the so-called musical instruments, all of which they were doing at the time the injunction issued.

The relators contend that, when considered with reference to the right of supersedeas, there is a distinction between an injunction that merely restrains the commission of an act the defendant is about to commit, or attempting to commit, and one that restrains the continuance of an act which he is performing at the time of the issuance of the order; that the one cannot be superseded on an appeal, for the reason that the *status quo* of the parties is not changed by the injunction, the effect of the same being in fact to maintain the *status quo* of the parties, while the other can be superseded for the very reason that the injunction does not maintain, but actually changes, the *status quo*. The distinction here sought to be drawn between injunctions that can be superseded and those that cannot is not the distinction ordinarily drawn by the cases. According to the usual classification, injunctions are either manda-

tory or prohibitory,—a mandatory injunction being one that compels the performance of some affirmative act, while a prohibitory injunction is one that operates to restrain the commission or continuance of an act;—and it is only the former that is superseded by taking an appeal and giving the supersedeas bond provided by statute. The reason usually given for this distinction is that an appeal and supersedeas does not destroy the intrinsic effect of a judgment; that, notwithstanding the appeal, the judgment is still the measure of such of the rights of the parties as it adjudicates, and, until reversed, it operates as an estoppel and a *res judicata* as effectively as it would had no appeal therefrom been taken and no supersedeas bond given. In other words, the appeal and supersedeas operates as a stay of affirmative action upon the judgment, as a supersedeas of execution, but does not destroy the judgment in so far as it can operate without the aid of an execution.

While there are cases to the contrary, this distinction is supported by the great weight of authority. In the Slaughterhouse Cases, 10 Wall. 273, 19 L. ed. 915, Mr. Justice Clifford, speaking for the court, said: "It is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is

Case Note.—That an appeal from a final decree granting a perpetual injunction and the giving of a supersedeas bond will not have the effect of modifying or suspending the decree, so as to permit the doing of the act enjoined pending the appeal, is said, in High on Injunctions, 4th ed. § 1098a, to be the well-established doctrine, supporting such statement by a large number of citations, including most of those cited in STATE EX REL. GIBSON v. SUPERIOR COURT. The same rule is said, in § 1698, to apply in the case of preliminary injunctions, the reason given being that, if it were otherwise, there would be no material advantage in obtaining an injunction in any case, as it would be in defendant's power to avoid its effect by appealing.

In support of this statement the author cites State ex rel. Commercial Electric Light & P. Co. v. Stallcup, 15 Wash. 263, 46 Pac. 251, which is cited in STATE EX REL. GIBSON v. SUPERIOR COURT, and several other cases.

State ex rel. Matthews v. Chase, 41 Ind. 356, states that an interlocutory order granting a temporary injunction against one partner continuing to sell the partnership goods is not suspended by an appeal therefrom. Green v. Griffin, 95 N. C. 50, holds that an appeal from an interlocutory order for an injunction against joining the walls of a store, which defendants were putting up, with plaintiff's walls, does not vacate such order.

Klinek v. Black, 14 S. C. 241, holds that 1 L.R.A. (N.S.)

an *ex parte* order, granted by the circuit court judge at chambers, enjoining the sheriff from putting a purchaser of land sold by him into possession, is not suspended by an appeal therefrom.

The case of State v. Johnson, 13 Fla. 33, is, however, cited by High on Injunctions in § 1698, in support of the statement that, if a supersedeas is granted upon an appeal from an order granting an interlocutory injunction and appointing a receiver *pendente lite*, it has the effect of suspending the order, where such an appeal is allowed under the practice of the state; and in Powell v. Florida Land & Improv. Co. 41 Fla. 494, 28 So. 700, citing this case with approval, it is held that, so long as an appeal with supersedeas from an order granting an injunction is pending, the power of the courts to enforce the injunction, or punish as contempts acts in violation of its terms, is suspended.

In 2 Spelling on Injunctions and Extraordinary Remedies, § 1141, it is also said that, as a general rule, a judgment granting, or refusing to dissolve, an injunction, or dissolving one already granted, is not affected by an appeal from it prior to reversal in the appellate court.

In § 1142, however, the statement is made that the authorities are not uniform on this point, and several cases in support thereof are cited, most of which relate to appeals from orders dissolving injunctions. One case, Osborne v. Williams, 40 N. J. Eq. 490, 4 Atl. 439, holds that an appeal from a final

heard in this court;" and it was held that the same rule applied to writs of error from state courts in equity proceedings. To the same effect is *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136. In *Leonard v. Ozark Land Co.* 115 U. S. 465, 29 L. ed. 445, 6 Sup. Ct. Rep. 127, it was said: "The injunction ordered by the final decree was not vacated by the appeal. *Slaughterhouse Cases*, 10 Wall. 273, 297, 19 L. ed. 915, 922; *Hovey v. McDonald*, 109 U. S. 150, 161, 27 L. ed. 888, 891, 3 Sup. Ct. Rep. 136. It is true that in some of the *Slaughterhouse Cases* the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case; but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction, nor a decree dissolving an injunction, is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey v. McDonald*, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding

decree advising that injunctions shall issue restraining defendants from carrying on their trade in a particular manner suspends the operation of the writ *ipso facto*, unless the other party comes in and shows good cause why it should not be stayed.

Northern C. R. Co. v. Canton Co. 24 Md. 500, also holds that the operation and effect of an injunction against proceeding with a reference entirely cease until the decision on appeal, where an appeal is taken and bond given, under Md. Code, art. 5, § 23, providing that on giving such bond the appeal shall stay the operation of the order appealed from in the same manner as do appeals from final decrees.

And *Gelston v. Sigmund*, 27 Md. 345, holds that the taking of an appeal from an order granting an injunction, and the giving of an appeal bond, stay the injunction, and suspend its operation pending the appeal.

The claim was made in *STATE EX REL. GIBSON V. SUPERIOR COURT* that there is a distinction between an injunction which merely restrains the commission of an act which defendant is about to commit, or attempting to commit, and one which restrains the continuance of an act he is performing at the time the order for injunction is issued; and that the order in the latter case may be superseded because the injunction in that case changes, instead of maintaining, the *status quo*. In support of the holding of the court that there is no distinction between these two classes of cases, as to the

ing the appeal." And in *Knox County v. Harshman*, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8, it was said: "The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect." In *Central U. Teleph. Co. v. State*, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136, the rule is stated in the following language: "The effect of a supersedeas is to restrain the appellee from taking affirmative action to enforce his decree, but it does not authorize the appellant to do what the decree prohibits him from doing. The doctrine which our decisions have long maintained is thus stated in *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411: 'Indeed, the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, stands binding upon the parties as to every question directly decided.'"

In *National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co.* 54 N. J. Eq. 167, 33 Atl. 936, it was said: "Moreover, I find no warrant for the insistence that the mere existence of an appeal suspends, or in any manner affects, the present inherent validity and force of the decree appealed from. The person in whose favor it is rendered is denied process to enforce

right to a supersedeas, may be mentioned *State ex rel. Matthews v. Chase*, 41 Ind. 356, *supra*, in which the injunction was against the continuance of the sale of goods.

And *Lindsay v. Clayton Dist. Court*, 75 Iowa, 509, 30 N. W. 817, holds that the taking of an appeal from a decree for the abatement of a liquor nuisance and restraining the continued sale of liquor, and the filing of a supersedeas bond, suspend the abatement of the nuisance, but do not suspend the injunction of the sale of the liquor.

And in *Genet v. Delaware & H. Canal Co.* 113 N. Y. 472, 21 N. E. 390, cited in *STATE EX REL. GIBSON V. SUPERIOR COURT*, it is said that a judgment prohibiting defendant from using its structures on plaintiff's land in the mining of coal in the way in which it had been accustomed to use them for years, and from depositing culm on the surface, operates of its own force as a prohibition against continuing the act enjoined; and that an appeal therefrom does not, of itself, relieve defendant from the duty of obeying the judgment. The court, in this case, sustains the power of the special term, which rendered the judgment, to suspend its operation after affirmance in the general term, pending the appeal to the court of appeals.

But the court, in *STATE EX REL. GIBSON V. SUPERIOR COURT*, expressly stated that it did not decide that question, the only point decided being that the defendant was not entitled, as a matter of right, to supersede the injunction order.

it, and that is all. Consequently, where the decree is itself an injunction, that injunction is in force and must be obeyed, unless, to continue the *status quo* of the parties pending the determination of the appeal, this court, or the court of errors and appeals, shall order a suspension of its effect. And it is not necessary to issue a writ to bind the parties to the suit to obedience to such a decree. Being before the court, they are bound, at their peril, to take notice of the provisions of any decree rendered in due course upon the issues tendered." In *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781, where the effect of the statutory provision is that a perfected appeal shall stay execution and all further proceedings upon a judgment appealed from, it is said: "Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the Federal courts and those of the other states; and the overwhelming weight of authority is that injunctions ordered on final hearing on the merits are not vacated by an appeal from that decree. A stay of proceedings, from its nature, operates only on orders and judgments commanding some act to be done, and does not reach injunctions." To the same effect are the cases of *Gardner v. Gardner*, 87 N. Y. 18; *Genet v. Delaware & H. Canal Co.* 113 N. Y. 475, 21 N. E. 390; *Hawkins v. State*, 126 Ind. 296, 26 N. E. 43; *Sixth Ave. R. Co. v. Gilbert Elev. R. Co.* 71 N. Y. 430; *James v. Markham*, 125 N. C. 145, 34 S. E. 241; *Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co.* 5 Utah, 151, 13 Pac. 174.

The only cases we find supporting the relators' contention are from California. In that state all the decisions lay down the general rule that a mandatory injunction can be superseded by an appeal and supersedeas bond, while a prohibitory injunction cannot; but they do not agree on the question whether it is the *status quo* at the time of the commencement of the action, or at the time of taking the appeal, that is maintained by the stay of execution when a stay is effected. In *Merced Min. Co. v. Fremont*, 7 Cal. 130, it is said that "a stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction;" and, further, that "the stay of proceedings pending an appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted; it operates so as to prevent any future change in the condition of the parties." This case was approved on both propositions in the cases of *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333, and in *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580. On the other hand,

in the cases of *Dulin v. Pacific Wood & Coal Co.* 98 Cal. 304, 33 Pac. 123; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, and *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436, the court, while adhering to its holding that a prohibitory injunction could not be superseded, says that the effect of a stay of proceedings is to leave the parties in the same situation with reference to the rights involved in the action as they were prior to the granting of the injunction. These cases make no mention of the contrary rulings, and it may be that the statement was made through inadvertence, as the question does not seem to have been involved in either of them. But, be this as it may, it seems to us that the cases first cited state the rule in accordance, not only with the great weight of authority, but with the better reason.

In this state, while no case presenting the precise facts of this case has been determined, it seems to us that the question presented has been determined in principle. In *State ex rel. Commercial Electric Light & P. Co. v. Stallcup*, 15 Wash. 263, 46 Pac. 251, we held that a temporary injunction restraining and enjoining the defendant from stringing electric wires on the streets of the plaintiff city could not be superseded on an appeal therefrom. In *State ex rel. Flaherty v. Superior Court*, 35 Wash. 200, 77 Pac. 33, we held the same way with reference to a final order of injunction enjoining the appellant from fencing up and otherwise obstructing a roadway. In these cases the question presented differed from the question in the case before us, in that the injunctive orders restrained the commission of an act, while the one before us restrains the continuance of an act. But according to all of the definitions, an injunction which restrains the continuance of an act or a series of acts is just as much a preventive or prohibitory injunction as is one which restrains the commission of an act; and, this being so, neither can be superseded on an appeal.

It is thought, however, that the case of *State ex rel. Byers v. Superior Court*, 28 Wash. 408, 68 Pac. 865, lays down a different rule. But it will be seen on an examination of that case that the injunctive order there in consideration was a mandatory injunction, as it commanded the defendant to deliver to the appellant certain books of account, moneys, and other property of which he was in possession, belonging to a corporation. While the court said that the effect of a stay of proceedings was to preserve the *status quo* of the parties, it is clear that it meant nothing more than that a mandatory injunction could be superseded.

It may be that the court itself has inherent power to suspend the effect of a prohibitory injunction, when the purposes of

justice require it, pending a decision of the merits on an appeal (*Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136); but this question we do not decide. The relator insists that he is entitled to supersede the order appealed from as a matter of right, and this we hold he cannot do, as the order is a preventive, and not a mandatory, injunction.

The application is denied.

Mount, Ch. J., and Rudkin, Crow, Hadley, and Dunbar, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY.

(.... W. Va.)

Constitutional law—requirement that corporation appoint agent.

That provision of chap. 39, p. 401, Acts 1905, requiring the corporations specified to

Headnote by BRANNON, P.

Case Note.—The power of a state to require foreign corporations to designate some person upon whom process may be served, as a condition to the right to do business within the state, cannot now be questioned. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364; *Carstairs v. Mechanics' & T. Ins. Co.* 13 Fed. 823; *Re Comstock*, 3 Sawy. 218; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Home v. Travelers' Ins. Co.* 80 Pa. 15, 21 Am. Rep. 89; *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369.

The theory upon which such statutes are upheld is that, corporations being mere creatures of the law, and not having the privileges and immunities of citizens of the several states, but depending for recognition and the enforcement of their contracts outside the state of their creation upon the assent of the states where they seek to do business, such assent may be granted upon such terms and conditions as those states may deem fit to impose. *Sparks v. National Masonic Acci. Asso.* 100 Iowa, 458, 69 N. W. 678.

And a foreign corporation coming into a state to transact business under such condition thereby agrees to be bound by such service.

Lafayette Ins. Co. v. French, *supra*; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 608, 37 L. ed. 292, 301, 13 Sup. Ct. Rep. 444; *Connecticut Mut. L. Ins. Co. v. Spratt* 1 L.R.A. (N.S.)

appoint the auditor as attorney to accept service of process and notice, is not unconstitutional.

(Sanders, J., dissents.)

(June 27, 1905.)

APPPLICATION for a writ of mandamus to compel defendant to comply with the state statute requiring it to appoint the state auditor as its agent to receive service of process. Writ awarded.

The facts are stated in the opinion.

Mr. Frank W. Nesbitt, for petitioner:

Matters which regulate the manner of service of process are not contractual.

7 Am. & Eng. Enc. Law, p. 677; 15 Am. & Eng. Enc. Law, p. 1032; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 24 L. ed. 423, 29 Ark. 661; 2 *Morawetz, Priv. Corp.* 1081; *Pearsall v. Great Northern R. Co.* 161 U. S. 665, 40 L. ed. 845, 16 Sup. Ct. Rep. 705.

Service of process under the act in question is due process of law.

Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 217, 48 S. E. 667; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Home Ben. Soc. v. Muehl*, 109 Ky. 479, 59 S. W. 520; *Ehrman v. Teutonia Ins. Co.* 1 Mc-

ley, 172 U. S. 602, 618, 43 L. ed. 569, 574, 19 Sup. Ct. Rep. 308; *Wilson v. Seligman*, 144 U. S. 41, 45, 36 L. ed. 338, 339, 12 Sup. Ct. Rep. 541; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 358; *Knott v. Southern L. Ins. Co.* 2 Woods, 479; *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. 358.

It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of the proceedings. *Vallee v. Dumergue*, 4 Exch. 290.

The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. *Lafayette Ins. Co. v. French*, *supra*; *Gillespie v. Commercial Mut. M. Ins. Co.* 12 Gray. 201, 71 Am. Dec. 743; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 607, 37 L. ed. 292, 301, 13 Sup. Ct. Rep. 444; *German Ins. Co. v. First Nat. Bank*, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

Statutes requiring the appointment of a state officer as the agent of a foreign corporation, upon whom service of process may be made, have generally been upheld upon the grounds above stated.

Crary, 123, 1 Fed. 471; Sparks v. National Masonic Acci. Asso. 73 Fed. 277; Osborne v. Shawmut Ins. Co. 51 Vt. 278; Pringle v. Woolworth, 90 N. Y. 502; German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69; Farmer v. National Life Asso. 50 Fed. 829; Lafflin v. Travelers' Ins. Co. 121 N. Y. 713, 24 N. E. 934; National Surety Co. v. State Bank, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593; Hartford F. Ins. Co. v. Owen, 30 Mich. 441; Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835; Maysville & B. S. R. Co. v. Ball, 108 Ky. 241, 56 S. W. 188; Hazeltine v. Mississippi Valley F. Ins. Co. 55 Fed. 743; Rehm v. German Ins. & Sav. Inst. 125 Ind. 135, 25 N. E. 173; Westchester F. Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682.

Defendant is a citizen of West Virginia, and therefore more properly subjected to the laws of this state than would be a foreign corporation.

Pinney v. Providence Loan & Invest. Co. 50 L. R. A. 586, note, 106 Wis. 396, 80 Am. St. Rep. 41, 82 N. W. 308; Hinckley v. Kettle River R. Co. 70 Minn. 105, 72 N. W. 835; Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A.

Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853, sustains the validity of a statute of Pennsylvania prohibiting any foreign insurance company from doing business within that state until it has filed with the insurance commissioner a written stipulation that legal process served on "the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this state;" and providing that, if the company cease to maintain an agent so designated, process may be served on the insurance commissioner. The court held that the condition imposed by the statute is not an unreasonable one, and that, the defendant companies having agreed that they might be "found" in Pennsylvania for the purpose of the service of process, they were bound by service in accordance with the statute. "If the legislature of a state requires a foreign corporation to consent to be found within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the state, and the corporation does so consent, the fact that it is found gives the jurisdiction notwithstanding the finding was procured by consent."

The validity of the foregoing Pennsylvania statute is recognized in a very recent case by the supreme court of Indiana. An Indiana insurance corporation was sued in the state of Pennsylvania, by service of process upon the insurance commissioners of the latter state, and judgment was rendered 1 L.R.A.(N.S.)

782, 41 N. E. 740; Fleming v. West, 98 Ga. 778, 27 S. E. 157.

Messrs. Clarke W. May, Attorney General, Frank Lively, and Brown, Jackson, & Knight also for petitioner.

Messrs. Chilton, MacCorkie, & Chilton, and L. E. McWhorter, for respondent:

The law deprives the corporation of its liberty to contract, and to select its own attorneys and agents.

Brannon, 14th Amendment, p. 263; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41, 82 N. W. 308; Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 217, 48 S. E. 667; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 876, 10 S. E. 285; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Ruhstrat v. People, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St.

against the corporation by default. In an action on such judgment in Indiana, it was held that the statute was not a denial of due process of law, the court saying: "It is well settled that, when a state has prescribed conditions upon which foreign corporations may do business within it, any such corporations thereafter doing business in the state will be presumed to have assented to such conditions." Old Wayne Mut. Life Asso. v. McDonough (Ind.) 73 N. E. 703. Citing Ex parte Schollenberger, *supra*; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; Knapp, S. & Co. Co. v. National Mut. F. Ins. Co. 30 Fed. 607; Stewart v. Harmon, 98 Fed. 192; Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471; Berry v. Knights Templars' & M. Indemnity Co. 46 Fed. 439; Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co. 55 Fed. 27; Sparks v. National Masonic Acci. Asso. 100 Iowa, 458, 69 N. W. 678; Fred Miller Brewing Co. v. Council Bluffs Ins. Co. 95 Iowa, 31, 63 N. W. 565; Pringle v. Woolworth, 90 N. Y. 509; Franzen v. Zimmer, 90 Hun, 103, 35 N. Y. Supp. 614; Mutual F. Ins. Co. v. Hammond, 106 Ky. 386, 50 S. W. 545; Murfree Foreign Corp., § 203; 6 Thomp. Corp., § 8027; Alderson, Judicial Writs & Processes, p. 207.

And a statute of Arkansas, in substantially the same language, which provides for service upon the auditor, or person designated by him, or agent specified by the company, has been held valid. And under such statute service upon the auditor is good personal service, although the written stipula-

Rep. 30, 57 N. E. 41; *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. W. 1006.

This law arbitrarily imposes upon a corporation an attorney in fact. Everyone acting in the capacity of attorney must assume all of the obligations of that relation.

3 Am. & Eng. Enc. Law, p. 335; *Smith v. Brotherline*, 62 Pa. 461; *Buffalow v. Buffalow*, 22 N. C. (2 Dev. & B. Eq.) 241.

The 14th Amendment to the Constitution was intended to secure the individual from the arbitrary exercise of the powers of government.

Bank of Columbia v. Okely, 4 Wheat. 241, 4 L. ed. 561; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524, 10 Sup. Ct. Rep. 930; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; 2 *Tucker, Const.* pp. 869, 870.

Brannon, P., delivered the opinion of the court:

By chapter 39, p. 401, Acts 1905, the state auditor was constituted the attorney

tion of the corporation, as the law requires, is not filed with the auditor. *Ehrman v. Teutonia Ins. Co.*, *supra*.

Under a statute of Missouri requiring foreign insurance companies, before transacting any business within the state, first to file with the superintendent of insurance a power of attorney authorizing him to receive service of process for the company, and consenting that such service shall be held as valid as if served upon the company, a foreign insurance corporation transacting business in that state, but which fails to file such power of attorney, may nevertheless be subjected to suit upon a policy in the state of Missouri, and a valid judgment recovered therein, where the only service of summons is upon said superintendent of insurance. *Sparks v. National Masonic Acci. Asso.* 100 Iowa, 458, 69 N. W. 678.

Likewise, foreign insurance companies may be required to appoint the state insurance commissioner their attorney, upon whom process may be served, "such authority to continue in force so long as any liability of the company remains outstanding." *Biggs v. Mutual Reserve Fund Life Asso.* 128 N. C. 5, 37 S. E. 955; *Green v. Equitable Mut. L. & Endowment Asso.* 105 Iowa, 628, 75 N. W. 635; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707.

Foreign corporations having a place of business in Massachusetts are required, as a condition to doing business in the state, to appoint the commissioners of corporations their attorney on whom service of process may be made; and such statute has been 1 L.R.A.(N.S.)

in fact for every foreign corporation doing business in this state, and for every non-resident domestic corporation; and every such corporation is required, by power of attorney duly executed by it, to appoint the auditor its attorney in fact to accept service of process and notice in this state for it, and, by the same instrument, to declare its consent that service of any process or notice in this state on said attorney, or his accepting, shall be equivalent to, and shall be, due and legal service upon the corporation. The act requires the corporation to pay yearly \$10 to the auditor for acting, to be turned into the treasury by him. The defendant refusing to execute such power of attorney, the state asks a mandamus to compel it to do so.

The corporation asserts that no duty rests upon it by reason of said act, because it is unconstitutional. The corporation says that the act denies it freedom of contract and freedom of choice of its agent, compels it to pay money, and deprives it of property without due process of law, contrary to both the state and Federal Constitutions. We cannot concede this. We shall not discuss the general power of a state over corporations taking charters under it, or foreign corporations coming to the state by its

held constitutional. *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 20 N. E. 318; *Youmans v. Minnesota Title Ins. & T. Co.* 67 Fed. 282.

While provisions for service of process upon a state officer in actions against non-resident domestic corporations are not so common as those affecting foreign corporations, there seems to be no difference in principle as to their validity. The power of a state over corporations of its own creation is certainly as extensive as that over foreign corporations.

While in *Pinney v. Providence Loan & Invest. Co.* 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41, 82 N. W. 308, cited in the dissenting opinion in *STATE v. ST. MARY'S FRANCO-AMERICAN PETROLEUM CO.*, a statute providing for service of process on corporations which neglect to file lists of the names of officers upon whom service may be made, by leaving copies with the register of deeds where the corporation has its principal place of business, is held not to constitute due process of law, it will be observed that the register was not made the agent of the corporation; nor was any provision made for bringing the fact of service to the notice of the corporation. And the court seems to have based its decision upon the ground that the mode of service prescribed was not "reasonably calculated to bring notice home to some of the officers or agents of the corporation."

On the other hand, a statute providing for service on domestic corporations having no officers in the state, by depositing a copy of the summons in the office of the secretary

grace to do business in it. It might be plausibly said that, a foreign corporation, or a nonresident domestic corporation, having no office or officers in the state, the state, under power to regulate corporations, and particularly to see to it that judicial process to answer suits by proper means be made available, has the power assumed in the statute. It is a duty, and must be a legitimate power, that the state render effective the jurisdiction of its courts against corporations accepting its charter and doing business in the state, or chartered by another state and doing business in the state, but having, perhaps, no officer to be readily found in the state. We can see how often the service of process, without which court procedure would be ineffectual and not due process, may be delayed, or be inconvenient, or be frustrated; and we can see how the state must have wide power in such case to secure service of the process of its courts, so its legislation do not deprive of the just right of the corporation. It ought to answer suitors in the courts. If the state deprives the corporation of an essential right, its action would not be held good. But what right does this act take away? If the auditor were clothed with the discretion to

do an act harmful to the corporation, complaint might be justly made; but the auditor does nothing but accept service, a mere ministerial act. He does not confess judgment; nor does he do any discretionary act. Doubtless, if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty. Before the act of 1905, the Code required the corporation to appoint such attorney. This act changes this so far as to make the auditor such attorney, thus taking from it the choice of person, sometimes a valuable right, but in this instance not so. But whether, but for § 8, chap. 53, Code 1899, this act would be valid, we need not, do not, say. That section reads thus: "Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint-stock company, and to alter or repeal any law applicable to such company."

of state, and imposing upon such officer the duty of immediately mailing a copy to the office of the company, or to the president, secretary, or any director or officer of said corporation, as may appear from the articles of incorporation on file in his office, is held to constitute due process of law. *Hinckley v. Kettle River R. Co.* 70 Minn. 105, 72 N. W. 835. This holding is reaffirmed in 80 Minn. 35, 82 N. W. 1088; *Hodge v. Eastern R. Co.* 70 Minn. 193, 195, 72 N. W. 1074.

That a statute changing the law for the service of process upon nonresident corporations by designating an agent for that purpose, not appointed by the corporation, does not infringe any right of contract, is decided in *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308. The situation there was the reverse of that complained of in *STATE v. ST. MARY'S FRANCO-AMERICAN PETROLEUM CO.* A Tennessee statute enacted in 1875 required foreign life insurance companies to make the secretary of state their attorney in fact to accept service of process, which the complaining company had done. In 1887 a statute was passed providing that, in actions against foreign corporations, process might be served upon any agent found within the county where suit is brought, no matter what character of agent such person might be. A judgment by default having been taken against the complainant, based upon a service of process upon an agent of the company temporarily within the state, and after it had ceased to do business there, it commenced an action to enjoin the enforcement of the judgment, contending that 1 L.R.A. (N.S.)

the appointment of the secretary of state as its agent to receive process under the act of 1875 constituted a contract between the state and the company which the subsequent statute violated. But the correctness of this position is denied in that case, the court saying: "The act of 1875 stated the term, upon compliance with which a foreign corporation should be permitted to do business within the state of Tennessee. There was, however, no contract that those conditions should never be altered, and when, pursuant to the provisions of the act of 1875, this power of attorney was given by the corporation, the state did not thereby contract that, during all of the period within which the company might do business within that state, no alteration or modification should be made regarding the conditions as to the service of process upon the company. When, therefore, in 1887, the legislature passed another act, and therein provided for the service of process, no contract between the state and the corporation was violated thereby, or any of its obligations in any wise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act."

When the defendant obtained its charter, that section was in force, and this charter is subject to it. Under such a reservation of right, either to amend a charter or to change the law regulating it, there is no limit to legislative power. It even includes right of repeal. In this instance the state has simply amended the law as to the appointment of an agent: has only made a public officer attorney, so that there be one particular person, at a fixed place, always to be found, and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service. 7 Am. & Eng. Law, 2d ed. p. 671; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 571, and other cases cited in Brannon's 14th Amendment, 365. When a charter issues under such law, the state has this right of amendment of the law in force before the charter. It is a condition of the charter as fully as if that right were in words in the charter. The law inserts or reads it into the charter. 10 Cyc. Law & Proc. p. 1087; *Cross v. West Virginia C. & P. R. Co.* 35 W. Va. 177, 12 S. E. 1071. If the corporation do not see proper to conform to it, it must discontinue business, as the legislature cannot force it to do business under the change. *Yeaton v. Bank of Old Dominion*. 21 Gratt. 593. It cannot be said that the 14th Amendment is violated because the act discriminates, requiring certain corporations, and not others, to appoint the auditor. As to domestic corporations having offices and officers in the state on whom service of process can be had, there is not need of such a statute; but as to those not so situated there is need. The classification is based on the reason of their being differently circumstanced, and this justifies such discriminating classification. *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. As to the exaction of \$10 for the service of the auditor, if his appointment is valid, this feature cannot render the statute invalid as taking property without due process. The auditor is paid by the state, and the state, by its officer, renders valuable service to the corporation. South Carolina instituted a commission for regulation of railroads, and required the company to pay salaries of its members, on the theory that the state had power of regulation and the service redounded to the benefit of the railroad company. The act was held not to violate the 14th Amendment, either as taking property without due process of law, or as denying the company the equal protection of the law. *Charlotte. C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 1 L.R.A. (N.S.)

L. ed. 1051, 12 Sup. Ct. Rep. 255. To the same effect, *New York ex rel. New York Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880. That feature of the act providing that the corporation shall not be required to pay any fee to anyone who may have been before appointed such attorney was mentioned in oral argument as violating the Constitution in impairing the obligation of a contract. That does not arise in this case. It is a matter between different persons. Further, that is a provision separable from the clause requiring the corporation to appoint the auditor, and, if unconstitutional, would not touch or infect that provision. 26 Am. & Eng. Enc. Law, 2d ed. p. 570.

Sanders, J., dissenting:

I cannot concur in holding that chap. 39, p. 401, Acts 1905, wherein it requires nonresident domestic corporations to appoint the auditor attorney in fact to accept service of process and notice, is constitutional. The defendant here was organized and now exists by virtue of a charter issued to it by the secretary of state on the 18th day of January, 1902; and on the 17th day of February, 1902, by power of attorney duly executed, filed, and recorded, as provided by § 24, chap. 54, of the Code of 1899, it appointing Wm. M. O. Dawson, a resident of the county of Kanawha, in this state, its attorney in fact to accept service of process and notice in its behalf and as a person upon whom service might be had. There is no complaint that the defendant did not fully comply with the statute as it existed prior to the passage of chap. 39, p. 401, Acts 1905; but it is the provisions of this act it is alleged to have violated, and application is made to this court for a writ of mandamus to enforce compliance therewith. The defendant contests the right of the state to compel it to comply with the provisions of chapter 39, and urges as the reason why it should not be compelled to do so that it is in violation of both the Federal and state Constitutions, in this: That it deprives it of the liberty to contract and select its own attorneys and agents, and that it is calculated to deprive, and may deprive, corporations of their property without due process of law. The law, prior to the passage of this act, was entirely adequate to make process available against foreign and nonresident domestic corporations, and completely protected suitors against such corporations by providing for the appointment of an attorney in fact to accept service of process, etc., and by requiring the power of attorney by which the appointment was made to be recorded; and just what called for the passage of chapter 39 is

difficult to determine, unless it was for the purpose of increasing the state's revenues. It does not afford any additional or more efficacious means of serving process than existed prior to its enactment. Therefore the act under consideration could be declared unconstitutional without in the least impairing the rights of any person who may desire to resort to the courts of this state for the enforcement of his rights against such corporation.

The selection by a corporation of its officers and agents for the purpose of managing and conducting its business, of all kinds whatsoever, is the highest and most important right which can be exercised by it, because its business is conducted solely by its officers and agents; and, under the provisions of the act in question, the defendant is deprived of this paramount right, and, instead thereof, the state has imposed upon it the duty of selecting the state auditor as such agent. The right to have notice of suit brought against it is an exceedingly important right,—so important that it should have the right of selecting its own agents for this purpose. It should be left to the corporation to determine whether or not the agent is competent to transact the business, and one in whom it would repose so important a trust; and to deny it this right is to clearly invade that constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. When the state selects one of its officers and compels his appointment as attorney in fact for the corporation, any judgment obtained against such corporation under a service upon such agent is not a judgment obtained by due process of law. Judge Brannon, in delivering the opinion of the court, says: "If the state deprives the corporation of an essential right, its action would not be held good." In determining the rights of a corporation, I fail to see what right or power is more essential to the successful management and safety of its business than the selection of its agents and servants, and especially in the selection of an agent to accept service of process for it, or upon whom service of process may be had in any suit which may be filed against it. A failure to notify a corporation of a suit pending against it may mean absolute destruction to the corporation, without remedy. If the act in question is constitutional, and the state has the power to select an agent to accept service of process, then where does such power end? Would it not have the power to select any other officer or agent of the company? If the corporation can be deprived of the agent of its own choosing in the one instance, why cannot the state de-

prive it of the selection of all its agents? There is as much reason to say that the state can appoint all as to say it can appoint one. There is no public necessity for the appointment of an agent to receive service of process until after the right of selection has first been given to the corporation and it fails or refuses to exercise it. What remedy is given the corporation, where the auditor fails to notify it of any suit brought against it? Judge Brannon says: "Doubtless, if he [the auditor] fail to warn his corporation of the suit, he would be liable on his [official] bond." I know of no law that fixes any such liability on the auditor. The act in question does not do so. While it is true he is a state official, yet he is not a state official when acting as attorney in fact for the corporation. The corporation is required to appoint him as its agent, and, in this respect, he is not the agent of the state nor acting for the state. But, suppose he could be held liable on his bond; the penalty of it, as fixed by statute, is \$20,000. Is this adequate to meet any such liabilities as may arise by reason of his failure to perform his duties in this respect? In what way can it be determined? The statute does not contemplate that the auditor's bond is taken to cover any such liability.

None of the authorities cited by the attorney for the state apply to this case. They refer to foreign corporations entirely, and in some of the cases the power of selection is first given to the corporation, with the provision that, if it fail to make the appointment, service may be had upon some state official, while in the other cases it is held that a foreign corporation can exercise the right to do business in a state only by comity, or as an act of grace on the part of the state, and the condition upon which the power is extended goes with it, and cannot be separated from it, so that, if the privilege is enjoyed, the condition must be performed; and all corporations referred to in these cases were permitted to do business in the state upon the express condition that they appoint a certain person to accept service of process, etc. The case of *Fisher v. Traders' Mut. L. Ins. Co.* 130 N. C. 217, 48 S. E. 667, is attempted to be applied here. It has no application, because it gives the corporation first the power to select its own agent, and provides that, if it fails to make the selection, process may be served on the secretary of the corporation commission. No such right was extended to this defendant. If so, it would have no just ground of complaint, and doubtless would not be complaining. And, upon an examination of all the authorities cited by counsel for the state, it will be found that

they do not support the state's contention. The state should have the right to require nonresident domestic corporations to appoint an agent or representative in the state to receive service of process and notices in legal proceedings instituted against them, and to provide, upon their failure to make such appointment, that service may be had upon a public official designated for that purpose, or in some other prescribed way. But the state has no power to compel a nonresident domestic corporation to appoint any particular officer or person as its agent to accept service of process etc., until it has been given the right to select someone of its own choosing, and a failure upon its part to do so. "Judgment against corporation on leaving summons with register of deeds, though authorized by statute, is not by due process under the 14th Amendment." Brannon's 14th Amendment, 263. And the author cites *Pinney v. Providence Loan & Invest. Co.* 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41, 82 N. W. 308, which decides that a statute authorizing service of process on a corporation by leaving a copy of such process with the register of deeds is unconstitutional, as in violation of the Constitution of the United States, declaring that no state shall deprive any person of life, liberty, or property without due process of law. There are much stronger reasons for holding in this case that chapter 39 is unconstitutional than there were for holding unconstitutional the act in the case just cited; for by the Wisconsin statute it was required that on or before October 1, 1898, the corporation file in the office of the register of deeds a list of the names of its officers therein mentioned on whom service of process, notices, or orders might be made, as provided by another section of the statute, and provided, further, that in all cases where such list of officers was not filed as aforesaid service of all legal process, notices or other legal proceedings might be lawfully and effectually made upon any such corporation by giving to and leaving with said register of deeds true copies of such legal process, orders, notices, or proceedings, in which case service so made should be valid.

Then, again, the defendant is required by this act to pay to the auditor, as its attorney, the stipulated sum of \$10 for his services. Not only is the right to select its own agent taken away from the corporation, but it is deprived of the liberty to contract with its agent as to the compensation which such agent is to receive for his services. Judge Brannon says: "The auditor is paid by the state, and the state, by its officer, renders valuable service to the corporation." This may be true; but still it is no reason why the defendant can be deprived of the

liberty to contract, as guaranteed to it by the Constitution. In Brannon's 14th Amendment, p. 110, the author says: "But what does the word 'liberty' mean in American Constitutions? This is the test question here, for it means in the 14th Amendment just what it means in the state Constitutions. It means personal liberty. This includes more than mere exemption from imprisonment. I should say that it means exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure, commonly called the right of locomotion; the right to acquire, hold, and convey property; the right to make contracts and to labor in any lawful calling to earn a living," etc. In *State v. Peel Splint Coal Co.* 36 W. Va. 856, 17 L. R. A. 385, 15 S. E. 1018, Judge Brannon, in delivering the opinion of the court, says: "The word 'liberty' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, to make lawful contracts therein, to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. . . . Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system—indeed, under all civilized governments—than this right of contract." I fully concur with the court in construing this constitutional provision and defining the word "liberty" as embracing the right to contract and be contracted with; and, if this is the proper construction, then it seems to me that no argument is necessary to show that the act in question is unconstitutional, because it deprives the defendant of its right to contract with its agent.

The validity of the act in question is upheld by the court by virtue of § 8, chap. 53, Code 1899; for Judge Brannon, speaking for the court, says: "But for said § 8, we need not, do not, say whether or not the act would be valid." If chapter 39, p. 401, Acts 1905, is unconstitutional but for said § 8, I fail to see how this section can rob it of its unconstitutional features and render constitutional an unconstitutional act. It is true the state, in said § 8, reserved the power to alter any charter or certificate of incorporation, and to alter or repeal any law applicable to a joint-stock company. This is a legislative, and not a constitutional, reservation; and, while the state has re-

served such powers, yet it cannot reserve to itself the right to pass an act in derogation of the Constitution. Therefore § 8, chap. 53, Code 1899, cannot relieve the act in question of its unconstitutional features. Mr. Justice Cooley, in *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275, speaking of the provision of the Constitution of the United States which forbids the impairment of obligations of contracts, says that, but for this provision, "the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the state where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained; but it could not do what would be inconsistent with constitutional principles." In *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, and many other cases, it is said, in upholding the reserved powers to alter or repeal the charter of a corporation, that under such reservation the legislature may exercise the right without impairing the obligation of the contract. This is because the reservation qualifies the grant, and, whenever the legislature exercises the power which it has expressly reserved, it does not impair the obligation of its contract, because it is a part of the contract that it shall be at liberty to exercise that power. It is not claimed that chapter 39 is invalid because it impairs the obligation of a contract, but because it is in conflict with the 14th Amendment to the Constitution of the United States. The state cannot reserve unto itself the power to pass an unconstitutional act. Whatever power the state may possess over corporations in their creation, or in passing or amending the laws under which they are formed, it cannot withdraw from them the guaranties of the Federal Constitution.

The object of the reservation, in whatever form expressed, was to preserve to the state control over the corporate franchise, rights, and privileges which in her sovereign or legislative capacity she had called into existence; in other words, to enable her to annul or modify that which she had created. It was not its object to interfere with contracts which the corporation, when once created, might make, nor with the property which it might acquire. With respect to everything else, it gives no power that the state would not have had without it. The artificial body created by the legislature is composed of natural persons who have combined their property to obtain an object 1 L.R.A. (N.S.)

beyond their individual resources, and who are clearly entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held, with the liberty to contract in regard thereto, as before they had associated themselves together. Mr. Justice Field says: "Whatever the state may do with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business and of having perpetual succession in its members. It may make its grant in these respects revocable at pleasure. It may make it subject to modifications. It may impose conditions upon its use and reserve the power to change these at will. But whatever property the corporation acquires in the exercise of these capacities conferred it holds under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law. Nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

For the foregoing reasons, I would refuse the writ.

WISCONSIN SUPREME COURT.

SALLY ANN PRITCHARD, Appt.,

v.

THOMAS G. LEWIS et al., Respts.

(.... Wis.)

1. Deed—ambiguity—evidence.

Where, by deeds executed the same day, land is granted to one person, "excepting and reserving therefrom a strip of land" of certain width, "to be used as a right of way," and this strip, "being the same premises as described in the other deed as a right

Case Note.—That possession, to be adverse, must be inconsistent with the right which is sought to be extinguished, is a proposition too well established to need the citation of authority. Upon this principle hinge the decisions in the cases subjoined, in which the question whether inclosure of a right of way by the owner of the servient tenement constitutes a possession adverse to such right is involved.

A right of passage may exist, though subject to the limitation of bars and gates. *Hinks v. Hinks*, 46 Me. 423.

The building of a fence across a road running along the line of a farm, which is made movable so that it can be opened and closed by travelers, does not make the owner's possession adverse. *Hempsted v. Huffman*, 84 Iowa, 398, 51 N. W. 17.

The erection of a gate, continued for more

of way," is granted to another, reserving the timber thereon, sufficient ambiguity exists as to grantor's intention to admit extraneous evidence in explanation.

2. Same—right of way.

The fee will pass to the second grantee where, in one deed, land is granted to one person, "excepting and reserving" therefrom a strip of certain width, "to be used as a right of way," which strip is granted to another, reserving the timber thereon to the grantor; where it appears that the grantor removed the timber therefrom, the second grantee paid the taxes thereon, and the wife of the grantor refused to sign the first deed until the strip had been conveyed to the second grantee.

3. Adverse possession—inclosed right of way.

Mere possession under a deed which includes a strip belonging to a stranger for a right of way, but which the grantor had a right to fence in, is not sufficient to ripen into an adverse title, since it is consistent with the title of the true owner.

4. Mortgage—cloud on title—equitable relief.

A mortgage which includes a strip of land the title to which is in a third person for right of way, but which the mortgagor has the right to fence in, is a cloud on the title

than twenty years by the owner of the soil across a neighborhood road or private path which gate is opened and shut at pleasure and hinders no one from the use of the road does not amount to an extinguishment, though it may to a modification, of the public easement. *State v. Pettis*, 7 Rich. L. 390.

The maintenance of sliding bars across a private or byroad, instead of the swinging gates permitted by statute, for thirty or forty years, during which time the road has been continually used, does not raise the presumption that the right to the road has ceased. *Van Blarcom v. Frike*, 29 N. J. L. 517.

Proof of the erection of a gate and bars across a lane, and of plaintiff's forbidding individuals, in two or three instances, to pass over the lane, is not a continuous, exclusive, open, and adverse enjoyment for any period of twenty years, where the public have exercised and claimed the right to pass and re-pass over the premises at their own will and pleasure, and they have done so without any continued interruption or hindrance. *Mowe v. Stevens*, 61 Me. 592.

But the inclosure of a private right of way within a field, and cultivating the ground over which it once ran, for the statutory period of limitation, bars the right to the easement. *Bowen v. Team*, 6 Rich. L. 298, 60 Am. Dec. 127.

Where a right of way granted to a railroad is inclosed and cultivated with the rest of a farm, such possession is adverse. *Maysville & B. S. R. Co. v. Holton*, 100 Ky. 665, 39 S. W. 27. *Contra*, *Virginia & S. W. R. Co. v. Crow*, 108 Tenn. 17, 64 S. W. 485.

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of the true owner, which entitles him to equitable relief.

(October 3, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Racine County in favor of defendants in an action brought to remove an alleged cloud from the title of certain real estate. Reversed.

Statement by Kerwin, J.:

This is an action to remove a cloud from title to real estate, created by mortgage from defendant Lewis and wife to defendant Adams. Plaintiff claims through deed from the common grantors, Evan Jones and wife, to Owen P. Pritchard, and defendant Lewis, through deed from said Jones and wife to John G. Lewis. The deeds are as follows:

This indenture, made this 11th day of November, in the year of our Lord one thousand eight hundred and seventy-two, between Evan Jones, of Racine county, Wisconsin, and Ellen, his wife, parties of the first part, and Owen P. Pritchard, of the same place, party of the second part, witnesseth: That the said parties of the first

Fencing across a street does not make the possession adverse when it is done by permission of the municipal authorities. *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130; *Carter v. La Grange*, 60 Tex. 636.

But where a person has been permitted to remain in the continued, adverse, and actual possession of a public street, by actual inclosure, for more than thirty years, the title vests absolutely in him. *Cornwall v. Louisville & N. R. Co.* 87 Ky. 72, 7 S. W. 553.

Other instances of the application of the rule are found in cases of encroachment by a fence upon the side of a highway, inclosing a portion not used or required for public travel, which it is held does not, of itself, amount to an adverse possession of the land so inclosed. *Lane v. Kennedy*, 13 Ohio St. 42; *McClelland v. Miller*, 28 Ohio St. 502.

There is a conflict of opinion as to whether the fencing and cultivation by the owner of the fee in land over which a railroad company has a right of way, of such portions thereof as are not covered by the tracks of the company, is so inconsistent with the company's easement therein as to amount to an adverse possession which will destroy the easement. That it is not adverse is held in *East Tennessee, V. & G. R. Co. v. West*, 89 Tenn. 293, 10 L. R. A. 855, 14 S. W. 776; *Northern Counties Invest. Trust v. Enyard*, 24 Wash. 360, 64 Pac. 516; *Contra*, *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 1 L. R. A. 213, 9 Am. St. Rep. 581, 18 N. E. 301; *Illinois C. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Matthews v. Lake Shore & M. S. R. Co.* 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. W. 1111.

part, for and in consideration of the sum of fifty dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all that certain piece or parcel of land situate in said county of Racine, known as a part of the northeast quarter of section number thirty-six (36), in township number three (3) north, of range twenty-two (22) east, bounded as follows: Begin in the west line of said quarter section, sixty (60) rods south of the northwest corner thereof, run thence east eighty (80) rods, thence south two (2) rods, thence west eighty (80) rods to the west line of said quarter, and then north two (2) rods to beginning, containing one acre, and being the same premises described as a right of way two (2) rods wide reserved by said parties of the first part in a deed this day executed by them to one John G. Lewis. Excepting and reserving from above-described premises all the timber thereon situated, with the right to said party of the first part to go upon said land and remove said timber for the term of ten years. Together with all and singular the hereditaments and appurtenances thereto in any wise appertaining, and all the estate, right, title, possession, claim, and demand, in law or in equity, of the said parties of the first part therein and thereto. To have and to hold the same unto said party of the second part, his heirs and assigns, to his and their sole use, forever. And the said Evan Jones, one of the parties of the first part, for himself, his heirs, executors, and administrators, doth hereby covenant with the said party of the second part, his heirs, executors, administrators, and assigns, that at the time of the delivery of these presents he is well seised of the above-granted premises as of an indefeasible estate of inheritance in fee simple, that the same are free and clear from all liens and encumbrances whatever, and that the same in the quiet and peaceable possession and enjoyment of the said party of the second part, his heirs and assigns, forever, against all persons lawfully claiming the same, or any part thereof, he will warrant and forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Evan Jones. [Seal.]
her
Ellen X Jones. [Seal.]
mark

Signed, sealed, and delivered in presence of John W. Knight, Rich'd P. Howell.

State of Wisconsin, }
County of Racine, }

On this 11th day of November, A. D. 1872, came personally before the subscriber, a notary public of said state residing in said county, Evan Jones and Ellen, his wife, to me well known to be the persons described in and who executed the above conveyance, and acknowledged that they had executed the same for the uses and purposes therein set forth.

Given under my hand and official seal.

[Notarial Seal.] John W. Knight,
Notary Public.

This indenture, made this eleventh day of November, in the year of our Lord one thousand eight hundred and seventy-two, between Evan Jones, of the county of Racine, state of Wisconsin, and Ellen, his wife, party of the first part, and John G. Lewis, of the same place, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of twenty-one hundred dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all that certain piece or parcel of land situate in said county of Racine, known as a part of the northeast quarter of section number thirty-six (36), in township number three (3) north, of range number twenty-two (22) east, bounded as follows: Begin at a point in the west line of said quarter section sixty (60) rods south of the northwest corner thereof, run thence east eighty (80) rods, thence south fifty (50) rods, thence west eighty (80) rods to the west line of said quarter, and then north fifty (50) rods to place of beginning. Excepting and reserving from the above-described premises a strip of land two (2) rods in width off the north side thereof, to be used as a right of way. The party of the second part, however, to have the privilege of fencing said right of way into his inclosure, and being required only to maintain a gate at each end thereof for the use of said party of the first part, his heirs and assigns. Together with all and singular the hereditaments and appurtenances thereto in any wise appertaining, and all the estate, right, title, possession, claim, and demand, in law or in equity, of the said parties of the first part therein and thereto. To have and to hold the same unto said party of the second

part, his heirs and assigns, to his and their sole use, forever. And the said Evan Jones, one of the parties of the first part, for himself, his heirs, executors, and administrators, doth hereby covenant with the said party of the second part, his heirs, executors, administrators, and assigns, that at the time of the delivery of these presents he is well seised of the above-granted premises as of indefeasible estate of inheritance in fee simple, that the same are free and clear from all liens and encumbrances whatever, and that the same in the quiet and peaceable possession and enjoyment of the said party of the second part, his heirs and assigns, forever, against all persons lawfully claiming the same, or any part thereof, he will warrant and forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

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Ellen X Jones. [Seal.]
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Signed, sealed, and delivered in presence of John W. Knight, Rich'd P. Howell.

State of Wisconsin, }
Racine County. } ss.

On this 11th day of November, A. D. 1872, came personally before the subscriber, a notary public of said state residing in said county, Evan Jones and Ellen, his wife, to me well known to be the persons described in and who executed the above conveyance, and acknowledged that they had executed the same for the uses and purposes therein set forth.

Given under my hand and official seal.

[Notarial Seal.] John W. Knight,
Notary Public.

The main controversy is whether the deed from Jones and wife to Pritchard, of the strip, conveyed the fee or an easement for right of way. The case was tried by the court, and the court found as facts, in effect, that the plaintiff and defendant Lewis respectively derived their title through deeds hereinbefore set forth; that at the time of the execution of the deeds, November 11, 1872, Owen P. Pritchard then, and prior to the time of his death, was the owner, and plaintiff since has been and is the owner, of the 20 acres of land adjoining the strip in controversy at the east end thereof; that said strip was used by said Pritchard in his lifetime, and by the plaintiff since his death, as a passageway to reach said 20 acres; that on the execution and delivery of the partition deed from William Beatty, as referee, to defendant Lewis, May 5, 1894, defendant Lewis entered into possession under said deed, and held adversely for ten years, sub-
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ject to the easement of Pritchard; that the mortgage referred to in the complaint was given and taken with full knowledge that the plaintiff had a right of way or easement over the strip of land in question and that the rights of the plaintiff were prior and superior to the lien of the mortgage. And, as conclusions of law: That the defendant Lewis is the owner in fee simple of the land in controversy, subject only to right of way or easement over the same to the plaintiff, her heirs and assigns; that the mortgage does not constitute a cloud upon the title of the plaintiff; that defendants are entitled to judgment against plaintiff, and to recovery of their costs. Judgment was entered accordingly, from which this appeal was taken.

Error is assigned: First, in the admission and exclusion of testimony; second, in finding that defendant Lewis had been in the continual occupation and adverse possession of the premises for more than ten years prior to the commencement of the action; third, in the conclusions of law that defendant Lewis is the owner in fee of the land in question, and that the reservation by grantor Jones, his heirs and assigns, in the Pritchard deed, was an easement merely; that defendants' claim, under §§ 4211 and 4212, Rev. Stat. 1898, is established by the evidence, that the mortgage does not constitute a cloud upon the rights of the plaintiff, and in ordering judgment for defendants.

Mr. W. W. Rowlands, for appellant:

Mere restriction of the use to which the land is to be put will not prevent a grant thereof from being of the fee.

Coburn v. Coxeter, 51 N. H. 158.

Whatever construction is given must finally leave the title to the standing trees on the strip of land in grantor Jones, who thereafter entered, felled the trees, and hauled them away.

Boults v. Mitchell, 15 Pa. 371; Wood v. Leadbitter, 13 Mees. & W. 844; Thomas v. Sorrell, Vaughn, 330; Pierrepont v. Barnard, 6 N. Y. 279; Wait v. Baldwin, 60 Mich. 622. 1 Am. St. Rep. 551, 27 N. W. 697; Hewitt v. Isham, 7 Exch. 77.

The presumption that possession follows the title is indulged in where adverse possession is relied on to defeat the recovery of the land by the owner of the legal title.

McCall v. Doe, 17 Ala. 533; Ringo v. Woodruff, 43 Ark. 469.

Constructive possession will extend only to such land as is used in connection with the land actually possessed.

Thompson v. Burhans, 61 N. Y. 52, 79 N. Y. 93; Jackson ex dem. Gilliland v. Woodruff, 1 Cow. 276.

This seems to be the doctrine of Wisconsin.

Pepper v. O'Dowd, 39 Wis. 550.

Where a vendor conveys two separate and distinct tracts of land, to only one of which he has title, an entry upon and occupation of that tract of which his title is good will not, without more, operate as a disseisin of the owner of the other tract, to which the vendor had no title.

Bailey v. Carlton, 12 N. H. 9, 37 Am. Dec. 190; Stewart v. Harris, 9 Humph. 714; Fenno v. Sayre, 3 Ala. 458; Woods v. Montevallo Coal & Transp. Co. 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. 475.

Mr. D. H. Flett, for respondents:

The reference, in the Pritchard deed, to the Lewis deed, incorporates the latter into the former so far as the description and conditions are concerned.

Tiedeman, Real Prop. § 841; 3 Washb. Real Prop. 4th ed. 428; 2 Devlin, Deeds, §§ 944, 1000; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939; Perkins v. Best, 94 Wis. 168, 68 N. W. 762; Town v. Gensch, 101 Wis. 445, 76 N. W. 1096, 77 N. W. 893; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

Parol evidence to vary the terms of a written instrument, or to show an intention contrary to that disclosed upon its face, is not competent, unless there is ambiguity in the instrument itself.

Elofrson v. Lindsay, 90 Wis. 203, 63 N. W. 89; Kirch v. Davies, 55 Wis. 287, 11 N. W. 689; Locke v. Whiting, 10 Pick. 280; Jones, Ev. § 495; Abraham v. Oregon & C. R. Co. 37 Or. 495, 64 L. R. A. 391, 82 Am. St. Rep. 779, 60 Pac. 899.

Acts and admissions of the grantee after delivery of his deed are inadmissible for the purpose of showing the construction put by him upon the deed.

Henshaw v. Mullens, 121 Mass. 143; Wilbur v. Grover (Mich.) 12 Det. L. N. 99, 103 N. W. 583.

Only an easement passed to Pritchard.

Elliot v. Small, 35 Minn. 396, 59 Am. Rep. 329, 29 N. W. 158; Towne v. Salentine, 92 Wis. 404, 66 N. W. 395; Fischer v. Laack, 76 Wis. 313, 45 N. W. 104.

Kerwin, J., delivered the opinion of the court:

1. The first and important question for consideration is, What title passed by the deed of November 11, 1872, from Evan Jones and wife to Owen P. Pritchard? The two deeds from Jones to Lewis and Pritchard upon their face indicate that they were executed upon the same day. The deed to Lewis in plain terms excepts and reserves the 2 rods for a right of way, not a right of way over the 2 rods, but "a strip of land 2 rods in width off the north side thereof, to be used

as a right of way," which quite plainly imports that the fee was intended to be reserved. Cincinnati v. Newell, 7 Ohio St. 37. The language used is in form an exception and reservation. A marked distinction exists between the terms "exception" and "reservation" as used in deeds; the distinction being that a reservation is something taken back from the thing granted, while an exception is some part of the estate not granted at all. Rich v. Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81; Fischer v. Laack, 76 Wis. 313, 45 N. W. 104. True, the terms "excepting" and "reserving" are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception, when such appears to be the clear and obvious intention of the parties. 2 Devlin, Deeds, § 980; Fischer v. Laack, *supra*; Gould v. Howe, 131 Ill. 490, 25 N. E. 602. The deed of Pritchard is a warranty deed, conveying by metes and bounds the strip of land in question, referring to it as "being the same premises described as a right of way 2 rods wide, reserved by said parties of the first part in a deed this day executed by them to one John G. Lewis;" and it further excepts and reserves the timber situated upon said strip, with the right of the grantor to go upon the land and remove said timber for the term of ten years.

It is contended on the part of the respondent that the language of the deed to Lewis excepting and reserving the premises for a right of way, shows upon the face of the deed that the fee was not reserved, but only a right of way, and that, while the deed to Pritchard was an absolute conveyance of the premises by metes and bounds, still the reference to the Lewis deed made it a part of the Pritchard deed, and constituted notice to Pritchard that only a right of way was reserved; and, the fee having passed to Lewis, Pritchard only got by his deed the right of way reserved in deed to Lewis. This argument is based upon the theory that the fee passed to Lewis. Hence, grantor Jones could only convey in his deed to Pritchard the remaining estate in him, which was only a right of way. The court below held, in a written opinion filed, that the reservation to Jones in deed to Lewis and subsequent grant to Pritchard was of an easement merely, and that the deeds were not so ambiguous as to require parol evidence to aid their interpretation; and the argument of counsel for respondent here is grounded upon the assumption that the deed to Lewis upon its face conveyed the fee and reserved the right of way only, and cannot be aided by extrinsic evidence; and several cases are cited upon this proposition, which will be considered.

Winston v. Johnson, 42 Minn. 398, 45 N. W. 958, is a case where it was held that the words "excepting and reserving," in a deed, constituted a reservation, and not an exception. But a careful examination of this case will show that it did not turn altogether upon the words of the deed, but upon the intention of the parties as gathered from their acts, the surrounding circumstances, as well as the physical condition of the property and the practical interpretation of the reservation by the grantee. In *Bolio v. Marvin*, 130 Mich. 82, 89 N. W. 563, there was no express reservation, the language being, "saving and preserving, however, from the operation hereof, the road running along the southerly line of said parcels," etc.; and here the court recognizes the well-settled doctrine that the intention of the grantor is to be gathered from the whole instrument, and says (p. 83, of 130 Mich., p. 563 of 89 N. W.): "There was not the slightest occasion to include this land in the deed, unless some interest was intended to be vested in the grantee." The court also refers with approval to *Reynolds v. Gaertner*, 117 Mich. 532, 76 N. W. 3, where the words used were held to create an exception, and not a reservation, and says (at p. 84, of 130 Mich., p. 562 of 89 N. W.): "But the language employed in the deed construed in that case is very different from that which we are now construing. In that case the language was, 'except two and forty-six hundredths acres to the Chicago & Canada Southern Railroad.'" In *Wellman v. Churchill*, 92 Me. 193, 42 Atl. 352, the language of the deed was, "with the reservation of a road 2 rods wide over the northerly side of said lot." Here the language plainly indicated a reservation, not an exception, and the court refers to the distinction between exception and reservation, and says (p. 195 of 92 Me., p. 353 of 42 Atl.): "Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the land and tenements devised, though exception and reservation have often been used promiscuously. Co. Litt. 47a. A construction given to a clause called a reservation is that it is an exception if it fall within that definition, and if such was the design of the parties." *Elliot v. Small*, 35 Minn. 396, 59 Am. Rep. 329, 29 N. W. 158, is where the clause was in form a reservation, and not an exception, and was a reservation for a public street. In this case much stress is placed upon the apparent intention of the grantor, and it is said (at p. 397 of 35 Minn., p. 330 of 59 Am. Rep., and p. 159 of 29 N. W.): "The so-called reservation was not, strictly speaking, an exception of anything; for an exception is of a part of the thing granted, and 1 L.R.A. (N.S.)

of something *in esse* at the time of the grant." So this case appears to turn upon the intention of the grantor and the wording of the reservation. In *Towne v. Salentine*, 92 Wis. 404, 66 N. W. 395, this court clearly recognizes the distinction between the words "exception" and "reservation," when used in a deed, and holds that, while a reservation for a right of way carries only an easement, an exception for the same purpose excludes the fee from the grant. In *Patrick v. Young Men's Christian Asso.* 120 Mich. 185, 79 N. W. 208, the language used in the deed was "excepting and reserving," and it was held to be an exception, and not a reservation.

Many cases might be cited in support of the doctrine that excepting land from a deed for right-of-way purposes withholds the fee from the grant, and that the fee in such land excepted does not pass to the grantee, unless it appears that the intention of the parties was that the right of way only should be reserved. The question, therefore, arises here, whether the language of the deeds in question is so ambiguous or indefinite as to admit of extrinsic evidence. As before observed, the Lewis deed upon its face appears to except the fee and burden it with a right of way in favor of Pritchard, as well as the right in the grantee to keep it inclosed and maintain gates. No reason is perceived why the grantor, Jones, did not have the right to except the fee, and so burden it. Nothing appears upon the face of the deed to Lewis showing a contrary intention. Now it appears very clearly from the deed to Pritchard, which on its face purports to have been executed upon the same day as deed to Lewis, that the grantor had reserved the fee to this strip in deed to Lewis, because he reserves to himself the timber situated thereon, which clearly he could not have done if the deed to Lewis had conveyed the fee; although he also refers to the property as the premises reserved for right of way. Counsel for respondent says, in his brief, that the two deeds should be construed together; and in so doing it is not easy to see how it can be gathered from the deeds that the intention of the grantor was to convey the fee to Lewis. Besides, the interpretation put upon these deeds by practical construction indicates quite plainly that the fee in this strip was reserved in the deed to Lewis and passed to Pritchard. Immediately upon the execution of these deeds, Jones swept the timber, which was valuable, from the strip, without any objection on the part of Lewis, which would be wholly inconsistent with the passing of the fee to Lewis; also the payment of taxes on this strip by Pritchard, and the fact that Mrs. Jones, one of the grantors, refused to sign deed to Lewis until Pritchard got his deed of the

1 acre, very strongly indicate that the fee to the strip was reserved, and intended to be reserved, in deed to Lewis, and transferred to Pritchard. In conveyances of this character, the question of exception or reservation being largely one of intention, and the court always determining from the nature and effect of the provision itself, the subject matter, and the situation of the parties, we are inclined to the opinion that sufficient ambiguity existed to warrant the admission of the testimony offered. *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Miller v. Miller*, 17 Or. 423, 21 Pac. 938. And, considering the deeds in the light of the competent testimony produced, there is no room for doubt that Jones reserved, and intended to reserve, the fee in the conveyance to Lewis, and that he conveyed the same to Pritchard.

2. The next question for consideration is whether the sixth finding is supported by the evidence. It is, in effect, that the defendant Lewis entered into possession of the strip in question May 5, 1894, under deed from Wm. Beatty, referee in the partition suit, and acquired title thereunder by adverse possession. Through the partition deed defendant Lewis got the interest of John G. Lewis. This was 24 acres; the 1-acre strip in question being owned in fee by plaintiff, subject to the right of Lewis to fence the same into his inclosure and maintain gates. The partition deed describes the tract by metes and bounds, and gives it as 24 acres, more or less, although it includes within the boundaries the 24 acres owned by Lewis and the 1-acre strip owned by plaintiff. The plaintiff, being the owner in fee of the strip in question at the time of the execution of the partition deed, is entitled to the benefit of the presumption created by § 4210, Rev. Stat. 1898. It is claimed on the part of the respondent that at the time of the execution of partition deed, May 5, 1894, defendant Lewis entered into possession under such deed, and continued to hold adversely; but the evidence fails to establish such claim. The possession by Lewis after May 5, 1894, as shown by the evidence, was perfectly consistent with title to the fee in plaintiff and her ancestor. The evidence does not establish that the defendant Lewis, or his father, held the strip in question in hostility to the plaintiff. Evidence of adverse possession must be clear and positive, and should be strictly construed. *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995. Upon the facts proved, the possession of the defendant Lewis was simply permissive, as well from the time of execution of partition deed as before. 1 L.R.A. (N.S.)

The actual occupation by defendant Lewis of the 24 acres, although the 1-acre strip was inclosed therewith, was perfectly consistent with the ownership of plaintiff, and not in hostility to her. *Stewart v. Harris*, 9 Humph. 714; *Nau v. Brunette*, 79 Wis. 604, 48 N. W. 649; *Lampman v. Van Alstyne*, *supra*; *Woods v. Montevall Coal & Transp. Co.* 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. 475; *Bailey v. Carleton*, 12 N. H. 9, 37 Am. Dec. 190. We must therefore hold that the sixth finding is not supported by the evidence.

3. Upon the question of the mortgage to defendant Adams creating a cloud upon the plaintiff's title, little need be said. The mortgage claimed to be a cloud upon the plaintiff's title in this case was executed by defendant Lewis and his wife to defendant Adams in December, 1903, and included therein the strip of land owned by the plaintiff, without any reservation whatever. The mortgage was executed upon the theory that defendant Lewis owned the fee. Since he did not, the mortgage is a cloud upon the plaintiff's title, and she is entitled to relief. It therefore follows that the judgment of the court below must be reversed.

The judgment of the court below is reversed, and the cause remanded, with instructions to enter judgment for the plaintiff.

WISCONSIN SUPREME COURT.

AGNES THEIS et al., Respts.,

v.

EMIL DURR et al., Appts.,

Impleaded with D. H. MAY et al.

(.... Wis.)

Corporations—fraudulent reduction of stock—relief.

Equity will interfere to prevent the majority stockholders of a corporation from exercising their statutory power to reduce its capital stock, where the purpose is to

Case Note.—The decision in *THEIS v. DURR* is a distinct addition to the list of adjudicated cases dealing with the validity of proceedings for the reduction of capital stock, including the power of a court of equity to supervise and review such proceedings where the proceedings themselves conform to statute, but have back of them an improper purpose. It will be noted that the court has not contented itself with restraining the proceedings subsequent to the reduction of the capital stock which gave effect to the improper purpose, but held that the reduction of the stock and the purpose back of it were inseparable, and affirmed the judgment annulling the entire proceedings, including the reduction of the capital stock. It is evident from reading the opinion of the

relieve defrauding stockholders from meeting their obligations on the theory that they have been overreached in a contract by which full-paid stock was issued for patent rights.

(October 24, 1905.)

A PPEALS by defendants Durr *et al.* from a judgment of the Circuit Court for Milwaukee County in favor of plaintiffs in a suit to annul proceedings for the reduction of the capital stock of a corporation. Affirmed.

Statement by **Marshall, J.:**

Appeals from the circuit court for Mil-

court that it would not have annulled the reduction of the capital stock had the subsequent proceedings for carrying into effect the reduction been just and fair to all the parties.

In *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250, cited by the court in the *THEIS* CASE, the question arose in an action of assumpsit to recover on a stock subscription, and the defendant, by way of defense, alleged that, subsequent to his subscription, the capital stock of the corporation had been improperly reduced at a meeting of the stockholders, by releasing the subscription of a particular stockholder, and not by a *pro rata* reduction; and the defense was sustained by the court. This case is authority for the general proposition to which the court cites it,—that equality between the stockholders should be preserved in the reduction of the capital stock; but does not involve the question as to the scope of the judgment to be rendered in a direct proceeding to annul a reduction of the stock where the illegality consists in the improper method giving effect to the reduction.

The case of *Currier v. Lebanon Slate Co.*, 56 N. H. 262, cited by the court in the *THEIS* CASE, was a suit in equity, by stockholders, to annul the purchase by the corporation of shares of its stock, which was made for the purpose of relieving the subscriber from the payment of assessments made upon the stock; the court saying that it amounted to a reduction of the capital stock in a manner unfair to other stockholders.

The general rule that the courts will not interfere with the internal management of corporations in the absence of fraud is thus stated in 4 *Thompson on Corporations*, § 4487: "Other decisions emphasize the principle that courts of equity cannot undertake the management of all the private corporations in the country; that, in the absence of usurpation, of fraud, or of gross negligence, they will not interfere, but will allow the majority to rule, and leave dissatisfied stockholders to redress their grievances through ordinary corporate methods." See also *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287, and 10 *Cyc. Law & Proc.* p. 969.

In *Berger v. United States Steel Corp.* 63 N. J. Eq. 809, 53 Atl. 68, where a scheme for

waukeee county. This was an equitable action to annul proceedings of the majority of the stockholders of the defendant corporation, reducing its authorized capital stock for the special advantage of those who had not paid in full their subscriptions therefor.

The issues and the nature of the evidence, so far as necessary to the questions raised upon the appeal, are indicated by this summary of facts found by the court: November 3, 1897, plaintiffs, G. Podoll and H. W. Theis, with the defendants, C. J. Fox, D. H. May, and one C. L. Clason as the parties of the first part, contracted with the

redeeming and retiring preferred stock of the corporation out of the proceeds of bonds of the corporation was attacked, the court, after upholding the validity of the corporate proceedings, took up the contention that the manner in which the conversion planned was to be carried through and consummated was illegal, and furnished sufficient ground for the injunction, and said: "Individual stockholders cannot question, in judicial proceedings, corporate acts of directors if the same are within the powers of the corporation and in furtherance of its purposes. are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment;" citing *Ellerman v. Chicago Junction R. & Union Stockyards Co. supra*.

In *Lowe v. Pioneer Threshing Co.* 70 Fed. 646, the court, while specifically recognizing the rule of noninterference in the internal policy and management of corporations, held that the rule did not apply where fraud had been practised on the rights of dissenting stockholders.

In *Coquard v. St. Louis Cotton Compress Co. (Mo.)* 7 S. W. 176, it was held that a corporation could not reduce its capital stock, and borrow money on its bonds, and distribute the same among its stockholders in payment of the portion of the capital stock canceled by such reduction. This case resembles the *THEIS* CASE in that the formal method prescribed for the reduction of the capital stock was pursued, and the attack upon the scheme was in the purpose back of it rather than the formal reduction of the capital stock itself. As in the *THEIS* CASE, there were two resolutions, one reducing the capital stock one-half, another to pay the stockholders the amount of the surplus thus created, and to cancel existing certificates and issue new ones. The court, in speaking of this phase of the case, said: "The case must be considered as a whole, and not in its detached portions;" and that, "when you place these resolutions in juxtaposition,—when you compare them together,—is it not plain that the supposed reduction is one in name, and not in nature?" The court therefore held the act sought to be enjoined *ultra vires*, and that the plaintiff, though but a holder of a few shares of stock, was entitled to equitable relief.

defendants, Emil Durr and W. D. Halstead, the second parties, to this effect: The former, who were the owners of a patent process for making pneumatic tires for vehicles, vested in the latter and such others as they might associate with them a thirty-day option to acquire, in a specified manner, a one-half interest in such patent process and the manufacturing plant to be established to produce tires pursuant thereto. The second parties for themselves and their associates agreed to proceed at once to equip a plant, in or near the city of Milwaukee, for manufacturing such tires, and to enlarge the plant from time to time or otherwise provide for supplying the trade. It was mutually agreed that, upon the acceptance of the option by the second parties, they would join with the first parties in organizing a corporation with an authorized capital stock of \$40,000, divided into 400 shares of \$100, each, and subscribe for one half such stock, and pay therefor the full face value thereof as fast as the corporation required the same for its business, and the second parties would subscribe for the other half of the stock, and pay therefor by conveying their said patented invention to the corporation for the consideration of \$20,000. The second parties in due time exercised their option. A corporation was accordingly organized as agreed upon. Podoll, Fox, May, and. Theis each subscribed for 40 shares, Clason subscribed for 25 shares of the stock and L. L. Caufy was permitted to join and subscribe for 15 shares thereof, making the half to be paid for with the patent right. The second parties and others associated with them, including defendants, Durr, Halstead, Benzenberg, Spence, and Joys, subscribed for the other half of the stock agreeing in accordance with the aforesaid contract to pay therefor. At a corporate meeting of such subscribers a resolution was unanimously adopted authorizing and directing the purchase of said patent right for the sum of \$20,000. The purchase was accordingly made, the property being accepted by the corporation as full payment for the stock subscribed for by the said first parties. Certificates were duly issued therefor. The other subscribers paid into the corporate treasury 40 per cent of their indebtedness, and received certificates of stock for the amount thereof. C. L. Clason assigned in trust 20 shares of his stock to L. L. Caufy, certificates of stock being issued to the latter and the stock accordingly transferred on the books of the corporation as if he were the owner thereof. The trust agreement was verbal. Thereafter Caufy assigned his certificates in blank to Clason. Before the commencement of this action Clason sold such stock to 1 L.R.A. (N.S.)

William H. Momsen, who applied to have the same transferred to him upon the books of the corporation and a new certificate issued therefor. Such demand was made after the proceedings to change the authorized capital stock. The demand was refused. The said second parties did not establish a manufacturing plant as they agreed to do. The corporation supplied the trade with its patented device by procuring the manufacture of tires by the special process. It now has a contract with a concern to manufacture and sell tires, using said patented process on the royalty plan. Three of those who were indebted upon subscriptions for stock and two persons who held full paid stock composed the board of directors for the first year. Thereafter it was composed of four of the former and one of the latter. The debtor members so controlling the corporate affairs neglected and refused to make any calls upon stock subscriptions although the corporation needed money to carry on its business. Instead of making such calls, they borrowed money against the protest of the director who held full paid stock. Only 40 per cent has been paid upon any of the subscriptions for stock made by such second parties or their associates. Prior to the 13th day of January, 1903, the holders of full paid stock insisted upon the others paying the 60 per cent due thereon, and the latter refused upon the ground that the former had not paid in full for their stock, except in form. On said date, at a meeting of the stockholders then held, the debtor subscribers, who still insisted upon having some relief from their agreement to put their liability for \$20,000 in money against the said patent right, proposed the passage of a resolution reducing the stock of the corporation 60 per cent with a view of thereby creating a basis for extinguishing their subscription indebtedness and making a 60 per cent reduction in the stock held by the others. The resolution was lost, but at an adjourned meeting it was carried by the necessary two-thirds vote. The form of the resolution was as follows:

"Be it resolved by the stockholders of the Milwaukee Puncture Proof Tire Company that the capital stock of said corporation is hereby reduced from forty thousand dollars (\$40,000) to sixteen thousand dollars (\$16,000), and that article 3 of the articles of incorporation be and the same is hereby amended so as to read as follows: 'The capital stock of said corporation shall be \$16,000, which shall be divided into one hundred and sixty (160) shares of \$100 each.'"

The articles of incorporation contained a provision for the amendment thereof in ac-

cordance with the statutes. When the resolution was adopted 20 shares of stock voted by L. L. Caufy was required to make the necessary two-thirds vote. He was the holder of the stock of record, but the owner was C. L. Clason, as before stated. Neither of the plaintiffs at any time consented to the reduction of the capital stock as proposed, or to a release of the debtor stockholders. After the passage of the resolution and compliance with statutory forms for reducing the capital stock, the corporation, acting by its board of directors, composed as aforesaid, in the main, of persons who were designed to be beneficiaries of the proceedings complained of, sent to each stockholder a letter containing these words:

"Pursuant to the resolution of the stockholders of the Milwaukee Patent Puncture Proof Tire Company, adopted on the 16th day of January, 1903, at its annual meeting, the articles of incorporation of said corporation have been duly amended reducing the capital stock of said corporation from \$40,000 to \$16,000. You will therefore please present your certificates of stock in said corporation on or before March 1st for cancellation and for the reissue of the proper number of shares of stock to you in accordance with the resolution so passed diminishing the capital of said corporation."

None of the plaintiffs complied with such request. Before the commencement of this action they caused a demand in writing to be made upon the directors of the corporation to set aside all proceedings theretofore had with a view to reducing the authorized stock of the corporation, and to proceed to call the \$12,000, due upon stock subscriptions and collect the same, asserting as a reason therefor that the debtors had for five years refused to recognize any liability in the matter. The demand was refused.

Upon the facts stated, the court decided, as matters of law, that the subscribers to the capital stock of the corporation who paid therefor by a conveyance of the patent rights, as contemplated in the preliminary contract, became thereby owners of 200 shares of such stock, fully paid, the same in all respects as if \$20,000 in cash had been rendered therefor; that the attempted reduction in the authorized capital stock to \$16,000, divided into 160 shares of \$100, each, was in violation of the rights of the holders of full paid stock who did not consent thereto, was contrary to law, and ought to be declared void and canceled of record; that judgment should be rendered accordingly with costs in favor of plaintiffs; and that the judgment sought in favor of the corporation against the debtors on stock subscriptions should be denied without prejudice of the right of the corporation to

proceed independently for the collection of such indebtedness. Judgment was rendered accordingly.

Messrs. Timlin & Glicksman and W. L. Gold, for appellants:

Existing laws relative to incorporation and the power of two thirds of the stockholders to diminish the capital must be read into and considered a part of the subscription contract.

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; *State ex rel. Damman v. School & University Land Comrs.* 4 Wis. 418; *Von Baumbach v. Bade*, 9 Wis. 577, 76 Am. Dec. 283; *Hongland v. Cincinnati & Ft. W. R. Co.* 18 Ind. 452; *Wapello County v. Burlington & M. River R. Co.* 44 Iowa, 585.

Where a statute authorized a corporation to reduce its capital stock by vote of its stockholders such proceeding, when properly taken, is binding upon the courts and conclusive as to the reduction.

Strong v. Brooklyn Cross-Town R. Co. 93 N. Y. 426; *Renn v. United States Cement Co.* (Ind. App.) 73 N. E. 269.

Mr. M. T. Halphide for respondents.

Marshall, J., delivered the opinion of the court:

According to the facts found as indicated,—and they are not only well supported by the evidence but in the main are admitted by the answer,—the dominating spirits among appellants conceived that by the preliminary contract mentioned in the statement they got the worst of the bargain in agreeing to contribute \$20,000 in money against, as an equivalent, the patent right, to make up a capital of \$40,000, in a corporation organized to acquire and use in all legitimate ways such patent right, and sought by means of the statutory authority to reduce capital stock in such an organization to even up with the respondents, to accomplish that under the guise of statutory authority, by arbitrarily extinguishing their liability for \$12,000, upon their capital-stock subscriptions, and canceling a corresponding amount of full-paid stock as if the same had no consideration to support it. By that it was supposed the \$20,000, agreed in the preliminary contract, and in effect in the corporate organization, to be contributed as an equivalent for the patent right, would be reduced to \$8,000, regardless of the wishes of respondents.

While appellants' claim, as regards advantage having been taken of them in the preliminary contract and partial execution thereof, is referred to upon appeal as explaining, and perhaps palliating, the proceedings to enable them to obtain without

the aid of any court, and without the consent of the other stockholders, a satisfactory measure of redress for their supposed misfortune, counsel do not venture to suggest that such claim, if it were in all respects well founded, warranted using, as they did, the statutory authority relating to the reduction of capital stock against the protest of respondents.

It must be conceded that liability to pay a subscription indebtedness for stock in a corporation can only be rightfully satisfied as to a stockholder not consenting, by payment according to the subscription contract. No reduction of authorized and subscribed for capital stock can be accomplished except by voluntary surrender by subscribers *pro rata*, or some method which will not prefer one stockholder over another. Corporate power in that regard does not authorize an arbitrary preferential cancelation of stock, or cancelation of a subscription liability for stock without in some proper manner treating all stockholders with like favor. The idea with which appellants started out, that they could effectively use their superior voting power to obtain an advantage over the holders of full-paid stock, has no support in reason or in law, and, as we understand it, no one connected with the case ventures to claim to the contrary. If the majority of stockholders of a corporation could so treat its assets, and be immune from judicial interference in respect thereto, there would be no protection for the minority but the conscience of the majority, which would be a very uncertain reliance. The law in respect to the matter is well stated in Purdy's Beach on Private Corporations at § 195, thus: "A statute which authorizes a corporation at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower it to effect a reduction by purchasing shares of a particular subscriber. Unless such a course is adopted as will work exact and even justice to all owners of stock, the statute is inoperative. When the purpose is to reduce the capital stock by purchase of shares, they may not be purchased from any particular stockholder alone without consent of all; but each stockholder is entitled to share *pro rata*, with all the others, in his surrender of shares for such purchase. No stockholder can be forced to sell his shares for reduction of the capital stock. Therefore when the transaction would operate for the relief and benefit of those from whom the stock is purchased, and would increase the liability of the remaining stockholders, it is invalid."

It is argued on behalf of appellants that, conceding they could not rightfully force an adjustment of their differences with respon-

dents in the manner attempted, the statute gave them the right to reduce the authorized capital stock, which was the only thing really accomplished by the proceedings annulled by the judgment; that the real wrong from the respondents' standpoint was, or will be, effected, if at all, by executing the purpose of the resolution; that, so far as appellants had a right to do what was done, their motives in the matter cannot be judicially inquired into, and their acts condemned upon the ground that such motives were bad. Counsel invoke the rule that the motives of members of a legislative body in doing what they may rightfully do are not a subject for judicial inquiry. That at least, has its limitations as regards private corporations, if it has any application thereto at all. Dill. Mun. Corp. 4th ed. § 311.

We do not intend by the foregoing to suggest that a court of equity can supervise or revise corporate action within the scope of the corporate power where there is no bad faith in the matter; only error of judgment. In such matters the members of a corporation, as to authority lodged with them, and the board of directors in the field where that is the governing body, are supreme within the limits of honest administration and of the boundaries of discretion. But where the act of either such body, though lawful in itself, is designed to accomplish some illegitimate object,—the mainspring of the transaction is some ulterior motive,—and the result, if permitted to operate, will be injurious to the corporation or members not concerned in the transaction, such a member may successfully invoke equity jurisdiction for protection of the corporation where the proper officers will not do it. That cannot be too strongly impressed upon the minds of those in control of corporate affairs. Wildes v. Rural Homestead Co. 53 N. J. Eq. 425, 32 Atl. 676; Berger v. United States Steel Corp. 63 N. J. Eq. 506, 53 Atl. 14; Robotham v. Prudential Ins. Co. 64 N. J. Eq. 673, 53 Atl. 842.

In the last case cited it was distinctly held that the purpose of the governing body of a corporation in determining upon a particular line of action may of itself render such action invalid and subject to annulment at the suit of stockholders. This language was used in the opinion: "It is well settled that an act may be *intra vires* or *ultra vires*, according to the purpose which the directors have in view in doing it. The expenditure of the money of a corporation by its directors is, *per se*, often a neutral act; whether such expenditure is *intra vires* or *ultra vires* must, in large numbers of instances, depend upon the pur-

pose—the actual honest purpose—which the directors have in view.”

There was no need in this case to go very far to discover that the purpose of appellants in passing the resolution complained of was entirely illegitimate. Such purpose clearly appeared by the records of the corporation. They showed that, while the formal resolution voted on and certified to be filed as required by law did not disclose its real object, an amendment thereto covering the matter was in due form adopted, and was in reality made a part thereof. The resolution so amended was acted upon the first time the matter was up for consideration, and lost for want of the requisite two-thirds vote in favor thereof. The same resolution as amended was reconsidered and passed on the second occasion of the matter being taken up. If there was any question as to the scope of the amended resolution, it would be solved by the subsequent resolution instructing the board of directors how to carry out the reduction of stock.

So it comes down to this: The authority to reduce authorized capital stock was in form exercised for the wrongful purpose of creating a basis for favoring the majority of stockholders at the expense of the minority. In short, a statutory authority given for one purpose was abused by being used for another and clearly illegitimate purpose. The doctrine advanced, that if stockholders, by combining a ruling majority, exercise a corporate power with bad motives to the pecuniary loss or prejudice of the corporation and outside stockholders, only the mere consequences in that regard, not the wrongful use of power, is open to judicial investigation and redress, has no foundation here. Abuse of power to the direct or indirect injury of stockholders in a corporation, as well as usurpation of power with like effect, as we have seen, is a subject that may be dealt with by courts and by the remedies which equity affords when there is no other remedy, or no other remedy which is reasonably effective. It would be difficult to conceive a plainer, more wrongful, obviously fraudulent abuse of corporate power than the one under consideration. The authority to reduce capital stock is limited by its purposes. When it is exercised clearly for an illegitimate purpose, especially when such purpose is fraudulent, as in this case, the act is void. In *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250, it was held that a statute like ours contemplates a reduction of capital stock only on a basis which deals with all stockholders alike, and that any other attempted reduction is void as to a nonconsenting stockholder. *Currier v. Lebanon Slate Co.* 56 N. H. 262, is to the same effect.

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We view the resolution, in form reducing the capital stock as the statute authorizes, the same as if the amendment referred to, and the real purpose as plainly indicated by the corporate proceedings had both before and after such passage, were embodied therein by express words. It is quite clear that, in the absence of such purpose, such passage would not have occurred. The elements in the transaction are inseparable. Each was a part of a single scheme conceived by appellants to benefit themselves at the expense of the corporation and of the respondents. If they had any claim against the first parties to the preliminary contract, the way attempted was not the proper one to enforce it. They directly and indirectly wronged respondents and wronged the corporation beyond the power of redress, efficiently, at the suit of respondents by any other remedy than that which a court of equity affords. Appellants, through a board of directors composed mostly of their own number, were in control of the corporation. They insisted upon carrying out their scheme of so converting its assets to their own use as to put themselves on the ground floor, so to speak, as they viewed the matter, with holders of full-paid stock. Presumably, before this action was commenced they in form took to themselves the corporate assets represented by their subscription liabilities. The directors refused to recognize the holders of full-paid stock to any greater extent than 40 per cent of their holdings. They insisted that they were justified in so doing by the resolution reducing authorized capital stock. There was no reason whatever to expect that the wrongs committed would be remedied by those in control of the corporate affairs. All of respondents were united in interests and similarly affected. The situation was one which in its entire scope could only be dealt with in an equitable action. There may not be any precedent for just such an action as this, and none is necessary to sustain it. Since it is clearly within the principles of equity jurisprudence, that is sufficient.

As to the form of the relief, it may be that some other would have been more orderly, but, as at present advised, it would seem that, since the proceedings were mere steps in the execution of a wrongful purpose to change the relations of one class of stockholders of the corporation to their advantage, and those of another to their disadvantage, and so not to any extent within the statute relating to the reduction of authorized corporate stock, there could not be a more direct way to remedy the mischief than by judicially declaring the whole of such proceedings void, and directing their cancellation of record. In any event, the

remedy which the court awarded was efficient. Appellants were not prejudiced by any mere matter of form.

The judgment is affirmed on both appeals.

WISCONSIN SUPREME COURT.

GEORGE R. BEST, Respt.,
v.

MARY THORNCRAFT GUNTHER et al.,
Appts.

(.... Wis.)

Power of sale—record—notice of revocation.
The common-law rule that notice to the agent is necessary to revoke a power of attorney to convey real estate is not abrogated by a statute which merely authorizes the recording of such a power, and provides that, if recorded, the instrument of revocation must also be recorded to be valid; and, therefore, merely recording a revocation of a recorded power without notice to the agent does not revoke his authority.

(Cassoday, Ch. J., dissents.)

(June 23, 1905.)

A PPEAL by defendants Mary Thorncraft Gunther et al., from a judgment of the Circuit Court for Waukesha County in favor of plaintiff in an action brought to foreclose a mortgage. Affirmed.

Statement by Siebecker, J.:

An action to foreclose a mortgage upon real estate. It appears that the defendants, Arthur W. Gunther and Mary T. Gunther, are husband and wife, and that at the time in question Mary T. Gunther owned the real estate involved in this litigation. There is

Case Note.—It is unquestioned that, at common law, notice to the agent is essential to the revocation of a power of attorney. Story, Agency, 9th ed. § 470; 1 Clark & Skyles, Agency, p. 417.

The decision in *BEST v. GUNTHER* is important in the states which have adopted statutes requiring the recording of instruments revoking powers of attorney. This is especially true in view of the fact of its possible conflict with the broad doctrine of *Arnold v. Stevenson*, 2 Nev. 234, which has heretofore been cited by text-books and encyclopedias as representing the law upon the proposition that notice need not be given where the revocation has been recorded under a statute requiring the same.

The court attempted to distinguish the *Arnold Case* on the ground of difference in the statutes of the two states, and stated that the Nevada statute "expressly provides that the recording of the instrument shall 'impart notice to all persons of the contents thereof.'"

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no dispute but that on November 21, 1898, she executed a general power of attorney to sell, to convey, and to mortgage her real estate, in favor of her husband, Arthur W. Gunther; giving and granting to him as full power and authority to do everything necessary for such purposes as she could exercise if she acted personally in the matter. This power was executed in the form to entitle it to record, and, on December 1, 1898, it was recorded in the office of the register of deeds for Waukesha county, where the real estate affected is situated. It also appears that on August 11, 1899, the defendant Mary T. Gunther executed an instrument purporting to revoke the power of attorney granted to her husband, and on the following day she caused the same to be recorded in the office of the register of deeds for Waukesha county. Arthur W. Gunther was at no time personally notified that his wife had revoked the agency created by the power of attorney, nor was the plaintiff in any manner informed, before the mortgage in question was executed, that she had revoked or intended to revoke it. On November 14, 1900, the defendant Arthur W. Gunther, as attorney of Mary T. Gunther, and in his proper person, made and executed and delivered to the plaintiff a note and mortgage to secure the sum of \$2,000 with interest, which mortgage covered the real estate of Mary T. Gunther in Waukesha county, and was recorded in such county November 16, 1900. There was default in payment of interest and the principal under the terms of the note and mortgage, and this action was commenced. The court awarded judgment to plaintiff for the amount due, with costs and solicitor's fees, and directed a sale of the premises covered by the mortgage in

An examination of the *Arnold Case* hardly bears out this statement, as the provision declaring that the recording of certain instruments shall constitute notice does not expressly refer to instruments revoking powers of attorney; but such instruments were considered by the court as coming within the general language of the provision declaring that the recording of any instrument in writing, "whereby any real estate may be affected," shall "impart notice to all persons of the contents thereof."

After thus considering the Nevada statute, the court, in the *Arnold Case*, makes the suggestion that there is no necessity for recording the instrument unless it is to operate as a notice of its contents; and says: "The judge below concludes that the deposit for record is an act to be done in addition to those required by the common law. We think not. Unless the intention of the legislature be obvious, no statute should be so construed as to make it impose onerous duties upon individuals, in addition to those

case the amount due on the judgment should not be paid as directed, and for personal judgment against Mary T. and Arthur W. Gunther in case of a deficiency after applying the amount realized on such sale. Other facts of record in the case are not material to the disposition of rights of the parties on this appeal, and need not be stated. This is an appeal from the judgment.

Messrs. Frame & Blackstone and Ritscher, Montgomery, & Hart, for appellants:

The recording law was enacted and the registry or record of conveyances kept for the very purpose of giving exact and reliable information of the titles to lands to all persons having business with, or in any manner pecuniarily concerned in, such titles.

Hoyt v. Jones, 31 Wis. 389; Wickes v. Lake, 25 Wis. 84.

Argument for rehearing.

Present necessity and custom, if not statute, have absolutely done away with the common-law rule requiring notice to the agent.

2 Kent, Com. p. 643; Kelly v. Phelps, 57 Wis. 425, 15 N. W. 386; Johnson v. Youngs, 82 Wis. 107, 51 N. W. 1095.

This power of attorney is an instrument whereby the title to real estate may be affected.

Rev. Stat. 1898, § 2242; Arnold v. Stevenson, 2 Nev. 234.

Subsequent purchasers in good faith for value are bound to take notice of all instruments, properly of record, affecting the title to the real estate they are dealing with.

Fallass v. Pierce, 30 Wis. 443; Johnson v. Youngs, 82 Wis. 110, 51 N. W. 1095; Gratz v. Land & River Improv. Co. 40 L. R. A. 393.

required by the common law, unless it be for the purpose of curing some defect, or affording some remedy, in which the common law is deficient. The law upon this subject was complete and perfect, so far as the agent and the public were concerned, before the passage of the act. It threw every safeguard around the public, and gave the agent ample protection from any negligence or imposition on the part of the principal. The only material defect which seemed to exist in the common law was the failure to give the principal a speedy and convenient means of revoking the power of his agent." The court further argued that, unless the recording of the instrument operated as a notice, the statute required "a superfluous and useless act to be done; for we can see no other object to be accomplished by it." The court, having thus discussed the effect of the recordation upon third parties, takes up the question of its effect as a notice to the agent; and says: "Though the intention of the legislature is 1 L.R.A. (N.S.)

27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381.

Messrs. F. W. Houghton and N. B. Neelen, for respondent:

To enable the principal to revoke the power, the agent must be notified of such revocation.

Story, Agency, 8th ed. § 462; 1 Am. & Eng. Enc. Law, 2d ed. p. 1216; Hutchins v. Hebbard, 34 N. Y. 24; Wheeler v. Knaggs, 8 Ohio, 169; Johnson v. Youngs, 82 Wis. 107, 51 N. W. 1095.

A power of attorney, or letter of attorney, to sell or mortgage real estate is not a conveyance.

7 Am. & Eng. Enc. Law, 2d ed. p. 486.

It is not essential to a power of attorney that it should be either attested or recorded to be a valid power to convey or mortgage lands, any more than it is necessary to record a deed itself that it may be a valid conveyance.

Slaughter v. Bernards, 88 Wis. 111, 59 N. W. 576; 24 Am. & Eng. Enc. Law, p. 86; Jones Chat. Mortg. § 547; Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 Atl. 674.

The matter of constructive notice from the record is entirely a creation of statute.

Quackenbush v. Reed, 102 Cal. 493, 37 Pac. 755; Bourland v. Peoria County, 16 Ill. 538; Betser v. Rankin, 77 Ill. 289; Kelley v. Vandiver, 75 Mo. App. 435; Davidson v. Cooks, 45 App. Div. 616, 61 N. Y. Supp. 362; Lewis v. Johnson, 68 Tex. 448, 4 S. W. 644; Bartz v. Paff, 95 Wis. 103, 37 L. R. A. 848, 60 N. W. 297; Winslow v. Crowell, 32 Wis. 639; Church v. Smith, 39 Wis. 492.

Siebeck, J., delivered the opinion of the court:

The question presented is whether the re-

not very clearly expressed, we conclude that the revocation is complete when the instrument of revocation is filed for record, and that no actual notice to the agent is required." The court also said that, inasmuch as the statute provides that the power of attorney shall not be deemed revoked by any act of the party by whom it was executed, until the instrument containing such revocation shall be recorded, the inevitable conclusion from the language is that, when the instrument of revocation is so filed, the revocation shall be deemed complete; and that, as all persons dealing with the agent after the instrument of revocation has been filed for record are chargeable with notice of the fact, it could see no great necessity for notifying the agent.

The Nevada case does not appear to have been cited up to this time in any other case, except in *BEST v. GUNTHER*; and, so far as can be found after considerable search, these are the only cases directly on the question.

cording of the instrument signed by Mary T. Gunther, purporting to revoke the power granted to her husband to convey her lands, operated to terminate this agency. The common law required that a revocation of such authority be brought to the personal notice of the agent. *Kelly v. Phelps*, 57 Wis. 425, 15 N. W. 385; *Walker v. Denison*, 86 Ill. 142. It is not claimed that, at the time he executed the mortgage here involved, Arthur W. Gunther had been actually notified that his authority under the letter of attorney had been revoked; nor is it claimed that plaintiff had actual notice that the defendant Mary T. Gunther had taken any steps to revoke it. It is urged that the statutes providing that letters of attorney and other instruments containing a power to convey lands as agents or attorneys for the owner may be recorded in the office of the register of deeds of the county wherein the lands to which they relate are situated, and that the authority granted by such a letter or other instrument shall not be deemed revoked by any act of the party who executed it, unless the instrument containing such revocation be also recorded in the same office, are an abrogation of the common-law rule; and that the recording of an instrument of revocation in itself effects a termination of the agency, and serves as a notice to all persons. This contention is, however, not justified by the terms of the recording statutes. The extent to which the recording of instruments, under the statutes, shall be deemed notice thereof, is specified by these enactments, and they contain no provisions declaring, expressly or by implication, that the recording of these instruments shall be deemed an abrogation of the common-law rule which requires the giving of notice to terminate the authority granted by them. Section 2242, Rev. Stat. 1898, defining what the term "conveyance," as affecting title to land, shall be construed to embrace, clearly indicates that a letter of attorney and an instrument revoking the authority conferred thereby are not included within the terms used in this chapter, and they can therefore not be affected by the provisions of the statutes which declare the effect of recording conveyances of real estate, and which were enacted for the purpose of protecting subsequent purchasers in good faith and for a valuable consideration. *Fallass v. Pierce*, 30 Wis. 443; *Gilbert v. Jess*, 31 Wis. 110; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614; *Edwards v. McKernan*, 55 Mich. 520, 22 N. W. 20; *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054.

The context of §§ 2237, 2246, Rev. Stat. 1898, providing that letters of attorney and other instruments containing powers to con-

vey lands may be recorded as therein prescribed, and, when so recorded, shall not be deemed revoked by any act of the party who executed them, unless the instrument of revocation be also recorded in the same office, contains nothing to the effect that such recording is necessary to give them validity; and it is not prescribed that the recording of the instrument of revocation shall take the place of the actual notice to the agent required at common law to terminate it. The case of *Arnold v. Stevenson*, 2 Nev. 234, is relied on as authority to the effect that the recording of the instrument of revocation operates, under the statute, as a notice to the agent and all persons dealing with him that the authority is terminated. The decision cannot serve as an authority for the construction of our statute, for the reason that the Nevada statute on the subject expressly provides that the recording of the instrument shall "impart notice to all persons of the contents thereof," and, as above stated, our statute contains no such provision. It is manifest that, since the statute does not operate to give such notice, it is necessary to comply with all the requirements of the common law for revoking the authority granted by a letter of attorney or other instrument containing a power to convey land; but, when such instrument has been recorded, a common-law revocation shall be ineffectual unless the instrument of revocation shall also be recorded in the same office. Applying this rule to the facts of the case, we must hold that Arthur W. Gunther had power to execute the mortgage which plaintiff now seeks to foreclose, and that the judgment appealed from was properly awarded. No other question arises for consideration.

Judgment affirmed.

A petition for rehearing having been filed, the following *Per Curiam* order was entered on October 3, 1905:

Rehearing denied, with \$25 costs.

Cassoday, Ch. J., dissenting:

I disagreed with the decision of this case at the time it was made, but, through some inadvertence, I failed to state the fact at the time the decision was announced. On this motion, I feel at liberty to briefly and respectfully state my views of the law applicable to the undisputed facts of this case. The question presented is whether the mortgage made and recorded November 16, 1900, and here sought to be foreclosed, is valid and binding as a security, although never executed by the defendant Mary T. Gunther, the sole owner of the land described in the mortgage, nor by anyone else with her consent or knowledge. True, the mort-

gage purports to have been executed by Arthur W. Gunther, assuming to act for and in the name of Mary T. Gunther, under and by virtue of a power of attorney executed by her and recorded about two years prior to the making of the mortgage. But within a year after the execution of that power of attorney, and about fifteen months prior to the making of the mortgage, Mary T. Gunther, under her hand and seal, duly executed a written instrument in terms expressly revoking, counterminding, annulling, and making void that power of attorney; and the same was duly acknowledged, witnessed, and recorded August 12, 1899. The contention is, and, as I understand, the court held, that such revocation was ineffectual and void, for the reason that the fact of such revocation was not "brought to the personal notice of the agent." Two cases are cited in support of such contention: *Kelly v. Phelps*, 57 Wis. 425, 426, 15 N. W. 385; *Walker v. Denison*, 86 Ill. 142-145. In the first of these cases the agent sued his principal for commissions on the sale of personal property by him, but which the principal refused to deliver. No such controversy is here presented. But the only object of such notice to the agent is to protect the agent. It is no protection to third persons dealing in good faith with the agent and without notice. 1 Am. & Eng. Enc. Law, 2d ed. p. 1220. In the other case, a patentee, after having given a power of attorney to Walker and another to sell the letters patent in certain territory named, sold and assigned all his interest therein to other parties, "who were aware at the time of the existence of the power of attorney," and two months thereafter the attorney under such power sold and conveyed the same interest in the patent to Denison, and took from him therefor a deed of the premises therein described; and the action was to set aside that deed, and the same was decreed by the trial court as prayed, and the judgment was affirmed by the supreme court, which held that the power was not coupled with an interest; "that the principal might revoke the power at any time, leaving the attorney to his action for breach of the covenant not to revoke;" that "when the principal, who has given a power of attorney to sell, himself sells and disposes of the thing before a sale by the agent, this will be a revocation of the power, by operation of law; . . . that, as the sale of the territory by the agent was without right and authority, and the conveyance of the land was made without consideration, a court of equity would require the agent and his wife, to whom the deed was made, to reconvey the land to the grantor." That case seems to be in line with 1 L.R.A. (N.S.)

my contention. See *Mechem on Agency*, §§ 219, 220.

Obviously the power of attorney in question was not coupled with an interest, as indicated in the case last mentioned. The statute prescribes how all conveyances of lands within this state or any interest therein should be executed. Rev. Stat. 1898, § 2216. Mrs. Gunther was expressly authorized by the statute to "convey her lands in this state, or any interest therein," by her "separate deed." Rev. Stat. 1898, § 2221. So the statute authorized her "by letter of attorney, executed and acknowledged in the manner" therein prescribed, to authorize her attorney to convey any interest in any of her real estate. Rev. Stat. 1898, § 2223. So it authorized her alone to execute and acknowledge "every such conveyance and letter of attorney" of or relating to her real estate. Rev. Stat. 1898, § 2224.

The important question is whether, prior to receiving the note and mortgage, the plaintiff had constructive notice that the power of attorney under which Arthur W. Gunther assumed to act in making them had in fact been revoked. The statute provides that "a letter of attorney or other instrument containing a power to convey lands as agent or attorney for the owner thereof when executed, acknowledged, and proved" as therein prescribed, may be "recorded." Rev. Stat. 1898, § 2237. Another section of the Revised Statutes provides that "no letter of attorney or other instrument containing a power to convey lands, when executed, acknowledged, and recorded as provided in this chapter, shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation be also recorded in the same office in which the instrument containing the power was recorded." Rev. Stat. 1898, § 2246. The obvious meaning of this section, to my mind, is that such power of attorney "shall be deemed to be revoked" in case "such revocation be also recorded in the same office in which" the power of attorney is recorded. But it is said that "a letter of attorney and an instrument revoking the authority conferred thereby are not included within the terms used in" chapter 100 of the Revised Statutes. The statute declares that "every conveyance of real estate within this state, . . . which shall not be recorded as provided by law, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall first be duly recorded." Rev. Stat. 1898, § 2241. Another section declares that "the term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument

in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity except wills and leases for a term not exceeding three years." Rev. Stat. 1898, § 2242. "Certainly the power of attorney was an "instrument in writing by which" an interest in real estate was authorized to be "created, alienated, mortgaged, or assigned, or by which the title to" Mrs. Gunther's real estate might "be affected in law or equity." The several sections cited are all contained in the chapter entitled "Of Alienation by Deed, and the Proof and Recording of Instruments Affecting Title to Land." "Authority to execute a deed must be given by deed." 2 Jones, Real Prop. in Conveyancing, § 1021. A mortgage thus purporting to be executed by a stranger to the title is on its face a mere nullity. Had the mortgage in question been so executed by Arthur W. Gunther before the power of attorney had been revoked, still it would have been valid only by virtue of the power of attorney. The power of attorney, therefore, would have been an essential part of such conveyance by way of mortgage. The sole object of the power of attorney was to affect the title to land; and hence, as indicated, the statutes fully provide for its being executed and recorded in the chapter "affecting title to land." The same is true of the revocation of the power, as appears from the statutes quoted.

The only object of recording such instruments is to notify persons subsequently dealing with the attorney or agent as to the extent of his power or want of power. Thus it was held in New York at an early day, under similar statutes to the sections here involved, that "a party dealing with an agent or attorney is bound to know the extent of his power, and is bound to inspect the instrument conferring it,—especially where there is but one transaction between them. . . . If, however, a power to convey is recorded, an instrument of revocation also recorded in the same county appears to be sufficient notice." *Williams v. Birbeck*, 1 Hoffm. Ch. 360. To the same effect is the decision in *Arnold v. Stevenson*, 2 Nev. 234, 239, where that case is cited approvingly. True, the statute of Nevada is slightly different from ours in its wording; but in my judgment it is the same in substance. The text writers seem to agree that the recording of such revocation pursuant to the requirement of a statute is constructive notice to all persons subsequently dealing with the attorney or agent. Thus, it is said by Mr. Jones that "it is provided by statute in nearly all the states, 1 L.R.A. (N.S.)

though in somewhat varying terms, that a power of attorney to convey real estate must be executed, acknowledged, and recorded in the same manner that conveyances are. In several states a power of attorney to convey is not deemed to be revoked, until the instrument of revocation is deposited for record in the same office in which the power is recorded." 2 Jones, Real Prop. in Conveyancing, § 1022, citing statutes in many states. Another writer says that "in some states the revocation of a power is required to be deposited for record in the proper office; and, where the revocation is recorded according to the statute, the authority is terminated, although the agent has no actual notice." 1 Am. & Eng. Enc. Law, 2d ed. p. 1221. Referring to such statutes, Mr. Mechem says that "these statutes commonly provide, also, that any instrument, revoking such a power shall or may be recorded in the same office, and make such recording in either case constructive notice of the facts which the record discloses. Where such statutes prevail, the recording of a revocation of the agent's authority is notice to all who may subsequently have occasion to deal with him; and, where the statute is imperative, the revocation cannot be given effect in any other way, unless by express notice." Mechem, Agency, § 229. The rule seems to be universal that "the death of the principal terminates a power to convey, and a deed made by the attorney after such death is void, even if he was ignorant of the fact of the death; though, if the power be coupled with an interest, it survives, and may be executed after the death of the donor." 2 Jones Real Prop. in Conveyancing, § 1037.

WISCONSIN SUPREME COURT.

WISCONSIN TELEPHONE COMPANY,
Appt.,

v.

CITY OF MILWAUKEE, Respt.

(.... Wis.)

1. Municipal corporations—licensing telephone poles.

The power to exact from a telephone company authorized by statute to erect its lines in the streets of a city a license fee for the use of such streets is not given to a

Case Note.—The question, When may a license fee be imposed upon a telegraph or telephone company authorized by statute to use streets?—has arisen in relation to the act of Congress of July 24, 1866 (U. S. Rev. Stat. §§ 5263, 5268, U. S. Comp. Stat. 1901, pp. 3579, 3581), which, in substance, provides that telegraph companies taking advantage of its provisions

municipal corporation by a charter conferring upon it general police power and the right to control and regulate its streets and prevent the encumbering of them.

2. Courts—examination of purpose of ordinance.

Courts have a right to determine whether or not ordinances sought to be upheld as police regulations were in fact passed for the purpose of raising revenue.

(October 24, 1905.)

APPEAL by plaintiff from an order of the Circuit Court for Milwaukee County overruling a demurrer to the answer in an action brought to enjoin the attempted collection of certain license fees. **Reversed.**

shall have the right to construct, maintain, and operate lines of telegraph over and along any of the military or post roads of the United States which have been, or may hereafter be, declared such by act of Congress. By Rev. Stat. § 3964, U. S. Comp. Stat. 1901, p. 2707, all letter-carrier routes, and, by the act of March 1, 1884, all public roads and highways, are declared to be post roads.

It was held in *St. Louis v. Western U. Tele. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, that such statute does not convey an unrestricted right to appropriate public property, but only a right to be exercised in subordination to public as well as private rights; and, hence, does not preclude the exaction of a reasonable sum per annum for every pole erected in the streets, for the privilege of using them.

This case is followed in *Postal Tele. Cable Co. v. Baltimore*, 79 Md. 502, 24 L. R. A. 161, 29 Atl. 819, Affirmed in 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356.

In *Western U. Tele. Co. v. Wakefield* (Neb.) 95 N. W. 659, it was held that said act of Congress does not preclude the imposition of a reasonable occupation tax on telegraph companies.

Nor the exaction, under the police power, of a reasonable fee for each pole and mile of wire, to cover the expense of municipal regulation and inspection. *Philadelphia v. Postal Tele. Cable Co.* 67 Hun, 21, 21 N. Y. Supp. 556.

But, where permission to occupy streets is granted to telegraph and telephone companies by state legislation, a different question is presented, for, as is said in *Dillon, Mun. Corp.* 4th ed. § 656, "the legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places." It necessarily follows that, when the state has granted away the right of the public, its municipal subdivisions cannot impose a license tax for revenue purposes.

In *Hodges v. Western U. Tele. Co.* 72 1 L.R.A. (N.S.)

Statement by Kerwin, J.:

Appeal from an order overruling plaintiff's demurrer to defendant's answer. The complaint alleges, in effect: The incorporation of defendant as a municipal corporation, the organization of plaintiff in 1882 under the statutes of Wisconsin then in force and the acts amendatory thereof, being re-enacted into § 1771, Rev. Stat. 1898; and that said plaintiff was so organized for the purpose of conducting a telephone business and maintaining telephone lines and exchanges, and in order to furnish lines of telephone communication to the public throughout the state of Wisconsin and other states. That, prior to the organization of plaintiff, the legislature of the state of

Miss. 910, 29 L. R. A. 770, 18 So. 84, it was held that a municipal corporation, the power of which over its streets is derived solely from the legislature, cannot impose a rental for their use upon telegraph companies permitted by statute to occupy streets without compensation to the state or to the cities. But the court adds: "We are not to be understood as denying or restricting the power of the city to regulate the use of its streets within legal limits."

In Pennsylvania, where a state statute authorizes telegraph companies "to construct lines of telegraph along or upon any of the public roads, streets, or highways, by the erection of the necessary fixtures," it has been held that a reasonable license fee may be imposed by municipalities, under the police power, to cover the expense of supervision necessary to the safety of the highways. *Chester v. Western U. Tele. Co.* 3 Lanc. L. Rev. 164, 2 Am. Elec. Cas. 93; *Western U. Tele. Co. v. Philadelphia*, 9 Sadler (Pa.) 300, 22 W. N. C. 39, 12 Atl. 144; *Lancaster v. Edison Electric Illuminating Co.* 8 Pa. Co. Ct. 178; *Allentown v. Western U. Tele. Co.* 148 Pa. 117, 33 Am. St. Rep. 820, 23 Atl. 1070; *Norristown v. Keystone Tele. & Teleph. Co.* 15 Montg. Co. L. Rep. 9; *Athens v. New York & P. Tele. and Teleph. Co.* 9 Pa. Dist. R. 253; *Taylor v. Postal Tele. Cable Co.* 202 Pa. 583, 52 Atl. 128. *Contra*, *Philipsburg v. Central Pennsylvania Teleph. & Supply Co.* 22 W. N. C. 572.

Whether the liability for damage to which the city is subjected by the presence of poles and wires in the streets, as well as the expense incident to the issuing of the license and to inspection and regulation, may be taken into account in determining the reasonableness of a license tax imposed under the municipal police powers, is a question on which the state and Federal decisions are in conflict. That it may be considered is affirmed in *Western U. Tele. Co. v. Philadelphia*, and *Taylor v. Postal Tele. Cable Co.* *supra*; and denied in *Philadelphia v. Western U. Tele. Co.* 40 Fed. 615, and *Postal Tele. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208.

Wisconsin, in prescribing the powers of telephone corporations, enacted a law which was re-enacted by § 1778, Rev. Stat. 1898, which was held by this court, in *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828, to apply to the plaintiff corporation; and that said statute applies to city streets, and authorizes a Wisconsin telephone company, including plaintiff, to construct and maintain its telephone lines along the streets of Wisconsin cities without applying for or obtaining from any city any franchise; and that no such city has the power to add to or detract from such legislative grant; and that the police power vested in said city to regulate its streets can be exercised only in harmony with said franchise. That, under said power conferred upon plaintiff, it established in defendant, city of Milwaukee, a telephone exchange, which was a part of its system of telephone lines and exchanges throughout the state of Wisconsin, and connected with other exchanges throughout the United States. That as a part of plaintiff's system, and necessary thereto, it has erected poles in defendant city along the streets and alleys thereof, and placed cross-arms, so called, thereon for the purpose of stringing wires by means of which plaintiff is enabled to carry on its said business. That the poles within the limits of said defendant city number 6,900, and plaintiff intends to constantly increase said number as the demand requires, and that most of said poles bear cross-arms, ranging in number from one to eight. That plaintiff did not construct and operate, and is not maintaining and operating, its said system within said city pursuant to any grant of authority or permission by defendant city, but constructed, maintained, and operated, and continues so to do, its telephone system, in said city by virtue of the authority conferred upon it by statute similar to and re-enacted in §§ 1771 and 1778, Rev. Stat. 1898, and without objection on the part of the defendant. That the poles and lines of plaintiff in said city are so located, constructed, and maintained as not to interfere with public travel, and in no way affect public safety or convenience, and that plaintiff has at all times complied with the requirements of law regarding the location, maintenance, and operation of its poles and lines, and that its system in said city is safe and convenient for public use. That its property is not assessed and taxed the same as the property of individuals, but by legislative enactment has been exempted from taxation, but required, in lieu of taxation, to pay a license fee prescribed by § 1222a, Rev. Stat. 1898. That it has at all times paid said license fee provided by law. That on February 9, 1 L.R.A. (N.S.)

1904, defendant adopted an ordinance which was thereafter approved and published, and which defendant claims has gone into force as a valid ordinance. The ordinance is entitled "An Ordinance Regulating the Construction and Maintenance of Poles and Their Attachments in or upon Any Street, Lane, Alley, Sidewalk, or City Property within the Limits of the City of Milwaukee, Wisconsin, for Telegraph, Telephone, Electric Light, or Other Poles in Said City, except Poles Owned by the Municipality Itself, and Providing a Penalty for the Violation Thereof." Sections 1 and 2 of said ordinance provide that such poles shall be designated by the name of such owners or lessees, and each pole shall have a distinct number not more than 10 feet from the grade of the street, and that such poles shall be placed, replaced, erected, and maintained only at such points as shall be designated by the board of public works; and that such board shall keep in its office an accurate record of the location of each pole as designated and permitted by it; and that such board at least once a year shall cause a thorough count, inspection, and record of the poles and cross-arms, and, if any shall be found defective, unsuitable, or unsound, it shall notify the owners or lessees to forthwith replace the same; and it shall be the duty of such owners or lessees to replace such defective, unsuitable, or unsound pole or cross-arm within forty-eight hours. Sections 3, 4, and 5 are as follows:

"Sec. 3. It shall be the duty of all such owners or lessees, on or before the first Monday in June, A. D. 1904, and annually thereafter, to apply in writing to the city clerk for a license to maintain for the ensuing year the poles and cross-arms then erected, specifying the poles to be maintained by their designation, as provided for in this ordinance, together with the number of cross-arms thereon; and the city clerk shall issue such license to such applicant upon presentation of a receipt from the city treasurer acknowledging payment to him, for the use of the city of Milwaukee, of \$1 for each and every pole authorized to be maintained thereby, including one cross-arm, if any, thereon, and 10 cents for each additional cross-arm. Said license shall authorize the maintenance of the poles and cross-arms designated in such application only, for the period of one year, to be computed from the first Monday in June of each and every year, and no longer.

"Sec. 4. All revenues derived from licenses under this ordinance shall be credited to and become part of the general city fund.

"Sec. 5. Any person, firm, company, or corporation who shall violate any provisions of this ordinance shall be subject to a pen-

alty of \$100 for each and every offense, to be sued for and recovered in the manner now provided by law for the recovery of like penalties; and the erection or maintenance of any single pole or cross-arm in violation of the provisions of this ordinance shall constitute a distinct and separate offense thereunder."

That the charter of the city of Milwaukee, chap. 184, p. 311, laws of Wisconsin for 1874, and acts amendatory thereof, confer certain powers upon defendant respecting regulation of the streets in said defendant city, but that said streets belong to the public under the Constitution and laws of the state of Wisconsin. That the state has granted, by act of the legislature, to plaintiff, the franchise and right to use such streets under § 1778, Rev. Stat. 1898, and that said defendant has no police control over its streets, except the police control granted by the provisions of its charter. That the police power granted to defendant by its charter confers no authority to pass and enforce the ordinance. That the exaction of the license fee in said ordinance is not authorized by law, nor by the provisions of chap. 184, p. 311, Laws 1874, and acts amendatory thereof. That said ordinance is void as being in contravention of the Constitution of the United States and of the Constitution of the state of Wisconsin. That said license fee specified in said ordinance is a tax, and that said ordinance was not passed with a view of regulating plaintiff's business or property, but for revenue purposes only; and that said license fee is arbitrary and unreasonable in amount. The complaint further alleges that the defendant threatens to enforce the ordinance, which will cause a multiplicity of suits and irreparable injury to plaintiff; and prays that defendant be enjoined, and that the ordinance be declared null and void.

The answer admits the material allegations of the complaint, but denies that the poles are so located and maintained as not to affect public safety, denies that the ordinance was passed without authority of law, and that the exaction of the license fee was not authorized, and that the ordinance was invalid or contravenes any provision of the Federal or state Constitution, and denies that the license fee of \$1 a pole is unreasonable.

Plaintiff demurred to the answer for want of facts sufficient to constitute a defense.

Messrs. Miller, Noyes, & Miller, for appellant:

The ordinance exacts a monetary consideration of plaintiff for the privilege of maintaining its poles and lines and conducting its business.
1 L.R.A. (N.S.)

Cooley, Taxn. p. 596; *Chilvers v. People*, 11 Mich. 43; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Neuman v. State*, 76 Wis. 112, 45 N. W. 30; *Harmon v. Chicago* (Ill.) 26 N. E. 697; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 40, 21 N. W. 828; *Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 611, 44 L. R. A. 565, 78 N. W. 735; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657, 114 Wis. 505, 90 N. W. 441.

The city has no power to license the maintenance of telephone poles.

State ex rel. Winkler v. Benzenberg, 101 Wis. 172, 76 N. W. 345; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747; *Kiel v. Chicago*, 178 Ill. 137, 52 N. E. 29; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *St. Paul v. Stoltz*, 33 Minn. 233, 22 N. W. 634; *Kansas City v. Grush*, 151 Mo. 128, 52 S. W. 286.

Messrs. Carl Runge and George E. Ballhorn, for respondent:

The court will not abridge the right of a city to make any needful and necessary regulations.

People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163.

The ordinance is valid under the authority of the city to regulate and control its highways.

State v. Foster, 22 R. I. 163, 50 L. R. A. 339, 46 Atl. 833; *Western U. Teleg. Co. v. Philadelphia*, 9 Sadler (Pa.) 300, 22 W. N. C. 39, 12 Atl. 144; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 40, 21 N. W. 828; *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 79, 22 L. R. A. 759, 41 Am. St. Rep. 23, 57 N. W. 970; *Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 604, 44 L. R. A. 565, 78 N. W. 735; *Baltimore v. Baltimore Trust & G. Co.* 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

The city has power to license under its power of regulation.

Monongahela City v. Monongahela Electric Light Co. 12 Pa. Co. Ct. 529; *Philadelphia v. Western U. Teleg. Co.* 11 Phila.

327; *Western U. Teleg. Co. v. Philadelphia*, *supra*; *Suburban Light & P. Co. v. Boston*, 153 Mass. 200, 10 L. R. A. 497, 26 N. E. 447; *Lancaster v. Edison Electric Illuminating Co.* 8 Pa. Co. Ct. 178; *Southwark R. Co. v. Philadelphia*, 47 Pa. 321; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990, 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 383, 5 Sup. Ct. Rep. 826; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *Ash v. People*, 11 Mich. 347, 83 Am. Dec. 740; *Marmet v. State*, 45 Ohio, St. 77, 12 N. E. 463; *Philadelphia v. Western U. Teleg. Co.* 40 Fed. 615; *State, Mühlenbrinck, Prosecutor, v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518; *State v. Herod*, 29 Iowa, 123; *Re Wan Yin*, 10 Sawy. 532, 22 Fed. 701; *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69, 23 Am. St. Rep. 558, 7 So. 885; *Baker v. Cincinnati*, 11 Ohio, St. 534; *Fayetteville v. Carter*, 52 Ark. 301, 6 L. R. A. 509, 12 S. W. 573; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; *Taylor v. Postal Teleg. Cable Co.* 202 Pa. 553, 52 Atl. 128; *Chester v. Western U. Teleg. Co.* 154 Pa. 406, 25 Atl. 1134.

A license fee is not a tax within the statutory restriction upon the power to tax.

State ex rel. Toi v. French, 17 Mont. 54, 30 L. R. A. 417, 41 Pac. 1078; *Fire Department v. Helfenstein*, 16 Wis. 136; *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 566; *State ex rel. Henshall v. Ludington*, 33 Wis. 107; *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372, 78 N. W. 407; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516.

Kerwin, J., delivered the opinion of the court:

The questions presented here upon the facts admitted by the demurrer are thus stated by respondent: "First. Has the city authority to exact a license such as is provided for in the ordinance, the enforcement of which the appellant seeks to enjoin? Second. Does the ordinance in question contravene the 14th Amendment of the Federal Constitution, and similar provisions of the Wisconsin state Constitution?"

The first proposition stated by counsel practically embraces the controversy before us, and we shall proceed to consider the right of the defendant city to exact the license fee. It is apparent from the argument of counsel for respondent, as well as from 1 L.R.A. (N.S.)

the authorities cited, that the ordinance is sought to be upheld under power of the defendant city to license the plaintiff and exact the license fee provided for in the ordinance. It is, however, contended that the license fee is not exacted for any right or privilege conferred upon the plaintiff, but simply as a police regulation; and reference is made to the provisions of the city charter conferring power to prevent the encumbering of streets, lanes, and alleys, and giving the city the right to control and regulate the streets, alleys, and public grounds of said city; and, under these provisions, as well as under the general police power, it is contended that the ordinance is in the nature of a police regulation. No power is conferred upon the defendant under its charter, or by any law of this state, to grant to the plaintiff the privilege of constructing, maintaining, or operating its telephone lines upon the streets of defendant city. This authority is specifically conferred by the legislature of this state, subject only to the provision that it shall not "obstruct or incommode the public use of any road, highway, bridge, stream, or body of water." No authority is conferred upon the defendant to impose any other condition upon the plaintiff, except such as it may lawfully impose under its power to control and regulate the streets, alleys, and public grounds, and prevent the encumbering thereof, and its general police powers. Beyond this it has neither the right to confer any privilege upon the plaintiff in the use and occupation of streets, nor to impose conditions. *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 604, 44 L. R. A. 565, 78 N. W. 735. It is very clear that the defendant had no power to exact a license fee from the plaintiff for the privilege of constructing, maintaining, or operating its telephone lines upon the streets of defendant city. *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828. And it is conceded on the part of the respondent that the ordinance can only be sustained on the theory of a police regulation. It will be seen, however, that the cases cited by respondent are cases where the license fee was upheld upon the ground that the municipality had the right to grant some privilege to the company licensed, and for the granting of which a license fee was sustained, or where the purpose of the ordinance was to regulate, and not to license. Counsel for respondent frankly concedes that the city has no franchise to grant to the plaintiff and no power to confer under which the poles and wires may be maintained in streets; but contends that, under the broad power of regulation conferred by

the legislature and the police power, it has the right to make and enforce reasonable regulations for the protection and safety of its citizens; and quotes at length from *Western U. Teleg. Co. v. Philadelphia*, 9 *Sadler* (Pa.) 300, 22 W. N. C. 39, 12 *Atl.* 144; but the case is not in point upon the proposition asserted, for the reason that the city of Philadelphia had the power to grant to the company the right to occupy the streets, and impose upon the company such conditions and regulations as the municipal authorities might deem necessary; and the court said: "That such is the relation of the city to the various companies which had been empowered to occupy its streets with a view to gain is to me abundantly clear, and they should not grudge a reasonable compensation for the space they occupy and the risks which she incurs on their account."

Counsel quotes from *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 *Wis.* 418, 72 *N. W.* 1118, to the effect that the charter of a corporation does not exempt it from police supervision and regulation, which is true as applied in that case, but the question here is not one of escape from police regulation, but whether the ordinance of the defendant is within it. *People ex rel. New York Electric Lines Co. v. Squire*, 107 *N. Y.* 593, 1 *Am. St. Rep.* 893, 14 *N. E.* 820, clearly involves a regulation under a statute of New York concerning such companies, and which provided for the removal of such wires and cables from the surface of the streets and laying the same under ground; and the court said (p. 602 of 107 *N. Y.*, p. 899, 1 *Am. St. Rep.* and p. 823 of 14 *N. E.*): "The claim that this law is void because it imposes a tax on the companies referred to cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and cause to be laid underground all such wires and cables as are required in their business; and there is no reason why such companies should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their own business." In *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 *Wis.* 72, 22 *L. R. A.* 759, 41 *Am. St. Rep.* 23, 57 *N. W.* 970, the question involved under the ordinance was one of reasonable regulation. The ordinance provided for the location and use of electric wires in the streets, reasonable safeguards for the same, and a penalty for the violation of the regulation. No license fee whatever was exacted. It was purely a regulation requiring safeguards and providing a penalty for failure to furnish the same. *Marshfield v. Wisconsin Teleph. Co. supra*, involved the question of the city's right to

control its streets and prohibit the encumbering of the same; and it was held that, under this power, the city had the right to prevent the encumbering by telephone poles certain of its streets in the exercise of a reasonable discretion, and that the common council had a reasonable discretion in the location of such poles. The dominant purpose of the street being for public passage, any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use. The decision only goes to the extent of authorizing a reasonable regulation on the part of the city. In *Baltimore v. Baltimore Trust & G. Co.* 166 *U. S.* 673, 41 *L. ed.* 1160, 17 *Sup. Ct. Rep.* 696, it was held that the street railway company, occupying the streets by permission of the municipality, was subject to reasonable regulations by subsequent ordinances, and that the city did not exhaust its power of regulation by one exercise of it. In *Philadelphia v. Western U. Teleg. Co.* 11 *Phila.* 327, the telegraph company commenced the construction of a new line on the streets, and the city sought to regulate such construction. Its right of regulation was sustained on the ground that the telegraph company was occupying the streets by permission of the city, under the restriction that it should not use the streets of Philadelphia without the consent of the mayor and city council first had and obtained. The cases generally cited by counsel for respondent from Pennsylvania and from the Supreme Court of the United States upon appeal from that state turn upon the laws of that state which authorize municipalities to grant permission to such companies to occupy the streets and impose such conditions and regulations as the municipal authorities may deem necessary. No such power is conferred upon municipal corporations in Wisconsin. *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 *Wis.* 23, 86 *N. W.* 657. *Ash v. People*, 11 *Mich.* 347, 83 *Am. Dec.* 740, upholds the right of the city of Detroit to pass an ordinance prohibiting the keeping of stalls for the sale of fresh meats outside of the public markets without license and payment of license fee under its charter, which expressly empowered the common council to license and regulate butchers and the keepers of shops and stalls. *Marmet v. State*, 45 *Ohio St.* 63, 12 *N. E.* 463, is a case where right to license is upheld under express legislative authority given. Also, in *State v. Herod*, 29 *Iowa*, 123, power was conferred upon the city to license. In *St. Louis* the title to the streets being in the city, and the charter giving the right to license, tax, and regulate telegraph companies, it was held that, the city having the right to grant

the use of the streets to telegraph companies, it regulates the use when it prescribes the terms and conditions upon which they shall be used. The case turns upon the power of the city to grant the right to use the streets to the telegraph company. *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990.

But we will not further extend discussion of cases cited by respondent. It is manifest they do not support the proposition that the defendant has authority to exact a license such as is provided for in the ordinance in question. The power rests in the state to determine what occupation shall be licensed. *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, *supra*; *Cooley*, *Const. Lim.* 7th ed. p. 884. And it is not claimed that any power has been granted to the defendant by the legislature to license the plaintiff; nor is it claimed that the plaintiff has failed to comply with all regulations respecting its use of the streets, or that it has violated the law granting it the right to occupy the streets by obstructing or in any manner interfering with the public use of the streets of defendant. And, no power having been delegated to defendant to license plaintiff, it could not exact a license fee as a means of raising revenue. *Wisconsin Teleph. Co. v. Oshkosh*, and *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, *supra*; *Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 604, 44 L. R. A. 565, 78 N. W. 735; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 114 Wis. 505, 90 N. W. 441; *Michigan Teleph. Co. v. Benton Harbor*, 121 Mich. 512, 47 L. R. A. 104, 80 N. W. 386. But it is claimed that the ordinance is a regulation, and not a revenue measure, and that it may be sustained upon the theory that the defendant has the right to impose such fee for supervision and inspection under the police power. Whether the city has power to impose any fee upon the plaintiff for inspection and supervision is not necessary to decide, and we do not decide, in this case, because it is clear that the ordinance was passed for no such purpose, but on the contrary, was an attempt to charge plaintiff for the privilege of maintaining its poles and wires in the streets. If the city had power to grant any privileges in the streets to the plaintiff, or had express authority from the legislature to license the plaintiff so as to bring its case within the authorities cited, the respondent's position would be quite different. But, as before observed, the defendant had no right or privilege to grant to the plaintiff, and no power to prevent its use of the streets in a reasonable manner consistent with the public use, and the provisions of 1 L.R.A. (N.S.)

the ordinance set out in the statement of facts show that it is a revenue measure, and not a regulation.

The ordinance requires telephone and telegraph companies to apply annually for a license to maintain, for the ensuing year, the poles and cross-arms then erected, and provides for payment, for the use of the city, of \$1 for each and every pole authorized to be maintained thereby. The ordinance further provides that all revenue derived from such license shall become part of the general city fund, and imposes a penalty for any violation; and further provides that the erection or maintenance of any single pole or cross-arm in violation of the provisions thereof shall constitute a distinct and separate offense thereunder. The plain import of this ordinance is that it grants the privilege to telephone and telegraph companies to occupy the streets of defendant city with their poles and cross-arms in consideration of the license fee exacted. *Neuman v. State*, 76 Wis. 112, 45 N. W. 30; *Chilvers v. People*, 11 Mich. 43; *Home Ins. Co. v. Augusta*, 50 Ga. 530. There is nothing in the ordinance indicating that the fee is exacted for inspection or supervision, or that it will be used for such purpose, or that any such amount is necessary to defray the expense of such inspection and supervision; and it is quite obvious that the aggregate amount sought to be collected would be far beyond the reasonable expense of such inspection and supervision. We think it safe to say that any reasonable cost of inspection and supervision would not exceed one tenth of the revenue chargeable according to the terms of the ordinance. True, where the power to license exists, a reasonable discretion is vested in the municipality; but courts have a right to look into ordinances with a view of determining whether they are passed for the purpose of revenue, although sought to be upheld as police regulations. Even if the city had the right to impose reasonable charges for inspection and supervision, it should not be permitted, under the guise of such power, to collect large amounts of revenue for the benefit of the city, regardless of the amount necessary for such inspection and supervision. And, where the court can clearly see that revenue, and not regulation, is the aim, and not the incident, and no power is given to license the occupation, the ordinance is void. *Wisconsin Teleph. Co. v. Oshkosh*, *supra*; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 40, 41, 86 N. W. 657; *Postal Telegr. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; *Michigan Teleph. Co. v. Benton Harbor*, *supra*; *New York v. Second*

Ave. R. Co. 32 N. Y. 261; *Memphis v. American Exp. Co.* 102 Tenn. 336, 52 S. W. 172.

It follows from what has been said that the order must be reversed.

The order of the court below is reversed, and the cause remanded, with instructions to sustain the demurrer.

WYOMING SUPREME COURT.

STATE OF WYOMING ex rel. OCTAVIUS A. HAMILTON

v.

LEROY GRANT, State Auditor.

(.... Wyo.)

1. Mandamus—payment of salary—officer removed.

Mandamus will lie to compel payment of salary to a public officer who is alleged to have been removed from office, since his right to the salary may be determined without any determination of the question of the right to the office as between him and his alleged successor.

2. Officer—removal.

A superintendent of a water division, who is appointed by the governor with the consent of the senate, may be removed from office in any manner provided by law, under constitutional provisions for the impeachment of the governor and other state officers for high crimes and misdemeanors, or mal-

feasance in office, and that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office in such manner as may be provided by law.

3. Public office—property right in.

There is no property right in a public office, so as to require notice and a hearing before a removal therefrom, under a constitutional provision that no one shall be deprived of property without due process of law.

4. Officer—removal—notice.

Notice and opportunity to be heard are not necessary before the removal from office of a public officer, where the statute provides that the removal shall be made upon filing the reasons therefor in the office of the secretary of state.

(August 1, 1905.)

APPPLICATION for a writ of mandamus to compel the issuance of a warrant for the payment of relator's salary as a superintendent of a water division. Denied.

The facts are stated in the opinion.

Mr. H. W. Moore, for relator:

An act is a mere nullity which does not give plaintiff an opportunity to be heard and answer charges against him, and which does not provide for serving notice on him and allowing him to appear and make his defense.

Coleman v. Glenn, 103 Ga. 458, 68 Am.

Case Note.—Throop on Public Officers, §§ 825, 828, lays down the doctrine that mandamus will not lie to determine, either directly or indirectly, a disputed question of title to a public office. He says the authorities are not in perfect harmony upon this question, for some of them recognize mandamus as a proper remedy for settling a disputed title to an office; but an issue upon the eligibility of a person to hold an office of which he is in possession cannot be raised upon mandamus to compel payment of his salary.

In *High on Extraordinary Legal Remedies*, § 105, it is stated that, in proceedings for the payment of salary, the courts will not ordinarily inquire into the eligibility of the officer whose salary is in question; but that, if there be no other claimant of the office, it would seem to be proper for the courts to determine whether the appointment under which relator claims is void.

In *Conlin v. Aldrich*, 98 Mass. 557, it was held that mandamus lies to enforce the right of a member of a school committee to act as a member of the board to the exclusion of one whom the other members wrongfully permit to act. And in *Keough v. Holyoke*, 156 Mass. 403, 31 N. E. 387, the court upheld the use of mandamus to determine the title to a municipal office.

And in Maryland mandamus is recognized as an appropriate remedy for one who claims 1 L.R.A. (N.S.)

title to a public office, such as state librarian. *Harwood v. Marshall*, 9 Md. 83.

Also, in *Eastman v. Householder*, 54 Kan. 63, 37 Pac. 980, mandamus was recognized as an appropriate remedy to regain possession of the office of superintendent of an insane asylum, from which the petitioner had been arbitrarily removed without cause.

But in *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14, it was held that mandamus would not lie to try the title to a public office.

And in *People ex rel. Nicholl v. New York Infant Asylum*, 122 N. Y. 190, 10 L. R. A. 381, 25 N. E. 241, the court held that mandamus is not the proper remedy to restore to office a person who had been wrongfully removed, after a successor has been elected to fill the vacancy caused by his removal. An information in the nature of quo warranto must be resorted to. *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L. R. A. 244, 93 Am. St. Rep. 222, 89 N. W. 204, is to the same effect.

The prevailing rule is that title to a public office will not be tried by mandamus. *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025.

Some courts hold that mandamus will not lie when the title to a public office is incidentally involved. Thus:

In *State ex rel. Addison v. Williams*, 25 Minn. 340, the court held that mandamus does not lie to obtain possession of the rec-

St. Rep. 108, 30 S. E. 297; Throop, Pub. Off. § 364; Mechem, Pub. Off. § 454; 19 Am. & Eng. Enc. Law, p. 662; *Denver v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784; *State ex rel. Denison v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *Field v. Com.* 32 Pa. 478.

A statute providing for the removal from office of such an officer for inefficiency, incapacity, neglect of duty, or other cause; and which makes no provision for giving him notice, or for allowing him to be heard in his defense,—is contrary to the constitutional guaranty which declares that no person shall be deprived of life, liberty, or property without due process of law.

Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Dullam v. Willson*, 53 Mich. 395, 51 Am. Rep. 128, 19 N. W. 112; *Denver v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784; *Benson v. People*, 10 Colo. App. 176, 50 Pac. 212; *Chase v. Hathaway*, 14 Mass. 221; *People ex rel. Peck v. Fire & Bldgs. Department*, 106 N. Y. 65, 12 N. E. 641; *State v. Donovan*, 89 Me. 448, 36 Atl. 982; *Re Murdock*, 7 Pick. 303, 12 Pick. 244; *Andrews v. King*, 77 Me. 231; *Ham v. Board of Police*, 142 Mass. 90, 7 N. E. 540; *Todd v. Dunlap*, 99 Ky. 449, 36 S. W. 541; *State ex rel. Meader v. Sullivan*, 58 Ohio St. 504, 65 Am. St. Rep. 731, 51 N. E. 48; *People ex rel. Smith v. Fire*

& Bldgs. Department, 103 N. Y. 370, 8 N. E. 730; *People ex rel. Freeman v. McGuire*, 27 App. Div. 593, 50 N. Y. Supp. 520; *People ex rel. Finlay v. Jewett*, 6 Cal. 291; *Collins v. Tracy*, 36 Tex. 546; *Lease v. Freeborn*, 52 Kan. 750, 35 Pac. 817; *Jacques v. Little*, 51 Kan. 300, 20 L. R. A. 304, 33 Pac. 106; *State ex rel. Hitchcock v. Hewitt*, 3 S. D. 187, 16 L. R. A. 413, 44 Am. St. Rep. 788, 52 N. W. 875; *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057; *State ex rel. Hastings v. Smith*, 35 Neb. 13, 16 L. R. A. 791, 52 N. W. 700; *Biggs v. McBride*, 17 Or. 640, 5 L. R. A. 115, 21 Pac. 878; *State ex rel. Carson v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384; *People ex rel. McLaughlin v. Fire & Bldgs. Department*, 106 N. Y. 676, 13 N. E. 92; *State ex rel. Atty. Gen. v. Hoglan*, 64 Ohio St. 532, 60 N. E. 627.

The plaintiff, being a state officer, is liable to removal only by the means pointed out by the Constitution, namely, impeachment; and the legislature was without authority to pass an act prescribing that "appointive state officers" could be removed by the governor; and such an act is absolutely void.

Nolen v. State, 118 Ala. 154, 24 So. 251; *Brown v. Grover*, 6 Bush, 1; *Lowe v. Com.* 3 Met. (Ky.) 237; *People ex rel. Burby v. Howland*, 17 App. Div. 165, 45 N. Y. Supp. 347; *Ex parte Hogg*, 36 Tex. 14; *Runnels*

ords of the office of county treasurer when the title to the office is incidentally involved.

In Missouri the rule is well settled that a claimant of a public office cannot contest his right thereto by mandamus to enforce payment of his salary, the title to the office being necessarily involved. The court held that quo warranto must be resorted to. *State ex rel. Simmons v. John*, 81 Mo. 13. And in the case of *State ex rel. Goodnow v. Police Comrs.* 80 Mo. App. 206, it was held that the right to an office cannot be ascertained by the mere action for the salary, where the incumbent of the office cannot be made a party. These Missouri cases lay down the doctrine that the title to the office must be judicially determined before the question of the right to salary will be decided. In Kentucky the same doctrine is applied in the case of *Gorley v. Louisville*, 104 Ky. 372, 47 S. W. 263, in which it was held that a detective of a city police force, who has been removed, and whose position has been filled by another, cannot maintain an action against the city to recover his salary accruing after his removal, before there has been an adjudication showing him to be entitled to the office.

In *Hartwig v. Manistee*, 134 Mich. 615, 96 N. W. 1067, the court held that mandamus will not lie to compel the city to pay a street commissioner's salary during the period between his suspension and the date

of removal, where his unfitness is assumed. The court refused to inquire into the regularity of the proceedings which resulted in removal, on the ground that, if the relator wished to raise that claim, he should proceed by quo warranto, as such an issue cannot be raised on an application for a writ of mandamus. In the case of *STATE EX REL. HAMILTON v. GRANT*, however, the court did, on the application for a writ of mandamus, consider the legality of the governor's action in removing the officer.

In *Hagan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265, a doctrine contrary to that established in *STATE EX REL. HAMILTON v. GRANT* is applied. In this case the court held that, in proceedings by a municipal officer, who has been removed, to recover his salary, the title to the office necessarily comes in question; and that question cannot be tried in such proceedings. In *Hadley v. Albany*, 33 N. Y. 603, 88 Am. Dec. 412, a similar doctrine is applied.

In *Wenner v. Smith*, 4 Utah, 238, 9 Pac. 293, a rule differing from that laid down in *Hagan v. Brooklyn* is applied. The court held that the title to the office of probate judge may be determined in an action by the claimant to recover the fees from an intruder. In this case the proceeding was not by mandamus, but by action against the intruder. The same rule is applied in *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299.

v. State, Walk. (Miss.) 146; State ex rel. Holmes v. Wiltz, 11 La. Ann. 439.

A superintendent of a water division of this state is a state officer.

New York & H. R. Co. v. New York, 1 Hilt. 562; People ex rel. LeRoy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; High, Mandamus, 3d ed. § 68, p. 79; Geter v. Tobacco Inspection Comrs. 1 Bay, 354, 1 Am. Dec. 621; Singleton v. Charleston Tobacco Inspection Comrs. 2 Bay, 105; State ex rel. Gill v. Watertown, 9 Wis. 254; State ex rel. Vail v. Clark, 52 Mo. 508.

Mandamus is an appropriate remedy to restore to his office a *de jure* officer who has been unlawfully removed therefrom, although the office is in the possession of another.

Pratt v. Police & Fire Comrs. 15 Utah, 1, 49 Pac. 747; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644; Kipley v. Luthardt, 178 Ill. 525, 53 N. E. 74; Johnson v. Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150; Hawke v. McAllister, 4 Ariz. 150, 36 Pac. 170; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; Keough v. Holyoke, 156 Mass. 403, 31 N. E. 387; Delgado v. Chavez, 5 N. M. 646, 25 Pac. 948; Metsker v. Neally, 41 Kan. 122, 13 Am. St. Rep. 269, 21 Pac. 206; Ex parte Lusk, 82 Ala. 519, 2 So. 140; Com. v. Gibbons, 196 Pa. 97, 46 Atl. 313; State ex rel. McMahon v. New Orleans, 107 La. 633, 32 So. 22; Sugden v. Partridge, 174 N. Y. 88, 66 N. E. 655; Thompson v. Troup, 74 Conn. 121, 49 Atl. 907; Schmulbach v. Speidel, 50 W. Va. 553, 55 L. R. A. 922, 40 S. E. 424; Akerman v. School Comrs. 118 Ga. 334, 45 S. E. 312.

Mr. W. E. Mullen, Attorney General, for respondent:

Quo warranto is not only the necessary and proper remedy, but the exclusive remedy, in cases of this kind, where a person is holding or occupying an office the title to which is in dispute.

Mechem, Pub. Off. § 217; McCrary. Elections, 3d ed. § 388; People ex rel. Wren v. Goetting, 133 N. Y. 569, 30 N. E. 968; State ex rel. James v. Lynn, 31 Neb. 770, 48 N. W. 881; 17 Enc. Pl. & Pr. pp. 407, 408; 2 Spelling, Inj. & Extr. Rem. § 1778.

Even if it were established that relator was wrongfully removed from office, mandamus would not be the proper remedy to restore him to the office.

People ex rel. Nicholl v. New York Infant Asylum, 122 N. Y. 190, 10 L. R. A. 381, 25 N. E. 241; State ex rel. White v. Barker, 116 Iowa, 90, 57 L. R. A. 244, 93 Am. St. Rep. 222, 89 N. W. 204.

The powers of the legislative department are absolute, except as restricted and limited L.R.A. (N.S.)

ed by the Constitution which the people have adopted.

State ex rel. Richardson v. Henderson, 4 Wyo. 535, 22 L. R. A. 751, 35 Pac. 517.

Subject to constitutional provisions or prohibitions, the authority of the legislature over public officers is complete and absolute.

Reals v. Smith, 8 Wyo. 170, 56 Pac. 690; Lee v. Uinta County, 3 Wyo. 52, 31 Pac. 1045.

The term "state officers" would seem to include only officers whose jurisdiction is general throughout the state, and who are heads of executive departments in the state government.

State ex rel. Hitchcock v. Hewitt, 3 S. D. 187, 16 L. R. A. 413, 44 Am. St. Rep. 788, 52 N. W. 875.

Impeachments do not lie against any but the superior officers of the state.

State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974.

Misconduct, as used in Const. § 19, includes not only any wrongful official act, but also neglect, malfeasance, omission to perform any official duty, or conducting the office in a generally incompetent manner.

Yoe v. Hoffman, 61 Kan. 265, 59 Pac. 351; State ex rel. Tilley v. Slover, 113 Mo. 208, 20 S. W. 788; Miller v. Roby, 9 Neb. 471, 4 N. W. 65.

A public office is not a contract, either express or implied, nor a grant; nor is it to be regarded as the property of the incumbent.

Reals v. Smith, 8 Wyo. 159, 56 Pac. 690. Notice or hearing was unnecessary.

Williams v. Gloucester, 148 Mass. 256, 19 N. E. 348; People ex rel. Jones v. Carver, 5 Colo. App. 156, 38 Pac. 332; O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Trainor v. Board of Auditors, 89 Mich. 162, 15 L. R. A. 95, 50 N. W. 809; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611.

The governor, having discovered that sufficient cause for removal existed, and having exercised the power conveyed to him, was not required, as a prerequisite for removal, to institute any investigation in the nature of a judicial or quasi judicial inquiry.

Trimble v. People, 19 Col. 187, 41 Am. St. Rep. 236, 34 Pac. 981.

The power of the governor in such cases extends to the removal of officers appointed by and with the consent of the senate.

People ex rel. Engley v. Martin, 19 Colo. 565, 24 L. R. A. 201, 36 Pac. 543; People ex rel. Stone v. Orr, 22 Colo. 142, 43 Pac. 1005.

A statute similar to chapter 59, Session Laws 1905, was passed by the legislature of the state of Washington, and, in construing

the same, the supreme court of that state held that no notice or hearing was necessary before making an order of removal.

State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281.

Mr. T. S. Taliaferro, Jr., *amicus curiae*:

No charges need be preferred, or notice given, to a person sought to be removed from office for incompetency, under a statute authorizing removal of a person when, in the opinion of the board, "he is incompetent to execute properly the duties of his office, or when, on charges and evidence, they shall be satisfied that he has been guilty of official misconduct or habitual or wilful neglect of duty."

Trainor v. Board of Auditors, 89 Mich. 162, 15 L. R. A. 95, 50 N. W. 809; Hallgren v. Campbell, 82 Mich. 255, 9 L. R. A. 408, 21 Am. St. Rep. 557, 46 N. W. 381.

It is not necessarily in conflict with fundamental law that an executive or other authority may remove a public officer without notice to him, or giving him a hearing.

What the people may do by an original or new Constitution, the legislature may do with reference to public officers, except as restricted by constitutional provisions.

Reals v. Smith, 8 Wyo. 170, 56 Pac. 690; Lee v. Uinta County, 3 Wyo. 52, 31 Pac. 1045; Ex parte Wiley, 54 Ala. 226.

The words "governor and other state and judicial officers" clearly include only those state officers of the same class and character as the governor; that is, elective, and not appointive, state officers.

People ex rel. School Dist. No. 3 v. Dolan, 5 Wyo. 253, 39 Pac. 752; State ex rel. Summerfield v. Clarke, 21 Nev. 333, 18 L. R. A. 313, 37 Am. St. Rep. 517, 31 Pac. 545; State v. Krueger, 134 Mo. 262, 35 S. W. 604.

The power of the legislature to provide in what manner nonimpeachable officers may be removed is plenary.

State ex rel. Hitchcock v. Hewitt, 3 S. D. 196, 16 L. R. A. 413, 44 Am. St. Rep. 788, 52 N. W. 875; State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974.

The fact that Mr. Hamilton was occupying the office of water superintendent at the time of the passage of chapter 59, Laws 1905, does not affect the right of Governor Brooks to remove him.

People ex rel. Gere v. Whitlock, 92 N. Y. 197; Williams v. Gloucester, 148 Mass. 256, 19 N. E. 348; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690; Lee v. Uinta County, *supra*.

No notice to Mr. Hamilton, or hearing, was necessary.

State ex rel. Atty. Gen. v. Doherty, 25 Ia. Ann. 119, 13 Am. Rep. 131; People ex rel. Jones v. Carver, 5 Colo. App. 156, 38 Pac. 332; O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949; Conklin v. Cunningham, 7 N. M. 1 L.R.A. (N.S.)

445, 38 Pac. 170; Trainor v. Board of Auditors, and Ex parte Wiley, *supra*; Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611; People ex rel. Engley v. Martin, 19 Colo. 565, 24 L. R. A. 201, 36 Pac. 543; People ex rel. Stone v. Orr, 22 Colo. 142, 43 Pac. 1005; State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281; State ex rel. Howlett v. Cheetham, 19 Wash. 330, 53 Pac. 349.

Beard, J., delivered the opinion of the court:

This is a proceeding commenced in this court, as a court of original jurisdiction, by the relator against the state auditor, praying for a writ of mandamus to compel the auditor to allow, draw, and sign a warrant on the state treasurer for \$100, being the amount of the salary claimed by the relator as superintendent of water division No. 4 of the state of Wyoming for the month of March, 1905. The relator presented his petition to Chief Justice Potter, and an alternative writ was issued by him and made returnable to this court.

The facts necessary to an understanding of the case, briefly stated, are as follows: On February 27, 1903, the relator was appointed, by the then governor of the state, superintendent of said water division for the term of four years, which appointment was confirmed by the state senate. He qualified, a commission was issued to him, and he entered upon the discharge of the duties of the office, and continued so to do until March 16, 1905, when he was removed from said office by the present governor of the state; the cause for such removal, as stated by the governor in writing and filed in the office of the secretary of state, being as follows: "Proof of Incompetency of O. A. Hamilton, Division Superintendent. Referring to tabulation of proofs taken in adjudicating rights on Green river and tributaries. Three hundred and thirty proofs submitted. Of these, 105 show no errors on face of tabulation; but of the 105 several petitions for corrections of descriptions of lands irrigated have been received and granted. Eighteen petitions for rehearing were received altogether from this work, and fully 200 would have been received if the errors had not been discovered in the office of the board of control prior to the issuance of final certificates of appropriation. The errors thus corrected by the board of control were of different character. Eighty-three per cent were in wrong descriptions of irrigated lands, 11 per cent in the date of priority, 4 per cent in the names of appropriators, and 2 per cent in unintelligible writing, miscalculations, etc. Owing to the necessity for reviewing the entire work, the state

engineer and superintendent of water division No. 1 went into the field in pursuance of an order of the board of control reopening the decree for correction. The entire matter was gone over, and many more corrections were made than were brought to the attention of the board through correspondence. This work has cost the state over \$200 in expense alone, besides the time of the administrative officers. It has cost the people much more in time and money. Similar errors have been found in all other proofs submitted by Mr. Hamilton. During the season of 1904 he spent a large part of his time mining along the Sweetwater river. He has never performed his part in the systemizing of the records pertaining to his division, and the card index belonging to that division is in the office of the board at Cheyenne. The photographic reproduction of a page of the Green river tabulation (a part of the records of the office of the board of control) is attached hereto. It is typical of the remainder of the tabulation." The photograph referred to was not attached to the pleadings, nor offered in evidence. On March 18, 1905, the governor appointed a successor to relator, until the convening of the next session of the senate, who immediately qualified. The relator was notified of his removal, but he was not notified to appear and show cause why he should not be removed; nor was he given a hearing upon charges before he was removed. He testifies, however, that, about February 20, 1905, he had a conversation with the governor about his resigning, and that he concluded not to resign; and that the governor then told him that, if he did not resign by March 15th, he would be removed; and that the governor gave, as his reasons for such contemplated removal, that relator's reports were erroneous, and that the state engineer and relator could not agree, and that it was not a good plan to have a board where its members were at loggerheads.

The claims of the relator are: (1) That he is a state officer appointed for a definite term, and therefore cannot be removed from office, except by impeachment; (2) that chapter 59, p. 101, Sess. Laws 1905, giving the governor power to remove from office appointive officers, is unconstitutional; (3) that, if said act is constitutional, such removal could not be made by the governor without charges being preferred, notice to relator, and a hearing, and that the attempted removal by the governor was null and void. On behalf of respondent, the attorney general objects to the consideration of the questions involved, on the ground that the title to the office is involved, and that mandamus is not the proper rem-

edy; and cites *Mechem on Public Officers*, § 217, where the rule is stated as follows: "It is well settled that mandamus will not lie to try the title to the office, or to compel admission to it, or to obtain possession of it, or to oust an usurper from it. In all these cases the party must resort to his remedy by quo warranto." Numerous authorities are cited, which, however, add nothing to the above statement. But the present proceeding is not brought against the appointee to succeed the relator, nor is the prayer to restore the relator to office. It may be conceded that quo warranto is the proper remedy to try the title to office between contending parties. Mandamus would be unfair, as well as inadequate, for the reason that it would be an attempt to secure an adjudication with but one of the parties claiming the office before the court. An examination of the prayer of the petition, if the facts stated warrant the relief prayed for, is frequently the best test of the nature of an action or proceeding; and that test, applied to this case, indicates that the purpose of the proceeding is not to determine the right to the office as between the relator and the appointee, but to compel the auditor to issue a warrant. The relator claims to be in office and entitled to the salary, and that it is the duty of the auditor to issue a warrant therefor; while the respondent alleges that the relator has been removed from office, and is not entitled to its emoluments, and that he has no duty to perform. The court will go no further in its decision than is requisite to determine the precise question presented by the issues. A decision in favor of the relator could mean no more than that he is a *de facto* incumbent of the office, and entitled to the emoluments thereof. It could not adjudicate, as between relator and appointee, as to which has the better title to the office. It could not declare the relator's title unassailable. On the other hand, a decision adverse to the relator would doubtless mean that he had been effectively removed, and has no right to the office. But there is nothing unfair to him in deciding the question, for his claims have been fully presented and argued to the court. In either case the rights of the appointee, who is not a party, are not involved, and the case is not one to try the title to an office between contesting claimants. The right of the court to entertain mandamus proceedings for the determination of the questions properly presented, notwithstanding the incidental inclusion of other matters more fitly presented by a proceeding in quo warranto has been upheld. In *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, the supreme court of California said: "An application for a writ of mandate to try title

to office would be answered at once by the suggestion that the law affords adequate process and procedure by an action of quo warranto or usurpation of office. But, when the writ is invoked to enforce a specific duty, and remedies at law are not adequate, aid will not be refused merely because occupancy, or incumbency, or title, is incidentally involved. It will act under such circumstances, as does equity, and inquire into and determine rights so far as, but no further than, may be necessary to the granting of the relief sought." See also High, Extr. Legal Rem. 3d ed. § 108. We are therefore of the opinion that we are not going outside of established legal rules in entertaining the application to the extent merely of determining whether or not the relator is entitled to the relief prayed for. The relator is entitled to the salary if he is the officer he claims to be, and he is such officer unless he has been removed. Therefore the legality of the governor's action in that respect is the only question to be decided.

We will first consider the relator's contention that he is a state officer, and cannot be removed, except by impeachment. The constitutional provisions with regard to his appointment are found in article 8 of the Constitution, which provides that the legislature shall, by law, divide the state into four water divisions, and provides for the appointment of superintendents thereof; that there shall be a state engineer, who shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. It further provides for a board of control, to be composed of the state engineer and the superintendents of the water divisions. In pursuance of these constitutional provisions, the first state legislature (Sess. Laws 1890, 1891, chap. 8, p. 91; Rev. Stat. 1899, §§ 848-850) divided the state into four water divisions, and provided for the appointment of a superintendent for each division by the governor, with the consent of the senate, who should hold his office for four years, or until his successor is appointed and shall have qualified, and providing that he shall have general control over the water commissioners of the several districts within his division, and shall, under the general supervision of the state engineer, execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation, and perform such other functions as may be assigned to him by the state engineer. It was under these provisions that the relator was appointed. The constitutional provisions with regard to the impeachment and removal of officers

are contained in §§ 18 and 19 of article 3, and are as follows:

"Sec. 18. The governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office."

"Sec. 19. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

The legislature passed an act (Sess. Laws, chap. 59, p. 101, approved February 20, 1905), as follows: "Any officer or commissioner of the state of Wyoming who shall hold his office or commission by virtue of appointment thereto by the governor, or by the governor by and with the advice and consent of the senate, may be removed by the governor from such office or commission for maladministration in office, breach of good behavior, wilful neglect of duty, extortion, habitual drunkenness, or any other cause deemed by the governor to justify and warrant such removal; Provided, reason for such removal shall be filed in the office of the secretary of state in writing, subject to inspection by any person interested." It was under the power conferred by this act that the relator was removed.

It will be observed that the causes for impeachment are "for high crimes and misdemeanors, or malfeasance in office," including only criminal conduct or positive wrongdoing; while officers not liable to impeachment may be removed for "misconduct or malfeasance in office;" thus very greatly extending the causes for removal authorized to be provided for by law. We are very clearly of the opinion that it was not the intention of the framers of our Constitution to require that the jurisdiction of the high court of impeachment should be invoked to try and remove minor and subordinate officers, especially as the term of office of many of such officers would expire by limitation during the session of the legislature at which they could be impeached; and, again, that court would have no jurisdiction in cases of "misconduct" not amounting to a high crime or misdemeanor or malfeasance in office. We are strongly inclined to the opinion, without deciding the point, that the officers liable to impeachment are the governor and other state officers mentioned in § 11, art. 4, of the Constitution, which does not include the officer in question. Certainly, and it has generally been so considered, only the superior executive and judicial officers of a state are subject to impeachment; and we have found no case where an officer holding by appointment, or an inferior officer of any kind, has been held subject to impeachment. On the other hand, it has been held that such

officers are not so subject. 15 Am. & Eng. Enc. Law, 2d ed. p. 1065; State ex rel. Hitchcock v. Hewitt, 3 S. D. 187, 16 L. R. A. 413, 44 Am. St. Rep. 788, 52 N. W. 875; State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974; State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281. The constitutional provisions of these states are similar to ours. The supreme court of South Dakota says: "The Constitutions of many of the states contain the same language as our own, defining what officers are subject to impeachment; but, so far as we have observed, such language has not been taken to include officers who hold by appointment, either by the governor or some supervising board authorized to make such selection and appointment." The supreme court of Washington has given us a rational view of the subject: "As a general rule, the term 'state officer' is only applied to those superior executive officers who constitute the heads of the executive departments of a state." Again: "The 2d section provides that the governor and other 'state' and judicial officers . . . shall be liable to impeachment; and the 3d section provides that all officers not liable to impeachment shall be subject to removal for malfeasance in office in such manner as may be provided by law. If 'state officers' should be taken to include all officers who have to do with the state's business, officers of all grades would be subject to removal by impeachment only, and there would be no use of § 3. But it is a matter of general as well as legal knowledge that impeachments do not lie against any but the superior officers of a state, and that it is usually limited to the executive and to the judiciary; and this was the intention in this article." Cases *supra*. Applying the reasoning of the Washington court, an interpretation of § 18, art. 3 of the Constitution, which would make it include minor and subordinate officers, would render § 19 meaningless and superfluous. There is no doubt in our minds but that the superintendent of a water division is such an officer as, under § 19, art. 3, of the Constitution, may be removed in the manner provided by law.

It is argued that the act under consideration (Sess. Laws 1905, chap. 59, p. 101,) contravenes the Bill of Rights, providing that no person shall be deprived of life, liberty, or property without due process of law. But the notion that there may exist a property right in a public office is not generally accepted. "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust, to be exercised for the benefit of the public. Such salary as may be attached to it is not 1 L.R.A. (N.S.)

given because of any duty on the part of the public to do so, but to enable the incumbent the better to perform the duties of his office by the more exclusive devotion of his time thereto." State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 109, 5 N. E. 228, 233. "A public office is not to be regarded as the property of the incumbent." *Reals v. Smith*, 8 Wyo. 159, 56 Pac. 690. "Subject to constitutional provisions or prohibitions, the authority of the legislature over public offices is complete and absolute." *Ibid.*; *Lee v. Uinta County*, 3 Wyo. 52, 31 Pac. 1045. It is well settled in this state that the Bill of Rights does not interfere with legislative control over public offices, and that such control is complete within the express constitutional limits. The legislature, however, under the provisions of § 19, art. 3, of the Constitution, did have express warrant for the passage of an act for the removal of officers not subject to impeachment and the method of procedure in effecting such removal is not limited by any other constitutional provision. Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611.

The only question that remains to be considered is the contention of counsel for relator that relator could not be removed, lawfully, without charges being preferred against him, notice of the time and place of a hearing upon such charges, and an opportunity to make defense. Counsel for relator has cited many authorities on this proposition, which sustain the rule as laid down in *Mechem on Public Officers*, § 454, which is as follows: "Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing; but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense." In the two leading cases cited by counsel for the relator (*Coleman v. Glenn*, 103 Ga. 458, 68 Am. St. Rep. 108, 30 S. E. 297, and *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112) the principle is recognized that, where the statute so provides, the removal may be made without notice. In the Georgia case, on page 460 of 103 Ga., page 108 of 68 Am. St. Rep., and page 297 of 30 S. E., the writer of the opinion quotes with approval the above quotation from *Mechem*; and in the Michigan case, on page 402 of 53 Mich., page 134 of 51 Am. Rep., and page 116 of 19 N. W., the court

says: "Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte*, as well as summary, a removal without charges, notice, and an opportunity for defense cannot be upheld." It is true that the rule has been sometimes stated without the qualifying exception in the case of "clear statutory authority;" but such statements are evolved from cases where the question did not arise. The later Michigan cases show that officers may be removed without notice, where the statute gives such authority, and where there is no constitutional provision prohibiting it. *Hallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408, 21 Am. St. Rep. 557, 46 N. W. 381; *People ex rel. Clay v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091; *Trainor v. Board of Auditors*, 89 Mich. 162, 15 L. R. A. 95, 50 N. W. 809. See also *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236, 34 Pac. 981; *People ex rel. Gere v. Whitlock*, 92 N. Y. 101; *State ex rel. Kennedy v. McGarry*, 21 Wis. 496; *State ex rel. Howlett v. Cheetham*, 19 Wash. 330, 53 Pac. 349.

From an examination of the authorities, therefore, it seems correct to say that, when the legislature has conferred power on the governor to remove an appointive officer having a definite term, and the statute does not provide the procedure, it will not be presumed that such removal may be made without notice and a hearing; but, if the authority is expressly given to proceed summarily, no such notice is necessary. If, therefore, the statute under which the removal was made in this case had closed at the semicolon before the proviso, it might be a question whether notice to the officer and a hearing on charges might not be required. But the legislature, having declared that removals may be made, proceeds to prescribe the method or the conditions under which such removals may be made. Having conferred the power upon the governor in language which is plenary, it adds: "Provided, reason for such removal shall be filed in the office of the secretary of state in writing, subject to inspection by any person interested,"—thereby declaring the express conditions and limitations under which the governor may act. Having entered upon the realm of limitation, the enumeration of one condition precludes the idea that there should be others not expressed. *Expressio unius est exclusio alterius*. To our minds the language of the proviso is inconsistent with the idea of a hearing. The sole restraint upon the action of the governor is the filing of his reasons for the removal, and the consequent check of public opinion. In defining the duties of the governor, the Constitution (§ 1 L.R.A. (N.S.)

4, art. 4) provides: "He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed." Being vested with the power to appoint many subordinate officers, for whose conduct he is, in a measure at least, held responsible to the people, it was no doubt deemed wise by the legislature to also invest him with the power of summary removal of such appointive officers for misconduct in office, whatever might be the source of his information and knowledge of such misconduct, so long as in his judgment it existed; and that the filing of his reasons was a sufficient guaranty of his good faith, and that the power would not be abused, but would be exercised only when a faithful execution of the laws required it. It was argued that this lodges an arbitrary and unsafe power in the executive. But it may be a question whether the evils that might arise from such condition would be greater than those growing out of maladministration, or misconduct in office and the delays to be anticipated from protracted litigation under more cumbersome methods. At any rate, the question is one for the legislature, and not for the courts. The law can be repealed, if proved to be vicious. Its wisdom does not concern us, for our duty is simply to declare the law as we find it to be. There is no claim advanced by counsel for the relator that the reasons assigned by the governor are not such as, if true, would constitute maladministration or misconduct in office; and they seem to us to be well within these terms. *State ex rel. Tilley v. Slover*, 113 Mo. 208, 20 S. W. 788; *Yoe v. Hoffman*, 61 Kan. 265, 59 Pac. 351; *Century Dict.*

We conclude, therefore, (1) that the superintendent of a water division is one of those officers mentioned in § 19, art. 3, of the Constitution, and that the legislature had the power to provide by law for the removal of such an officer, in a summary manner, and without notice or a hearing, for one or more of the causes mentioned in said section; (2) that it was the intention of the legislature that removals from office, provided for in chapter 59, p. 101, Sess. Laws 1905, might be made summarily, and without notice or hearing; (3) that the removal of the relator from office by the governor was in accordance with law, and that, after such removal, the relator was not entitled to the salary of said office, and that the respondent was justified in refusing to issue a warrant to him for the same. It is therefore considered and adjudged by the court that the writ of mandamus prayed for by the relator be, and the same hereby is, denied. It is further ordered

and adjudged that the relator pay the costs of this action taxed at ———dollars.

Parmelee, District Judge, concurs. Potter, Ch. J., did not sit.

Petition for rehearing denied.

WYOMING SUPREME COURT.

JOSEPH M. HOWELL, Plff. in Err.,
v.

BIG HORN BASIN COLONIZATION COMPANY.

(.... Wyo.)

1. Irrigation—reservoir.

A portion of a gulch, which, by means of a dam, is converted into a section of an irrigation ditch, in which the water stands over an area 2,000 feet long, nearly 400 feet wide and in places 12 or 15 feet deep, and the connection between which and the outlet ditch can be closed so that it can be used as a storage place, is a reservoir, within the meaning of a statute providing that owners

Case Note.—The persistence with which water will seek its level renders the artificial accumulation of it above the ordinary level of the surrounding country more or less dangerous according to the quantity of water accumulated and the susceptibility of adjoining property to injury in case of its escape. The result is that there has been some tendency on the part of the courts, as represented in the case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, to hold one who accumulates water in large quantities as an insurer. On the other hand, water may be accumulated in small quantities without material danger to adjoining property. At the same time, the very facts that that is so, and that ordinary precaution will prevent injury from the accumulated water, render the case peculiarly one for the application of the principle that the injury itself is evidence of negligence.

Farnham, *Waters*, p. 2799, says that the degree of care required to avoid injury cannot be the same in all cases of stored water. There are many cases where the water can be stored with comparative safety, and where the effect of its escape will be slight, while in other cases the attempt to store is attended with such imminent danger, and the result of a breaking away of the water would be so disastrous, that the one attempting the storage may well be required to take all the risks of the enterprise. Therefore, no rule can be stated which will be applicable in all cases, but the extent of the liability must be determined from the circumstances of each case as it arises. And in the final conclusion it will probably appear that the question of liability depends upon the further question of negligence. The one attempting to store water must

of reservoirs shall be liable for leakage therefrom.

2. Same—discharging water on adjoining land.

The owner of an irrigation ditch is liable for the injury done by wilfully and knowingly discharging water therefrom through spillways upon adjoining property.

3. Same—waiver of injury.

A landowner waives his right to recover for the injury done to his land by the casting of water thereon by authorizing and directing the defendant to cast it there.

4. Same—injury by seepage.

Failure of a statute specifically to require the observance of a care in constructing and grading the bottom of an irrigation ditch will not exempt the owner from liability for injury to adjoining lands through seepage caused by negligence in that respect.

5. Same—liability for injuries.

The liability of insurers does not attach to persons conveying water in ditches for irrigation purposes; nor are they liable for injuries to adjoining property, not attributable to some fault or neglect on their part.

5. Same—negligence.

Constructing an irrigation ditch through exercise care commensurate with his undertaking.

The mere transmission of water through artificial ditches, as shown in *HOWELL v. Big Horn Basin Colonization Co.*, is, in the exercise of ordinary care, attended with such slight danger of injury to adjoining property that the question of liability will usually turn upon the question of negligence in the construction and maintenance of the ditch. This is well illustrated by the authorities cited in the *HOWELL CASE*; and in *Boulder v. Fowler*, 11 Colo. 396, 18 Pac. 337, it was held that a municipal corporation is liable for damages to property from overflow, by percolation or seepage, from street gutters which it makes use of for the purpose of supplying water to its inhabitants for irrigation purposes, where it fails to use ordinary care in the construction and management thereof,—such as a man of average prudence and intelligence would employ, under like circumstances, to protect his own property.

The liability of the water to do injury if allowed to escape must be continually borne in mind by the one attempting to make artificial use of it; and his failure to bear that fact in mind may be material upon the question of his negligence.

Thus, *Dunstan v. New York*, 91 App. Div. 355, 86 N. Y. Supp. 562, which cites *Reed v. State*, 108 N. Y. 407, 15 N. E. 735, discussed in the *HOWELL CASE*, held that a municipality is chargeable with knowledge that water in its water mains is a dangerous element if allowed to escape, and is liable for damages caused by its failure to exercise proper care in maintaining the pipes in a safe condition, even though they are rendered unsafe by the wrongful or negligent acts of others.

sand banks, and forming the bottom by sand and gravel loosely scraped together, and permitting such condition to continue after notice of its insufficiency, by reason of which the water seeps through the bottom to the injury of adjoining land, is evidence of negligence.

7. Same—injury obviated by drainage.

The fact that the injurious results of seepage from an irrigation ditch may be obviated by drainage may be shown, as affecting the measure of damages.

8. Same—evidence—consent.

The fact that plaintiff, an adjoining landowner, had not notified defendant, the owner of an irrigation ditch, of a claim for damages for casting water upon his property, is admissible in evidence upon a disputed question as to the existence of plaintiff's consent thereto.

(August 1, 1905.)

ERROR to the District Court for Sheridan County to review a judgment in favor of defendant, in an action brought to recover damages for alleged negligent injuries to plaintiff's property. Reversed.

The facts are stated in the opinion.

Mr. E. E. Enterline, for plaintiff in error: It was not incumbent upon the plaintiff to construct drainage ditches to carry away the water from his land, coming from defendant's ditch system.

Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; McCarty v. Boisé City Canal Co. 2 Idaho, 245, 10 Pac. 623; Flynn v. San Francisco & S. J. R. Co. 40 Cal. 14, 6 Am. Rep. 595; Yik Hon v. Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666; Burroughs v. Housatonic R. Co. 15 Conn. 124, 38 Am. Dec. 68; Philadelphia & R. R. Co. v. Hendrickson, 80 Pa. 182, 21 Am. Rep. 97; Fero v. Buffalo & State Line R. Co. 22 N. Y. 209, 78 Am. Dec. 178; Cook v. Champlain Transp. Co. 1 Denio, 91; Kellogg v. Chicago & N. W. R. Co. 26 Wis. 223, 7 Am. Rep. 69.

Notice to the defendant, under the circumstances of this case, was not necessary in order to fix a liability for the injury inflicted by it upon plaintiff's land.

Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215.

The consent given cannot be construed to have given the defendant company permission to discharge large quantities of water upon the land, and injure it.

Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437.

A person constructing a reservoir by which water is collected, and which may escape by overflow or percolation on the premises of another, is liable for damages caused thereby, notwithstanding he was not negligent in building or maintaining the reservoir.

Texas & P. R. Co. v. O'Mahoney (Tex. Civ. App.) 50 S. W. 1049, 24 Tex. Civ. App. 631, 1 L.R.A. (N.S.)

60 S. W. 902; Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

The owner of a ditch is liable for damage caused by seepage of water from it, and damages can be recovered even though there was no negligence in the construction of the ditch.

Arave v. Idaho Canal Co. 5 Idaho, 68, 46 Pac. 1024; Texas & P. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. 902 (Tex. Civ. App.) 50 S. W. 1049; Big Goose & B. Ditch Co. v. Morrow, 8 Wyo. 537, 80 Am. St. Rep. 955, 59 Pac. 159; Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. 819; Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 969; Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; Shields v. Orr Extension Ditch Co. 23 Nev. 349, 47 Pac. 194.

Messrs. E. E. Lonabaugh and Dewitt C. Wenzell, for defendant in error:

A license, while it remains unrevoked, is a justification for acts done under it, which would otherwise amount to a nuisance, in 21 Am. & Eng. Enc. Law. p. 723.

Woodward v. Seely, 11 Ill. 157, 50 Am. Dec. 445; Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405; Burkam v. Ohio & M. R. Co. 122 Ind. 344, 23 N. E. 799; Wilson v. St. Paul, M. & M. R. Co. 41 Minn. 56, 4 L. R. A. 378, 42 N. W. 600; Hathaway v. Yakima Water, Light, & P. Co. 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896; Crosdale v. Langan, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824.

A ditch company is not an insurer against all damages that may occur on account of the construction and maintenance of its ditch, but is only required to use reasonable skill, judgment, and care in the construction and maintenance of same.

Long, Irrigation, §§ 68, 69; King v. Miles City Irrig. Ditch Co. 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431; Lisonbee v. Monroe Irrig. Co. 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693.

Potter, Ch. J., delivered the opinion of the court:

This is a proceeding in error for the review of a judgment rendered by the district court, sitting in Big Horn county, in an action brought by Joseph M. Howell against the Big Horn Basin Colonization Company, a corporation, to recover damages for alleged injuries to a tract of land owned by the plaintiff, caused by overflow, leakage, and seepage of water from an irrigating ditch and reservoir constructed and maintained by the defendant. The cause was tried to the court without a jury, and, up-

on the findings of fact and conclusions of law, separately stated in writing, judgment was awarded the defendant for costs.

There are two causes of action set out in the petition; the first alleging injury to plaintiff's land from waters that leaked and seeped from a reservoir constructed, operated, and maintained by defendant; and the second alleging the negligent construction and maintenance of the defendant's ditch and reservoir, whereby large quantities of water leaked and seeped therefrom, and overflowed the same at certain spills or waste gates, and came out upon and flooded the land of plaintiff, causing a large part thereof to be covered with water, destroying growing crops thereon, and rendering the land useless and unfit for agricultural or other purposes. The allegations as to negligence, the escape of water from defendant's irrigating works, and the injuries to plaintiff's land are denied by the answer; and, in a second defense, it is alleged that plaintiff refused an offer of defendant to construct drainage ditches through and around his land to carry off any escaping water from defendant's irrigating works, and authorized and directed defendant to permit such escaping water to run into and upon the land of plaintiff; which license, it is averred, had not been revoked or withdrawn, otherwise than by bringing this action. The court found that, on different occasions since the construction and operation of defendant's ditch system, large quantities of water escaped therefrom at certain spills or waste gates, constructed as hereinafter explained, covering and flooding about 60 acres of plaintiff's land, and washing sand and dirt upon 2 or 3 acres thereof, and causing alkali to rise to the surface of a portion of such land, and that said 60 acres had become wet or boggy, and incapable of cultivation while in that condition; and further, that, by reason of the construction and maintenance of the ditch, water has seeped and percolated through the soil, rising and coming to the surface on about 21 acres of the land, not causing a permanent injury, but damaging the plaintiff by reason of such seepage in the sum of \$105. The court also found that none of plaintiff's land had been permanently injured, but could be drained and rendered fit for agricultural purposes; that the land was of little value; that defendant had notice that the water flowed through the spills aforesaid; that plaintiff had given his consent to defendant to permit the water escaping from the ditch, the waste gates or spills, and the ditch system to run over and upon his land, and had not revoked such consent at the time the action was commenced; that there had been no leakage or seepage through the banks of the ditch or

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alleged reservoir; and that defendant had not been guilty of malice or negligence. As conclusions of law, the court found that the alleged reservoir did not constitute a reservoir, within the meaning of § 974, Rev. Stat. 1899; that the consent of plaintiff aforesaid amounted to a complete defense to the action; and that defendant was not liable for the injury caused by seepage through the soil, but not escaping through the banks, the same not being the result of negligence on the part of the defendant.

It appears from the evidence that plaintiff is the owner of 160 acres of land situated on the northerly side and in the immediate vicinity of Shoshone river, from which stream the defendant, in the year 1900, constructed an irrigating ditch or canal; taking the ditch out at a point on such stream somewhere to the west or southwest of plaintiff's land, and running the same in a general northeasterly direction. The ditch does not cross plaintiff's land, but passes the same within a comparatively short distance from its west and north boundaries. As the ditch approaches a point about 2,500 feet west of plaintiff's land, it intersects the southern bank of what was theretofore a dry gulch, across which, and evidently near its eastern or southeastern extremity, the defendant constructed a dam or embankment about 20 feet in height, into which gulch, above the dam and on the side opposite plaintiff's land, the water carried in the ditch flows, thereby forming a lake or reservoir. The water therein backs up the gulch approximately 2,000 feet, and is probably 12 or 15 feet deep at the dam. The length of the dam is about 360 feet. The ditch is continued from the other or northerly side of the gulch, whence it proceeds more sharply to the east for some distance, and then about due northeast, passing north of and away from the land of plaintiff. At one point this outlet ditch approaches within 300 feet of one corner of the land. The line of the ditch is along slightly higher ground than plaintiff's premises, and the slope is generally in the direction of those premises. Below the dam there is a natural depression in the ground, called a "dry wash," which originally constituted a continuation of the gulch, forming with it a natural drainage for the country above. That dry wash continues upon plaintiff's land, terminating thereon in a natural slough, which runs northeasterly through the southeastern portion of the land. For the purpose of allowing the escape of waste water, and to protect the dam aforesaid against floods and freshets, the defendant built in the ditch, at or near either end of the dam, waste ways or spills. The water overflowing, or

flowing through such spills,—particularly the spill in the ditch on the northerly side of the gulch,—ran into the dry wash aforesaid, and upon the land of plaintiff, in such quantities, at times, that it flooded 63 acres thereof, rendering the same swampy; and in one or more places the water remained on the land, forming a pond. It appears that the dam was constructed with soil scraped from the gulch above, but subsequently that was supplemented with brush and timber backed up with dirt. The dam was originally about 100 feet wide at its base, which was later increased 40 or 50 feet. The evidence discloses that the exposed soil in the gulch was composed of sand and gravel, but there is no evidence as to the depth of such soil, or the character of the bottom of the gulch, as it was finally prepared to receive the water. The dam is apparently on a line with the lower bank of the canal on either side of the gulch, or connects therewith, so that the water is conveyed into the gulch and taken out immediately above the dam. It is evident, however, that the bottom of the gulch in the vicinity of the dam is several feet below the bottom of the ditch on either side, and hence a large body of water has been accumulated and retained therein.

It is clear, from the evidence, that the greater quantity of the water that flowed upon plaintiff's land and flooded it came over or through the spills, and principally, if not altogether, from the spill on the northerly side of the gulch. We think the evidence discloses that, until a few months prior to the trial, which occurred in December, 1903, a small quantity of water occasionally, if not continually, leaked through the embankment that was constructed across the gulch, which would naturally flow down the dry wash and into the slough on plaintiff's land, if sufficient in quantity. That leakage seems to have been entirely stopped at least three months previous to the trial; but none of the witnesses seem to have attached much, if any, importance to it as a factor in the injury complained of. The inference is strong that, had no other water escaped from the ditch or reservoir, the small amount that trickled through the dam would not have occasioned actual injury. The probabilities are that it might have proved beneficial to plaintiff. However that may be, there is no evidence that such leakage contributed in any appreciable degree to the alleged injury. We think that the only reasonable conclusion to be drawn from the evidence is that the flooding was caused by the water that flowed through or over the spills or waste gates. Indeed, that seems to have been the understanding of the witnesses on both sides. There is a de-

cided conflict in the evidence as to the exact source of the seepage. It is not denied that water rose to the surface in one or more places on plaintiff's land from beneath, showing clearly the presence of water in the soil from seepage or percolation. Nor is it denied that such water came from the ditch of defendant. But the plaintiff's witnesses were of the opinion that both the reservoir and the outlet ditch situated north of the land in question were responsible for the seepage, while, in the opinion of the witnesses who testified in behalf of defendant, it all came from the ditch, and none of it from the reservoir. Such a matter is perhaps incapable of absolute proof. But we believe that the opinion expressed by the defendant's witnesses is the more reasonable one, in view of the facts. The location of the surface evidence of the seepage, in the first place, favors that opinion, which is greatly strengthened by the manner in which the ditch in that locality was constructed. The line of that ditch appears to be along a side hill to the northeast of plaintiff's land, and it was constructed partly by cutting through sand banks, and partly for some distance by scraping sand and gravel down the side of the hill to form the bottom and lower bank. Where the latter method of construction was adopted, the bottom of the ditch to the depth of 5 or 6 feet was composed entirely of sand and gravel so brought down and deposited upon a natural rock base to bring the ditch bottom up to the required level. The tendency of water flowing through a canal so constructed to percolate through the loose soil, and the proximity thereto of plaintiff's land where the evidence of seepage occurred, together with the natural slope of the ground, furnish a substantial basis for the opinion that the source of such seepage was the ditch, rather than the reservoir. The opinion that the water in the reservoir contributed to the seepage was based largely upon the fact that in the winter season, when water is not flowing in the ditch, ice forms upon the land, thus showing the continual presence of water coming up through the soil. Witnesses for the defendant, however, testified that, even after water had ceased to flow in the ditch, seepage therefrom would continue to appear on the surface of the land below, owing to the complete saturation of the soil from water flowing in the ditch during the several months of the irrigating season. The evidence would, we think, amply justify a finding that the ditch aforesaid was the source of the seepage; and the court probably intended so to find, although the findings are perhaps not definite on that point. But the defendant maintained, and its own witnesses testified, that it came from the ditch, ow-

ing to the manner of its construction. For that reason, and in view of the principles upon which this case must be decided, it will be unnecessary to determine whether any of the injury caused by seepage was or was not the result of percolation from the reservoir. The trial court held that the accumulation of water in the gulch by the means above explained did not constitute a reservoir, within the meaning of § 974, Rev. Stat. 1899, which declares that "the owners of reservoirs shall be liable for all damages arising from the leakage or overflow of the waters therefrom, or by floods caused by breaking of the embankments of such reservoir." It will be unnecessary in this case, for reasons that will become apparent, to determine the precise degree of liability imposed by that statute. But, whatever the extent of such liability, we are clearly of the opinion that the use of the gulch in the manner stated constituted a reservoir, within the contemplation of the statute. The learned district court evidently considered the gulch as a part of the ditch, and the building of the embankment across it as a convenient contrivance merely for the conveying of the water to the place of ultimate use. No doubt, the company may have adopted the plan pursued with the view, largely or chiefly, of transferring the water to the other side of the gulch, and as a more feasible method than building a flume or running the ditch on grade around the sides of the gulch. Nevertheless the fact remains that the plan put in operation resulted in the creation of a somewhat extensive basin, wherein a large body of water was artificially collected and retained. The witnesses generally referred to the water thus inclosed as a lake or reservoir. Water remains therein the entire year. Not only is the retention of water in such basin a necessary consequence of the operation of defendant's irrigating works, but that result was evidently intended. The outlet ditch is provided with a head gate, supposedly for the purpose of shutting out the water from that ditch and thus, when desired, preventing its flowing out of the gulch; and Mr. Welch, the company's secretary, testified that after the close of the irrigating season of 1903 the outlet ditch was closed, and the reservoir filled up for winter use.

As ordinarily defined, a reservoir is a place where water collects naturally, or is stored for use when wanted, as to supply a fountain, a canal, or a city, or for any other purpose. Century Dict. Further argument seems unnecessary to show that this body of water, maintained by the defendant, constitutes a reservoir, not only according to accepted definitions and the general understanding, but within the meaning of the 1 L.R.A. (N.S.)

statute. A contrary view would, it seems to us, violate the terms and object of that statute. The error of the trial court in that regard, however, cannot be held to have operated prejudicially to the plaintiff. As above suggested, the cause of the greatest injury was the escape of water through the spills. There could exist no doubt of defendant's liability to respond in damages for the injury so caused, in the absence of sufficient exonerating facts, whatever may be the responsibility of reservoir or ditch owners under the statute or at common law. Clearly, the defendant had no right to willfully or knowingly discharge the water from its reservoir in that manner upon plaintiff's land, unless, as it alleges, the plaintiff had consented thereto. Although the spills were confessedly constructed to carry off waste water, and to guard against injury to the dam, reservoir, and ditch from freshets and floods, it appears that more or less water frequently, if not habitually, poured out through cracks or openings in the spills, and at times large quantities,—sufficient, as some witnesses testify, to irrigate four or five places of the size of plaintiff's tract. Some effort appears to have been made from time to time to avoid or lessen such flow of water by more perfectly closing the cracks in the spills, but such efforts do not seem to have entirely prevented the escape of water therefrom. Our understanding of the testimony is that the flooding of plaintiff's land from that source was not so much the result of a large amount of water flowing down on any single occasion, but, rather, a frequent or continual flow, that eventually saturated the land far beyond its power of absorption, thus rendering it swampy and in an unfit condition for cultivation or even grazing purposes, though there is considerable evidence to the effect that it was capable of drainage at comparatively small expense, and of being thereby brought into good condition. The only defense asserted in avoidance of liability for the damage thus occurring is that the plaintiff consented that defendant might permit the water so to flow through the spills and upon his land. Upon that question the evidence is conflicting, with the preponderance clearly favoring the defendant's claim. Three witnesses, including the manager of defendant company, testified that the plaintiff had, with knowledge of the manner in which the water was so escaping, verbally directed the officers and employees of the company to make no provision for diverting it from his land, but to allow the same to flow thereon. The manager testified that he proposed to plaintiff that the company would divert such water from his land by digging drainage ditches, but the plaintiff told him to let the

water run, and he would take care of it. This is corroborated by the testimony of a son of the manager. At a later period, according to the testimony of another employee of the company, who had observed the escape of the water from the spills, he was directed by plaintiff to allow the same to flow down and upon his land, who stated that he could use it. There is no evidence of a subsequent withdrawal of such consent or direction, or of any notification by plaintiff to defendant to keep the water from his land. On the contrary, the plaintiff testified that he acceded to the suggestion for digging drainage ditches, and indicated to the manager of defendant where such ditches could be made. It is admitted that there was some conversation between such manager and the plaintiff with reference to a proper location for a drainage ditch, but the former testified that it had reference only to a ditch which the company constructed to prevent water flowing upon the adjoining land of the plaintiff's brother. The plaintiff also denied having the later alleged conversation with the other employee. The foregoing brief statement of the substance only of the evidence on this subject is sufficient, we think, to show the conflict in the testimony, and that the trial court was justified in finding that the plaintiff had consented as alleged, so far as the water is concerned which escaped at the spills. We find no justification for finding that the consent applied to water otherwise escaping from defendant's irrigating works. It is perhaps reasonable to assume that, when the plaintiff gave his consent and directions as alleged, and thereby induced the company to refrain from taking the necessary and proposed precautions to prevent the escaping water from going upon his land, there was no anticipation on his part of the injurious consequences which followed. But the company cannot be held answerable for plaintiff's failure to foresee the detrimental result of his consent; it being free from fraud, misrepresentation, or malice. The proposal of the manager of defendant to divert the water from plaintiff's land does not appear to have been the result of complaint by the latter, but, on the contrary, to have proceeded from a desire on the part of such official to prevent possible injury to the plaintiff. The defendant having offered to construct drainage ditches, if permitted to do so, to divert the water coming from the spills away from plaintiff's land, but the latter, instead of acquiescing in such offer, having directed and authorized the defendant to allow the water to flow upon his land, his directions and conduct in that respect amounted to a waiver of his right to recover for the damage alleged to have been caused by such flowage. Griffin

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v. Lawrence, 135 Mass. 365. Having consented and directed that the water be allowed to go upon his premises, it was his duty, when injury subsequently became manifest, to call the defendant's attention to the matter and withdraw his consent. No doubt, had he done so in apt time, much, if not all, of the damage so occurring might have been averted. It is fair, at least, to assume that defendant would have done its duty in that regard. The refusal of the trial court, therefore, to award damages against defendant for the injury to plaintiff's land caused by the flowing of water over and upon the same from the spills and reservoir, must be sustained.

This brings us to the question of seepage. The findings of fact upon that subject are as follows: "That, by reason of the construction and maintenance of said ditch by defendant company, water has seeped, percolated and escaped through the soil, rising and coming to the surface on plaintiff's said land, over about 21 acres thereof, and that plaintiff's said land has not been permanently injured thereby; that plaintiff suffered damages thereby in the sum of \$105; that the said ditch and the embankments thereof, including the embankment across said gulch and the waste gates thereto, were properly constructed by said defendant, and that there is no leakage or seepage through the banks thereof; that said defendant was and is not guilty of any malice or negligence in the construction, operation, or maintenance thereof." Upon the facts so found, the court stated the following conclusion of law: "That for any seepage from said ditch system, not escaping through the banks of said ditch and embankment, but percolating through the soil and rising to the surface at a distance from said ditch,—the same not being the result of any negligence of defendant company, and it being impossible in any manner to guard against the same,—the defendant company is not liable." The number of acres found to have been injured through seepage appears to be a fair and reasonable deduction from the evidence, and the same, we think, is true respecting the finding as to the amount of damage from that cause. There is considerable conflict in the evidence regarding damages; such conflict covering the value of the land before and after the injuries complained of, the amount of the actual damage to the land, and the permanency of the injuries. The witnesses for the respective parties differed widely as to those matters. Those who testified for the defendant were generally of the opinion that, because of the naturally wild and sandy condition of the land, it had been permanently benefited by the flooding received; suffering only temporary ill effects,

capable of being overcome by drainage at very moderate expense. And the court found as a fact that the land had not been damaged in any sum whatever, except in the sum of \$105, as above mentioned, on account of the seepage. In estimating the damage from seepage, the sum of \$5 per acre was evidently allowed, which we think sufficiently large, under the evidence, to prevent its being disturbed on this appeal.

While maintaining that the proof shows negligence on the part of defendant, counsel for plaintiff in error contends that the trial court erroneously held that negligence was a necessary element of liability. The rule of absolute liability is insisted on in case of injuries caused by either reservoirs or ditches. In Colorado, where they have a statute, as in this state, declaring the owners of reservoirs liable for all damages from leakage or overflow, or by floods caused by breaking of the embankments, the court of appeals, without deciding whether or not the statute is absolute, and imposes responsibility regardless of conditions or circumstances, held it sufficiently absolute to relieve the plaintiff from alleging and proving negligence, and to cast upon defendant the burden of showing exonerating facts, if any; the damage and cause having been established. *Larimer County Ditch Co. v. Zimmerman*, 4 Colo. App. 78, 34 Pac. 1111. We are, however, relieved in this case from determining the extent of liability in relation to reservoirs, for the reason that the injurious seepage was shown to come from the ditch, and not the reservoir, by the preponderance of the evidence, as we think, as well as for another reason, about to be explained.

We have no statute defining the responsibility of ditch owners for injuries caused by escaping water. It is provided that they shall carefully maintain the embankments of the ditches, so that the waters thereof may not flood or damage the premises of others. Rev. Stat. 1899, § 901. And a ditch company is expressly required to keep the banks of its ditch in good repair, so that the water shall not be allowed to escape, to the injury of any mining claim, road, ditch, or other property located and held prior to the location of the ditch. *Id.* § 3069. There is also a provision authorizing the state engineer to inspect, during construction, any ditch, canal, or other work carrying more than 50 cubic feet of water per second of time, and to order such alterations or additions deemed necessary for the security of the work, or the safety of persons residing on or owning land in the vicinity of such works. *Id.* § 932. And such inspection may be requested, upon certain conditions, by any such resident or landowner. *Id.* § 933. By these provisions the legislature has shown

a scrupulous desire to protect against unreasonable injury from water conveyed through ditches, but they clearly fall short of imposing upon a ditch owner the burden of an insurer. The statutes require the exercise of care in the construction and maintenance of the embankments of a ditch, and contemplate the exercise of that degree of care which a prudent man, with due regard for the rights of others and the risk of his undertaking, would exercise in conveying through an artificial channel a substance such as water, that possesses detrimental and destructive, as well as beneficial and productive, qualities, unless properly restrained. But that is clearly the rule, without statutory aid. The failure to specifically require the observance of care in constructing and guarding the bottom of a ditch cannot be regarded as an exemption from liability, should damage be caused through negligence in that respect. The construction and operation of an irrigation ditch, either by an individual or corporation who has taken the necessary steps to acquire an appropriation of water, is a lawful enterprise: and, so far as the evidence discloses, the defendant had a lawful right to construct and maintain its ditch over the line traveled by it, and to convey water through the same to the place of use. This case, therefore, is unlike that of *Clear Creek Land & Ditch Co. v. Kilkenny*, 5 Wyo. 38, 36 Pac. 819, where liability for damage from seepage was upheld on the ground that the ditch was constructed across the land of the plaintiff without authority, no right of way therefor having been obtained. The well-settled rule is that the owner of an irrigating ditch is bound to exercise reasonable care and skill to prevent injury to other persons from such ditch, and he will be liable for all damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining, or operating the ditch. *Long. Irrigation*, § 68; 3 *Farnham, Waters*, § 634; 17 *Am. & Eng. Enc. Law*, p. 512; *Lisonbee v. Monroe Irrig. Co.* 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009; *King v. Miles City Irrig. Ditch Co.* 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431; *Jenkins v. Hooper Irrig. Co.* 13 Utah, 100, 44 Pac. 829; *Shields v. Orr Extension Ditch Co.* 23 Nev. 349, 47 Pac. 194; *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635, 63 N. W. 921; *Chidester v. Consolidated Ditch Co.* 59 Cal. 197; *McCarty v. Boise City Canal Co.* 2 Idaho, 245, 10 Pac. 623; *Turpen v. Turlock Irrig. District*, 141 Cal. 1, 74 Pac. 295; *Stuart v. Noble Ditch Co. (Idaho)* 76 Pac. 255; *Emison v. Owyhee Ditch Co.* 37 Or. 577, 62 Pac. 13. The principle is stated in *Gould on Waters* as follows: "A person may lawfully collect water by means of a dam, or in

ditches, canals, culverts, or pipes, and is not liable in such a case for injuries caused by the escape of the water, in the absence of negligence on his part. . . . If the injury is caused by hazardous experiments, by the imperfect construction of a dam or canal embankment, or negligence in maintaining it, or in opening flood gates, the owner is liable." Gould, Waters, § 298. "The measure of the care which the ditch owner is bound to use is that which ordinarily prudent men exercise under like circumstances when the risk is their own. And if he fails to exercise this degree of care, he is liable for the injuries which the water causes to the adjoining property in consequence of his negligence." 3 Farnham, Waters, § 634. The construction of ditches is one of the customary and recognized methods of appropriating water, and conveying the same for use in irrigation and for other necessary purposes. It is the method more generally, and, indeed, almost universally, employed. While those engaged in such an undertaking, attended with possible risks to others, should be answerable for the conduct thereof with diligence proportioned to the apparent risk, there is no substantial reason, we think, for holding them accountable as insurers, nor for injuries not attributable to some fault or negligence on their part. Occasional expressions may be found in judicial opinions apparently tending toward a more stringent rule. But examination will disclose in most, if not all, of such cases, where statutory provisions have not intervened, that liability was upheld on the theory of negligence. That we understand to be the effect of the case of *Shields v. Orr Extension Ditch Co.* 23 Nev. 349, 47 Pac. 194, much relied on by counsel for plaintiff in error. The Nevada court there sustained the refusal of certain instructions drawn upon the theory that the defendant might recover if it had not been guilty of negligence. The decision was, however, based on the ground that the uncontradicted testimony showed the existence of negligence, and hence the instructions were held inapplicable and misleading.

The district court therefore properly held that the plaintiff could not recover for the damage from seepage unless the same was shown to have resulted from the negligence of defendant. We think, however, that the evidence does not support the finding of no negligence. As already explained, the ditch from the reservoir runs along a side hill above the premises of plaintiff, where at least in one place a cut was made through sand banks, and in two or three places a fill was made by scraping sand and gravel down from the side of the hill to form the bottom and lower bank of the ditch; thus bringing the bottom some 5 or 6 feet above

the natural level of the ground. The seepage complained of most probably came from the parts of the ditch so constructed. The engineer in charge of its construction testified that, in his opinion, the seepage came from the cut through the sand banks, and that was also the opinion of the defendant's manager, on account, as he says, "of the loose condition of the sand banks." It appears that, at the time of construction, water was turned in and teams used in an endeavor to tramp the earth solid; but whether the company made any such endeavors after commencing the operation of the ditch, and the appearance of the seepage on plaintiff's land, is not sufficiently disclosed. The defendant's witnesses testified that the seepage was becoming less each year, because of the natural washing down and deposit of sediment in the ditch, as a consequence of the flow of water therein during each irrigating season; and, while the evidence shows that the officers and agents of the company knew of the seepage, it fails to show, we think, sufficient, if any, precautions on the part of the defendant to prevent the same. It is true that the defendant's engineer testified that the canal was properly constructed, and on proper grade to carry the water. But that opinion is clearly insufficient to sustain the finding that there was no negligence, in the face of the fact that the water constantly seeped from the ditch, to the knowledge of defendant, as a result of its construction through unusually loose and porous soil, without proper effort to prevent it. *Reed v. State*, 108 N. Y. 407, 15 N. E. 735. We need not decide whether a ditch owner would be liable for temporary seepage that might be the usual and necessary incident of a new ditch constructed by excavation in the generally prevailing soil of the country and in the usual manner. The question in that case, even, would depend upon the existence or nonexistence of negligence. It appears that the ditch south of the reservoir was excavated in the earth, and did not seep; and there is sufficient evidence to show that the places in the ditch in question where the seepage occurred were constructed through or with such unusually loose and porous soil as to require at least active endeavor on the part of the defendant to render it reasonably capable of holding water. The great benefit to be derived from such enterprises as that of the defendant does not authorize the promulgation of a principle that will permit one tract of land to be reclaimed at the expense of the destruction of another without compensation. If the company saw fit to construct its ditch through soil naturally incapable of holding water, it should at least have made all proper and reasonable

efforts to prevent seepage therefrom. Failing to do so, it was clearly negligent. *Ibid.*; *Scott v. Longwell* (Mich.) 102 N. W. 230; *Shields v. Orr Extension Ditch Co.* 23 Nev. 349, 47 Pac. 194; *Turpen v. Turlock Irrig. District*, 141 Cal. 1, 74 Pac. 295. In *Reed v. State*, 108 N. Y. 411, 15 N. E. 735, the New York court of appeals said: "The attempt to collect a large body of water into a limited space surrounded with a porous and gravelly soil, without taking adequate precaution to confine it to the receptacle prepared for it, was, upon the face of it, an inexcusable act of negligence in those having charge of such work, and cannot be justified under the known laws governing the motion of fluids." In the Michigan case above cited, recovery of damages was sought for injury caused by water seeping through the banks of a mill race. The damage occurred after the race had been emptied and cleaned, and water again turned into it. The court said: "In view of the undisputed fact that such a race was likely to leak on account of the scraping and cracks, I think that we could safely say, as a matter of law, that defendants were negligent in not taking proper precautions to prevent the water escaping. At any rate, defendants were bound to use care proportioned to the danger. If the question of defendants' negligence was one for the jury, the material circumstances to be considered by the jury were these: The probability of the escape of the water, and the precautions taken by defendants to prevent such escape." We do not think the evidence warrants the statement of the court, in its conclusion of law on this subject, that it was impossible for the defendant to guard against the seepage complained of. The seepage was continuous, not occasional or accidental. There is some testimony to the effect that the line of the ditch pursued the most practicable route, and that the plan of filling in along the depressions or low places was more advisable than fluming. Beyond that, no attempt is discerned to excuse or justify the defendant on the ground that the seepage, or the injury to plaintiff therefrom, could not have been avoided by the defendant, unless the admitted fact that water would usually seep through such loose soil as composed the bed and banks of the ditch at the points mentioned is to be viewed in that light. But if it be true that the ditch was constructed in such a place and manner, or through such soil, that it was impossible to prevent the continuous and large amount of seepage that occurred, or, at least, to avoid the injurious consequences thereof, then it might be difficult to find any reasonable basis for holding that the defend-

ant had exercised the required diligence, care, and skill in constructing its canal.

Over the objection of the plaintiff, the court permitted the defendant to show, on cross-examination of plaintiff's witnesses, and also by the testimony of its own witnesses, that much, if not all, of the alleged injury to the land of plaintiff could be overcome by proper drainage. The object of the testimony was evidently to show that the land had not suffered permanent injury. It was clearly admissible for that purpose, as bearing upon the question of damages. There is no indication that it was admitted upon the theory that plaintiff had contributed to the injury by his failure to properly drain his premises.

Error is also assigned upon the action of the court in admitting testimony to the effect that the plaintiff had not notified the defendant that he had a claim against it for damages. The evidence was, we think, properly admitted. It was pertinent upon the disputed question of consent to the flowage of water through the spills, and tended to show that such consent had not been withdrawn. It also had a bearing upon the question of plaintiff's good faith in connection with certain other proof, *viz.*, that, when he was approached by defendant's manager on the subject of compromise of the pending action, his only response was that the matter was out of his hands, and in the hands of his father, who appeared as one of plaintiff's chief witnesses.

The defendant being liable for the damages caused by the seepage, the plaintiff was entitled to judgment for the amount of that damage as found by the court, *viz.*, \$105. It is unnecessary to remand the cause for a new trial, as a proper judgment can be entered upon the facts found and sustained by the evidence.

The judgment will be reversed and vacated, and the cause remanded, with directions to the District Court to enter judgments for the plaintiff and against the defendant for the sum of \$105 and costs.

Beard, J., concurs. Van Orsdel, J., did not sit.

NORTH CAROLINA SUPREME COURT.

R. P. SPENCER et al., Appts.,
v.
SEABOARD AIR LINE RAILWAY COMPANY et al.

(137 N. C. 107.)

1. Railroad consolidation—one named in statute.

The naming of one railroad corporation with which another is empowered by stat-

ute to consolidate does not preclude a consolidation with others, where the statute continues, "and any transportation company now or hereafter incorporated by the laws of the United States or any of the states thereof."

2. Authority to consolidate—in what statute.

Authority of a railroad company to consolidate with another for the purpose of forming a through line across the state may be found in the provisions of the statute authorizing the latter company to form a consolidation with others, and need not of necessity be inserted in its own charter, or a statute passed with special reference to it.

3. Intent to authorize consolidation.

In determining whether or not a particular railroad company has been empowered

to consolidate with others, the expressed purpose of the legislature to create a through line across the state, and to connect with roads in other states, is to be taken into consideration.

4. Majority stockholders—power to consolidate.

An alteration of the charter of a corporation, impairing the obligation of the contract, is not effected by authorizing a majority of the stockholders to consolidate with another, and acquire the interests of dissenting stockholders under the right of eminent domain.

5. Eminent domain—taking minority stock.

The stock of dissenting stockholders in a railroad company may be taken by right of eminent domain upon payment of just compensation, for the purpose of effecting a consolidation of the road with others to

Subject Note.—Condemnation of shares of minority stockholders in American corporations.

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- IV. Property subject to condemnation.
 - a. In general, 611.
 - b. Shares of stock, 615.
- V. Some statutes in point, 615.
- VI. Conclusion, 617.

I. Introduction.

This note has been confined, designedly, to cases in the United States.

The reasons for omitting the English cases relating to the question under annotation are those stated by the late Chief Justice Doe, of New Hampshire, in the course of one of the most elaborate discussions to be found in the reports, of the rights and remedies of minority stockholders who dissent from proposed radical innovations upon the corporate scope and purposes authorized by legislative acts. He utters a warning against the use, in this class of cases, of the English and American colonial decisions as precedents under post-revolutionary constitutional governments. After referring to the remark of Selden, J., of the New York court of appeals, in *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, 355, that the earlier case in that state, of *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, 40 Am. Dec. 354, is in direct conflict with several English cases, Judge Doe calls attention to some fundamental differences between conditions in England and conditions in the United States. Parliament, he says, having authority to make any person a member of any incorporated or unincorporated partnership without his consent, and to make any alteration in his helpless condition, the question in English courts being merely whether Parliament intended to exercise that power, the decisions of that question are inadvertently cited in a manner that tends to throw doubt upon all 1 L.R.A. (N.S.)

constitutional security of private rights, and to countenance the idea that the people of New York are living under a government as absolute as the one they cast off when they ceased to be subjects of Great Britain. Cases in which a construction is given to the exercise of the unlimited power of Parliament, without occasion to consider the legal nature of legislative power, and without regard to the question whether the absolute sovereignty exercised in a particular instance is legislative, judicial, or executive, or neither, have a tendency, so far as they are followed in this country, to obliterate an essential feature of American government, and to re-establish the arbitrary dominion that was extinguished in this state (New Hampshire) by the Constitution. The argument from British precedent begs the question of legislative authority, and takes it for granted that the people of New Hampshire who went through the Revolution for rights of life, liberty, and property, which they considered natural, essential, and inherent, proceeded deliberately, at the close of the struggle, to set up a government as despotic as the one they overthrown. The usage of the American colonies and states before the adoption of constitutional limitations has been a misleading precedent. Under the nonlegislative reign of Parliament, and the preconstitutional government of this state, there was no limit to governmental power to be decided or considered by the court. On the question of power, English precedent and preconstitutional practice in this country establish either boundless despotism or nothing. *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510.

The power of eminent domain is the most far-reaching and the greatest of all the powers of sovereignty. In constitutional governments it is limited by only two restrictions, viz.: It can be exercised only for the public benefit, and the property taken must be paid for according to its value.

The necessities of the public are supreme, and private rights must yield to them. *State, Van Reipen, Prosecutor, v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740.

create a through line and subserve the interests of the public.

6. Estoppel—of stockholder to defeat consolidation.

A stockholder of a railroad company, dissenting from an attempt to consolidate the road with others, who, instead of taking prompt steps to prevent such consolidation, waits until after it is an accomplished fact and vast public and private interests have attached under the new conditions, will not be permitted to come into a court of equity for a forfeiture of the corporate charter, the appointment of a receiver, and the rescission of the merger, but will be remitted to his action under the statute for compensation for his stock.

(Douglas, J., dissents.)

(December 6, 1904.)

The right of the state to take property is an absolute and inherent one, restricted only by the Constitution in the feature that compensation must be made for the taking. It is an attribute of political sovereignty, and the Constitution affects only the mode of its exercise. Neither in the organic law, nor upon principle, is there any limitation upon legislative action other than that it shall be in the direction of public utility. *People v. Baltimore & O. R. Co.* 117 N. Y. 150, 22 N. E. 1026.

The right of eminent domain rests upon the principle that individual interests must be subservient to that of the public, and they must yield when public necessities require. This, however, in constitutional governments is not to be done but upon compensation. The principle is broad enough to include all kinds of property. *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

The principle underlies all forms of government, that for ends of the public utility and good all other ends should yield. *People v. Baltimore & O. R. Co.* 117 N. Y. 150, 22 N. E. 1026.

The right to take private property for public use without the consent of the owner, called the right of eminent domain, belongs, alone, to the sovereign. It embraces all cases where, by the authority of the state and for the public good, the property of the individual is taken without his consent for the purpose of being devoted to some particular use, either by the state in its sovereign capacity, or by a corporation, public or private, or by a private citizen to whom such right has been granted by the state. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 15 L. R. A. 505, 29 N. E. 1062.

The right of eminent domain rides over every other. It may, indeed, be truly said that this *jus publicum*, this eminent domain, is the law of the existence of every sovereignty. It is as vital to it as air to animal life; and hence, it has no limit 1 L.R.A.(N.S.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Wake County in favor of defendants in an action brought to rescind a consolidation of certain railroad lines. Affirmed.

Statement by Connor, J.:

This is an appeal by the plaintiffs from a judgment upon a demurrer *ore tenus* at the October term, 1904, of the superior court of Wake county. The *feme* plaintiff, Ida T. Spencer, alleged: That she was the owner of seven shares of stock in the defendant corporation, the Raleigh & Gaston Railroad Company, of the par value of \$100 each; that she acquired the said stock in 1887, and has owned the same continuously to the date of the institution of this action; that said stock is represented

but the necessities of the body politic, of which that body alone must be the judge. It is absolute over the persons as well as the property of its members. It commands the sacrifice of life as well as the surrender of possessions; and it would be strange, indeed, if to that sovereignty which can compel me to lay down my life in its service, the power should be denied of taking my property for its uses. At this time of day it is too late to set up any barrier to that power. It has been in constant exercise since the existence of society, and must continue unrestricted so long as society shall last. *Tucker, P., in Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42, 76, 36 Am. Dec. 374.

For the purposes of this note, it is taken for granted that the power of eminent domain operates alike upon natural and artificial persons, and to condemn corporate as well as individual property; that this sovereign power can be exercised only by virtue of an act of the legislature, which, to be constitutional, must provide for just compensation to the owner of the property condemned; and that the purpose for which, alone, any property can constitutionally be taken, must be a public one. But it is also assumed, notwithstanding some possible exceptions where peculiar constitutional language clothes the judicial branch of the government with power to adjudge whether or not the purpose for which property is sought to be condemned is a public one, that the well-established and widely recognized rule upon the subject is, in general, that the decision of the legislature as to what constitutes a public purpose is final and conclusive, when the question admits of any doubt whatever (*State v. Noyes*, 47 Me. 189); or, as the New Jersey court of errors and appeals stated it in *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, and repeated it in *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455, that it is one of the legislative prerogatives to decide the important question whether an enterprise or

by certificate No. 1,644, bearing date of April 13, 1887. "(2) That the defendant the Raleigh & Gaston Railroad Company was created and organized under an act of the general assembly of North Carolina (chap. 25, p. 17, of the Acts of 1835-36), and has since that day continuously exercised the corporate powers thereby conferred, until the alleged merger of said corporation in what is known as the Seaboard Air Line Railway. (3) That the said Raleigh & Gaston Railroad Company, acting under and by virtue of certain alleged and assumed powers attempted to be granted under an act of the general assembly of the state of Virginia, has endeavored to merge and consolidate itself with certain other railroads under the corporate name of the Seaboard Air Line

Railway, and has become the alleged holding corporation in respect to said other subsidiary corporations; that such alleged merger and consolidation was and is *ultra vires*, and beyond the corporate powers of said Raleigh & Gaston Railroad Company, and is invalid and void in so far as the plaintiffs are concerned. (4) That at a meeting of the stockholders of the said Raleigh & Gaston Railroad Company held in the city of Raleigh on May 20, 1901, in pursuance of a notice, a copy of which is hereto attached as part of this complaint, a majority of said stockholders undertook and attempted to take such action as would result in the merger and consolidation of said corporation as aforesaid; that said notice did not warrant such action; that at said meeting the said Ida

scheme of improvement be of such public utility as to justify a resort for its furtherance to the exercise of the power of taxation or eminent domain. Primarily the judiciary has no concern in such matters. And not only this, but, if the public interest be involved to any substantial extent; and if the project contemplated can, in any fair sense, be said to be promotive of the welfare or convenience of the community, the legislative adoption of such project is a determination of the question from which there is no appeal, and over which no other branch of the government has any supervision whatever.

The question as to what constitutes a public purpose warranting an exercise of the power of eminent domain is conceived to lie beyond the scope of this note.

II. Relation of stockholder to his associates and the corporation.

The relations of stockholders among themselves and to the body politic are contractual.

When one takes stock in a corporation one contracts with the company that his interest shall be subject to the direction and control of the corporate authorities to accomplish the objects of the organization. He does not agree that the enterprise to which he has subscribed may be changed in its purposes and character at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another. *Clearwater v. Meredith* (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604.

Early in the 19th century, in what Chief Justice Andrews of Connecticut more recently characterized as a leading and perhaps the earliest case in which the reciprocal obligations of a corporation and its stockholders are discussed, Chancellor Kent, of New York, enunciated and applied the principle that a fundamental change in the

purposes and business of a corporation could not be made by the majority of the shareholders without the consent of all and against the objections of some. *Livingston v. Lynch*, 4 Johns. Ch. 573.

It seems to be the settled law of America and England that any act of a corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied power of the charter of incorporation,—in other words, any *ultra vires* act,—is a breach of the contract between the corporation and each of the stockholders; and consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract set forth in the charter. *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833.

If the charter gives the corporation no right or power to go into a new enterprise, any one stockholder has the right to object. The fact that the new enterprise will be profitable has nothing to do with the matter. Each stockholder has the right, at his pleasure, to stand on his contract. That it will be for his interest to do otherwise is for him alone to judge. By becoming a stockholder, he contracted that a majority of the stockholders should manage the corporate affairs within the proper sphere of the corporation, but no farther. Any attempt to use the funds or pledge the credit of the company beyond the legitimate scope of the charter is a violation of the contract which the stockholders have made with each other, and of the rights—the contract rights—of any stockholder who chooses to say, "I am not willing." It may be that it will be to his advantage, but he may not think so; and he has a legal right to insist that the company keep within its chartered powers. *Central R. Co. v. Collins*, 40 Ga. 582.

This is substantially repeated by the Illinois supreme court in *Harding v. American Glucose Co.* 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577.

A change in the constitution of an associated company, which in effect substitutes

T. Spencer, by her attorney in fact, R. P. Spencer, appeared and protested against the action to be taken by a majority of said stockholders, and thereupon filed a written protest against such action, a copy of which is hereto attached as a part of this complaint; that prior to said meeting several other meetings had been held, at which plaintiffs were not present, and of which they had no notice, at which certain proceedings were had, which plaintiffs cannot state because the records of said corporation are not kept within the limits of the state, and plaintiffs have not been able to obtain access thereto; that the action of said meeting of May 20, 1901, was *ultra vires* and illegal and invalid and void as to the plaintiffs; that, after filing of said pro-

test, said R. P. Spencer, for himself, and on behalf of said Ida T. Spencer, withdrew from said meeting, and was not present thereafter, and took no part in the proceedings. (5) That the said Raleigh & Gaston Railroad Company, so far as plaintiffs are concerned, has since the alleged merger and consolidation preserved its corporate identity and separate existence as a corporation, notwithstanding that since then it has nominally constituted an integral part of the so-called Seaboard Air Line Railway, and although it has not since then separately exercised its corporate powers and discharged its corporate duties; that it has not held any meeting of its stockholders or of its directors; that it has not published any statements of its receipts and disbursements; that it has not

a new constitution, requires unanimous consent, and cannot be made without the assent or the whole body of the subscribers. *Davies v. Hawkins*, 3 Maule & S. 488.

There can be no consolidation of the stock of one corporation with that of another, so as to create a consolidated company composed of the stockholders of both corporations, without express statutory authority. To attempt such a scheme over the objection of a minority of the stockholders in either corporation is illegal and contrary to public policy. *Tompkins v. Compton*, 93 Ga. 520, 21 S. E. 79.

And this contract, like the contract created by the charter between the corporation and the state, is under constitutional protection.

A corporate charter is a contract, within the meaning of the Constitution of the United States, between the state granting and the corporation receiving it, the obligation of which it is beyond the power of the legislature to impair. The contract subsisting between the members of a corporate body and the corporation is equally protected by the Constitution. The doctrine that the legislature can confer upon any number of the stockholders who may own more than half the stock authority to accept charter amendments allows the charter to be altered in its most essential stipulations, not only without the approbation, but against the consent, of a great body of the corporators, thereby subjecting them to duties and responsibilities not imposed by their contract. This cannot be done without a clear violation of the Constitution. *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517.

Nothing is more certainly settled than that any fundamental alteration of a charter interferes with the rights of the corporators, and that no majority, however large, can compel any individual stockholder to submit. *Kean v. Johnson*, 9 N. J. Eq. 401.

After shareholders have contracted among themselves under legislative sanction, and expended their money in executing the mutual plan, a majority of their number cannot radically change the scheme, by virtue of 1 L.R.A. (N.S.)

a legislative enactment; and a dissenting stockholder cannot be compelled to engage in a new and different undertaking, without impairing the obligation of the contract between the stockholders and with the state. This proposition is as well supported by every consideration of justice and right as it is firmly embedded in judicial decision. *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455; *Mills v. Central R. Co.* 41 N. J. Eq. 2 Atl. 453.

The legislature cannot compel a stockholder to go into a new and distinct corporation without his consent, as such action is in violation of the contract resulting from the original charter. *Deposit Bank v. Barrett*, 11 Ky. L. Rep. 910, 13 S. W. 337.

It is well settled that two corporations cannot be consolidated, or one purchase the property and franchises of another, without the unanimous consent of the stockholders, even by legislative authority; for such a transaction works a fundamental change in the contract of the shareholders. *Louisville & N. R. Co. v. Howard*, 15 Ky. L. Rep. 25.

No change in a corporation which violates any of the substantial statutory conditions as they existed when he became a shareholder or subscribed for his stock can bind him if he dissents, or can compel him to submit to the new order of things against his will. *Tuttle v. Michigan Air Line R. Co.* 35 Mich. 247.

A consolidation of corporations, even when authorized by statute, is cause for the discharge of the stockholders who refuse to consent to it. *Shelbyville & R. Turnp. Co. v. Barnes*, 42 Ind. 498.

The relation between a corporation and each of its stockholders is one of contract, and any material change in the powers or purposes of the corporation, not in aid of the original object, made without the consent of the stockholder, is not binding upon him, even when authorized by an act of the legislature. *McCray v. Junction R. Co.* 9 Ind. 359; *Booe v. Junction R. Co.* 10 Ind. 93.

These general propositions have commanded judicial favor in an extended line of decisions. *Botts v. Simpsonville & B. C.*

declared any dividends, but has subordinated itself to the management and control of the officers and directors of the said Seaboard Air Line Railway, although, as plaintiffs allege, it has done so contrary to law and in violation of its corporate duties and obligations. (6) That immediately prior to, or immediately after, said stockholders' meeting of May 20, 1901, the said Raleigh & Gaston Railroad Company, acting through certain officers and agents, of whom plaintiffs cannot procure definite information, attempted to sell and sold 1,828 shares of the stock of said Raleigh & Gaston Railroad Company, which was held in its treasury for certain definite purposes; that the same was not sold for such purposes, but was sold in violation of the duties of said

officers and of the rights of the plaintiffs; that it was sold to certain parties whose names plaintiffs cannot ascertain, but who were directly interested in the organization of the said Seaboard Air Line Railway; that it was sold secretly, without being offered for subscription to the stockholders of said road, including the plaintiffs, or to the public, and without any opportunity for bidders to bid for same; that it was sold at a grossly inadequate price, and no account has ever been rendered in respect to its sale and purchase. (7) That, under the charter and amendments thereto of the said Raleigh & Gaston Railroad Company, it had no right or power to acquire stock of other corporations, nor to do any of the acts which it has attempted to do and has

Turnp. Road Co. 88 Ky. 54, 2 L. R. A. 594, 10 S. W. 134; *Fulton County v. Mississippi & W. R. Co.* 21 Ill. 338; *Mayfield v. Alton R. Gas & Electric Co.* 198 Ill. 528, 65 N. E. 100; *Carlisle v. Terre-Haute & R. R. Co.* 6 Ind. 316; *Fisher v. Evansville & C. R. Co.* 7 Ind. 407; *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Shelbyville & R. Turnp. Co. v. Barnes*, 42 Ind. 498; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 155; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. 517; *Tanner v. Lindell R. Co.* 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510; *Jones v. Concord & M. R. Co.* 67 N. H. 119, 38 Atl. 120; *Gregg v. Northern R. Co.* 67 N. H. 452, 41 Atl. 271; *Hartford & N. H. R. Co. v. Crosswell*, 5 Hill, 383, 40 Am. Dec. 354; *Blatchford v. Ross*, 54 Barb. 42, 37 How. Pr. 110, 5 Abb. Pr. N. S. 434; *Prothingham v. Barney*, 6 Hun, 366; *Tabor v. Earle*, 8 Hun, 1; *Indiana & E. Turnp. Road Co. v. Phillips*, 2 Penr. & W. 184; *International & G. N. R. Co. v. Bremond*, 53 Tex. 96; *Gulf, C. & S. F. R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342; *Stevens v. Rutland & B. R. Co.* 29 Vt. 545; *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78, Fed. Cas. No. 9,891.

"This is familiar law, running through all the cases, and cannot be controverted." *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455.

But a stockholder's consent need not be express. It may and will be implied from want of promptitude in objecting. If the dissentient wait until the change has been completed, and fortunes expended upon it, and public interests created in it, he will be deemed to have acquiesced. *Chapman v. Mad River & L. E. R. Co.* 6 Ohio St. 119.

And if a statute be in force when the objecting stockholder takes stock, authorizing the corporation, by vote of the stockholders, to make the change to which he objects,—for instance, to consolidate,—he is deemed to have taken his stock subject to the operation of the statute; and its provisions make a part of his contract as shareholder. *Mayfield v. Alton R. Gas & Electric Co.* 198 Ill. 528, 65 N. E. 100; *Nugent v. Putnam* 1 L.R.A. (N.S.)

County, 19 Wall. 241, 22 L. ed. 83; *Dickinson v. Consolidated Traction Co.* 114 Fed. 232; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223.

III. Remedies.

A dissenting stockholder may enjoin an unauthorized consolidation. *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

When it is proposed to consolidate two or more corporations, and the legislature consents, those stockholders who do not consent to enter the consolidated corporation are entitled to withdraw their shares of the capital stock, and may enjoin the consolidation till they are secured. *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

The supreme court of Pennsylvania in 1858 considered the right of a stockholder to prevent a consolidation of his corporation with another, on his prayer for an injunction, and decided to grant the injunction until security should be given to the dissentient in double the market value of his stock, to pay for such stock when its actual value should be ascertained. *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685.

The chief justice who wrote for the court, after postulating the necessity of a legislative authority for a consolidation; the right of a private corporation to abandon its charter and dissolve itself; and that any radical change, such as a consolidation, in the corporate purposes, scope, and identity was, as to objecting stockholders, equivalent to a dissolution,—proceeded to discuss the effects of such a change when authorized by statute and proposed by a majority of the shareholders, and to consider what any single disapproving stockholder could say and do in opposition. Such a stockholder, said he, cannot object that the contract between the state and the corporation, created by the charter, is violated, since both parties to that contract had agreed to change it. He cannot object that the company is not discharging its public obligations, for the legislature has relieved it, and, the state having released it, he cannot object to a dissolution.

done in connection with said merger and consolidation; that said acts are unknown to plaintiffs in detail and in their entirety, and will be, if possible, ascertained and disclosed to this court during the progress of this action; that all of said acts and doings which have resulted in said so-called merger and consolidation have been *ultra vires*, contrary to law, and in derogation of the manifest and inherent rights and privileges of the plaintiff Ida T. Spencer as a stockholder in said corporation. (8) That, if the said Raleigh & Gaston Railroad Company had maintained and discharged its separate duties as a corporation created and existing under the laws of North Carolina, the said stock of the plaintiff Ida T. Spencer would have largely increased in value,

and would now have been a valuable asset of said plaintiff, but that the said Raleigh & Gaston Railroad Company having undertaken to purchase the stock of other corporations and operate the same as a so-called holding corporation, having issued bonds to an amount at present unknown to plaintiff, having assumed the debts of many other corporations, having indorsed or guaranteed bonds of other corporations, having assumed the burden of extending lines of railway upon its own credit, all of which it has done, and done many other things which were *ultra vires* and destructive of plaintiff's rights in the premises as one of its stockholders, the said stock has been prevented from receiving the dividends the said road would otherwise have earned;

It is part of his contract that the corporation may dissolve itself; and, on dissolution, the rights and property, or their legal equivalents, are to be distributed among the members. But he may object that it is a violation of the contract between him and his associates to be one corporation for given purposes, that he invested for those purposes, and that the capital is being diverted. He may object that neither his co-corporators, nor the state, nor both united, are empowered to make a new contract for him, and to constitute him a member of a new corporation. Then what? In the instant case the corporation was a railroad, and its property and franchises were an indivisible unit. The objecting stockholder can no more force his fellow stockholders to go on with the old enterprise than they can compel him to enter a new one. And on dissolution, however effected, the only means of distributing an indivisible unit corporation's property and assets is by sale and distribution of the proceeds, or to allow one or more of the owners to take it and pay the others the value of their shares. *Ibid*.

The conclusion in this case was approved in *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78, Fed. Cas. No. 9,891, but McDonald, J., therein criticized its reasoning in the following manner: The only American case which I have found which seems opposed to the proposition that no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a private pecuniary corporation without the consent of all the stockholders, unless the charter itself has provided otherwise, is that of *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685. That "case decides that a single stockholder has no right to object to the consolidation of the company in which he holds stock with another railroad company. The learned chief justice who pronounced this decision cites no authority in support of it. His reasoning on it seems to me not very satisfactory. It may be a right under Pennsylvania laws touching railroad corporations. But it is singularly inconsistent with the judgment rendered in the case, which was that the 1 L.R.A. (N.S.)

complainant could not be made a stockholder against his will in the consolidated company; and that the consolidation should be enjoined till he was secured in the payment of the value of his stock. Why enjoin the consolidation at all if he had no right to object to it? His objection in that case seems to have been pretty effectual."

When the majority of the stockholders of a corporation, against the will of the minority, sell all the corporate property, thereby working a practical dissolution, the minority stockholders are not bound to take in payment for their stock a *pro rata* share of the proceeds of the sale, or, in substitution therefor, the stock of another corporation, but, at their election, may have from the proceeds of sale, whether it be money or property, the market value of their stock at the date of the sale, or their proportionate share of such proceeds; or they may, if they choose, follow the property into the hands of the purchaser, and share in the profits arising from its use in the same ratio that they would have shared if the sale had not been made. If the transaction was tainted with bad faith, they may, under some circumstances, have it set aside, and, if diligent, have an injunction against proceeding. *Tanner v. Lindell R. Co.* 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

If, against the consent of any shareholder, an association transfers its assets to a corporation in exchange for stock therein, the dissenting shareholder is entitled to a receivership of the assets, and to recover of those making the exchange the full value of his interest. *Frothingham v. Barney.* 6 Hun. 366.

When a consolidation of railroad companies is unauthorized as to an objecting stockholder, and is consummated by a wrongful appropriation of his equitable interest by the consolidated corporation, that body becomes equitably liable to him for the value of his stock. *International & G. N. R. Co. v. Bremond*, 53 Tex. 96.

It was the view taken by the Massachusetts supreme court in 1856, that, if a purely private corporation, which is under no obligation to the public to exercise its franchise,

that if the said Raleigh & Gaston Railroad Company had been operated as a separate and distinct corporation, as it was originally chartered, and as it was intended that it should be, the plaintiff's stock would have produced for her large dividends during the past few years, whereas, owing to the illegal and destructive acts hereinbefore mentioned, her stock has produced for her no dividends whatsoever. (9) That the value of plaintiff's stock is not measureable in any degree by its present market value, because it has none, nor by its antecedent market value, which is not pertinent to this controversy; that the effect of the merger and consolidation has been to completely destroy the corporate existence of said Raleigh & Gaston Railroad Company,

in so far as the actors therein could affect such destruction, and to destroy completely the value of the plaintiff's said stock, both commercially and intrinsically. (10) That the said Raleigh & Gaston Railroad Company, or the officers thereof, if any there be, or the officers of the Seaboard Air Line Railway, have either destroyed the books, records, and papers of the said Raleigh & Gaston Railroad Company, or have removed them beyond the limits of the state, either of which acts is contrary to law and in derogation of the rights in the premises of the said Ida T. Spencer as a stockholder in said corporation. (11) That the said corporation, the said Raleigh & Gaston Railroad Company, has ceased to act under and in pursuance of its

and is empowered to dissolve and liquidate any time a majority of its shareholders so determine, decides to go out of business, it may employ the method of transferring its property and assets to another corporation as a mode of so doing, and, always providing the action is in good faith, may take in payment, in lieu of cash, stock in the purchasing corporation, to be distributed to such of its stockholders as elect to accept it for their holdings, the others being paid in money the value of their shares. *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490.

The New York supreme court has since expressed the opposite opinion. *Taylor v. Earle*, 8 Hun, 1.

IV. Property subject to condemnation.

a. In general.

All private property, both tangible and intangible, is subject to the right of eminent domain. *People v. Adirondack R. Co.* 160 N. Y. 225, 54 N. E. 689.

Whatever exists which public necessity demands may be appropriated. *State v. Noyes*, 47 Me. 189.

Any property in existence, whatever its form, whether tangible or intangible, may be subjected to the exercise of the power of eminent domain, and may be seized and appropriated to the public use when necessity demands it. *Metropolitan City R. Co. v. Chicago West Div. R. Co.* 87 Ill. 317.

Strictly speaking, there is no such thing as an extinction of the right of eminent domain. If the public good requires, all kinds of property are alike subject to it,—as well that which is held under it as that which is not. Even contracts and legislative grants which are beyond the reach of ordinary legislation are not exempt. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.* 36 Conn. 196.

It is fully conceded that the right of eminent domain, the right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must 1 L.R.A. (N.S.)

judge, is a right incident to every government, and is often essential to its safety. And property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. Even the term "taking," which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Art. 10. Here again the term "appropriate" is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists which public necessity demands may be thus appropriated. *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1.

The word "property," in art. 10 of the Massachusetts Bill of Rights, which provides that, whenever the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor, is understood to include every valuable interest which can be enjoyed as property and recognized as such. *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155.

The power of the state to take private property for the public use reaches every description of property within its jurisdiction, even when acquired by grant from the state itself. *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125, 15 Am. Rep. 13.

Thus: The right of eminent domain may be invoked to condemn the riparian rights of a landowner through whose premises flows a stream, proposed to be diverted above and returned below his land, under a statute (N. D. Rev. Codes, § 5958, subd. 6) declaring that all classes of private property not enumerated may be taken for public use when such taking is authorized by law. *Bigelow v. Draper*, 6 N. D. 152, 60 N. W. 570.

charter and in compliance with its corporate duty and the laws of North Carolina for the two years last past, and since May 20, 1901; that thereby it has forfeited its charter, under the provisions of § 688 of the Code of North Carolina.

"Wherefore the plaintiffs demand judgment: (1) That the defendants the Raleigh & Gaston Railroad Company and the Seaboard Air Line Railway be required to disclose to this court as follows: When the attempted merger mentioned in this complaint went into effect, and what are its terms; what relation the defendant Raleigh & Gaston Railroad Company bore and now bears to said merger; what have been the annual receipts and disbursements of the said Raleigh & Gaston Railroad Com-

pany as a separate entity, and in its distinct and separate corporate capacity, from January 1, 1901, to this date; what have been its annual net profits during said period; what stock of other companies it has acquired or attempted to acquire; what bonds of other companies it has purchased or assumed or guaranteed or indorsed; to whom it sold said 1,828 shares of treasury stock, when, and at what price; to what uses or purposes the proceeds derived from the sale of said stock were applied; what disbursements it has made out of the funds of said Raleigh & Gaston Railroad Company, or otherwise, to effect such merger and consolidation, or in connection therewith or incidental thereto; who are the present corporate officers of the said Rail-

Under a statute authorizing a water company to acquire, by the exercise of the right of eminent domain, the plant, property, rights, and privileges of another corporation, if the authority is exercised, every item of property, if any, must be taken by the condemnation proceedings, and just compensation must be given for each. These include the real estate, the physical system, both real and personal, and all the franchises, rights, and privileges held by the condemned company, except its franchise to be a corporation. *Kennebec Water District v. Waterville*, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6.

Private corporations are no more secured in the absolute and uncontrollable enjoyment of their property and franchises granted by the sovereign power than are individuals who are possessed of property and privileges, independent of legislative grants. *State v. Noyes*, 47 Me. 189.

It is well settled that a franchise is property, and that it, as well as the property by means of which it exists, may be taken for public use. *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307.

The authorities for condemning and taking corporate franchises are found in every state from the beginning to the present time. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *Richmond, F. & P. R. Co. v. Louisa R. Co.* 13 How. 71, 14 L. ed. 55; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718, Affirming 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307; *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, 6 So. 404; *Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co.* 53 Fed. 687; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556; *Shorter v. Smith*, 9 Ga. 517; 1 L.R.A. (N.S.)

Illinois & M. Canal Co. v. Chicago & R. I. R. Co. 14 Ill. 314; *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill. 333; *Metropolitan City R. Co. v. Chicago West Div. R. Co.* 87 Ill. 317; *Lafayette Pl. Road Co. v. New Albany & S. R. Co.* 13 Ind. 90, 74 Am. Dec. 246; *Covington & L. Turnp. R. Co. v. Sanford*, 14 Ky. L. Rep. 689, 20 S. W. 1031; *State v. Noyes*, 47 Me. 189; *Kennebec Water District v. Waterville*, 96 Me. 234, 52 Atl. 774, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6; *Bellona Co.'s Case*, 3 Bland. Ch. 442; *Baltimore & H. de G. Turnp. Co. v. Union R. Co.* 35 Md. 224, 6 Am. Rep. 397; *Baltimore & F. Turnp. Road v. Baltimore, C. & E. M. Pass. R. Co.* 81 Md. 247, 31 Atl. 854; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1; *Central Bridge Corp. v. Lowell*, 4 Gray, 474; *Haverhill Bridge v. Essex County*, 103 Mass. 120, 4 Am. Rep. 518; *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125, 15 Am. Rep. 13; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.* 62 Mich. 564, 4 Am. St. Rep. 875, 29 N. W. 500; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Barber v. Andover*, 8 N. H. 398; *Pierce v. Somersworth*, 10 N. H. 369; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Northern R. Co. v. Concord & C. R. Co.* 27 N. H. 183; *Crosby v. Hanover*, 36 N. H. 404; *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271; *State. Van Keipen, Prosecutor, v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740; *Re Kerr*, 42 Barb. 119; *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *Com. v. Pennsylvania Canal Co.* 66 Pa. 41, 5 Am. Rep. 329; *Re Towanda Bridge Co.* 91 Pa. 216; *Philadelphia & G. Ferry Pass. R. Co.'s Appeal*, 102 Pa. 123; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Re Harrisburg & C. Turnp. Co.* 2 Dauphin Co. Rep. 51; *Scranton Gas & Water Co. v. Northern Coal & I. Co.* 3 Lack. Legal News, 302; *Red River Bridge Co. v. Clarks-ville*, 1 Sneed, 176, 60 Am. Dec. 143; *Armington v. Barnett*, 15 Vt. 745, 40 Am. Dec. 705; *White River Turnp. Co. v. Vermont C. R. Co.* 21 Vt. 500; *Tuckahoe Canal Co. v. Tuckahoe & J. River R. Co.* 11 Leigh, 42,

eigh & Gaston Railroad Company; when and where the stockholders of said corporation held their last annual meeting, and what were the proceedings of such meeting, if any such meeting was held. (2) That the defendant the Raleigh & Gaston Railroad Company be required, under the direction of this court, to render an accounting of all its receipts and disbursements since January 1, 1901, to this date, as a separate and distinct corporation. (3) That the alleged merger and consolidation of the said Raleigh & Gaston Railroad Company with other corporations into what is known as Seaboard Air Line Railway be declared *ultra vires* and void as to these plaintiffs. (4) That a receiver be

appointed for said Raleigh & Gaston Railroad Company."

At the session of 1899, p. 127, chap. 34, the legislature of this state incorporated the Richmond, Petersburg, & Carolina Railroad Company, a Virginia corporation, and, by virtue of said act, declared that said new corporation should succeed to all of the rights, etc., of the Virginia & Carolina Railroad Company, etc. By the provisions of an act of the general assembly of Virginia approved January 12, 1900, the Richmond, Petersburg, & Carolina Railroad Company was authorized, upon petition filed in the circuit court of Richmond, to change its name, etc. The said railroad company duly filed its petition in said court, praying that it be permitted to change its

36 Am. Dec. 374; James River & K. Co. v. Inompsen, 3 Gratt. 270.

Speaking of the power of eminent domain to reach and take property for the public use, the Supreme Court of the United States, on one occasion, said: We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535.

The grant of a franchise is of no higher order and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one, as well as the other, may be taken for public purposes on making suitable compensation. Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. 71, 14 L. ed. 55; Baltimore & F. Turnp. Road v. Baltimore, C. & E. M. Pass. R. Co. 81 Md. 247, 31 Atl. 854.

The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961.

The rights and franchises which have become vested upon the faith of contracts which arise out of acts of incorporation can be taken by the public upon just compensation to the corporations, under the state's power of eminent domain. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, per Harlan, J.

The power of the legislature to take the property and franchises of incorporated companies, and to apply them to another public use deemed more important, upon just compensation, is undeniable. Mobile & G. R. Co. v. Alabama Midland R. Co. 87 Ala. 501, 6 So. 404.

A franchise is an incorporeal hereditament known as a species of property, as well as any estate in lands. It is property which may be bought and sold; which will descend to heirs, and may be devised. The owner of such property may repose with the same security for its protection under 1 L.R.A. (N.S.)

the wings of the Constitution; but we know not why he should expect any greater exemption from public burden than the owner of any other estate. If the owner of lands, buildings, and all property of like description must yield up that property for public use upon compensation, how is it that property of this kind claims a higher privilege, or is guarded by a stronger force? We know of no principle which limits the right of eminent domain to lands and other real estate. Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 40, 42 Am. Dec. 716.

There is a fallacy in the argument to support the doctrine that a grant of corporate powers and privileges constitutes a contract of which the obligation is impaired when the legislature, exercising the right of eminent domain, condemns and takes away the franchise. The contract constitutes the franchise. All franchises emanating from the government are the results of contracts between the state and individuals. To say, therefore, that, although such franchises may be taken for public use upon compensation, and at the same time to insist that the contract or covenant by which they are created is unconstitutionally impaired, is an absurdity. Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 454, 44 Am. Dec. 556.

All grants made by the state, although irrevocable, are subject to the right of eminent domain, unless it is expressly relinquished as in the case of the right of taxation. Illinois & M. Canal Co. v. Chicago & R. I. R. Co. 14 Ill. 314.

The exercise of the right of eminent domain over franchises and property held by corporations under a charter is of frequent occurrence. Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333.

Said Shaw, Ch. J., of Massachusetts, on one occasion: If the whole of a franchise should become necessary for the public use, I am not prepared to say that the right of eminent domain, in an extreme case, would not extend to and authorize the legislature to take it on payment of a full equivalent.

name to the Seaboard Air Line Railway Company, and pursuant to said petition an order was duly made by said court changing the name of said corporation in accordance with the prayer in said petition. By chapter 168, p. 463, Private Laws of 1901 of North Carolina, the Seaboard Air Line Railway Company, successor to the Richmond, Petersburg, & Carolina Railroad Company was empowered to exercise in this state all of the powers, etc., vested in the Richmond, Petersburg, & Carolina Railroad Company under its charter and amendments thereto, etc. It was also provided that, "with the approval of two thirds in amount of its stockholders given at any annual or special meeting . . . it may . . . lease, use, operate, consolidate with,

or purchase, or otherwise acquire, . . . the Seaboard & Roanoke Railroad Company, or any railroad or transportation company now or hereafter incorporated," etc., " . . . and from time to time it may consolidate its capital stock, property . . . of any other such railroad or transportation company upon such terms as may be agreed upon by the respective companies, power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act of the general assembly of the state of North Carolina with the approval of a majority in amount of its stockholders respectively given at a meeting called for such purpose or at which all of the shares of capital stock are represented in person

Boston Water Power Co. v. Boston & W. R. Corp. 23 Pick. 360.

A franchise is subject to the same sovereign right of eminent domain by which the property and rights of all subjects and individuals are liable to be taken and appropriated to a public use, in the manner provided in the Constitution, whenever the legislature deems that the public exigencies require it. This principle is too well settled by the highest authority to be now open to question. *Central Bridge Corp. v. Lowell*, 4 Gray, 474.

It is held, said Cooley, J., of the Michigan supreme court, that, although a state grants a privilege in exclusive terms, it does not thereby bind its hands against such an exercise of the right of eminent domain as may annihilate the franchise for the benefit of another, when the terms of the first would exclude. *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

It must be regarded as settled in this state, said the New Hampshire supreme judicial court, in 1858, that, in the exercise of the power of eminent domain, any real estate, property, franchise, or easement of any corporation, however exclusive the grant, may be taken for public use, provided suitable compensation be made. This question has been so elaborately discussed in several cases in our own reports that it is unnecessary to repeat the discussion here. *Crosby v. Hanover*, 36 N. H. 404.

It cannot be doubted that the state legislature, under the power of eminent domain, can take the franchises of a corporation for public use upon making due compensation. And if all the franchises and property of a corporation, under the power of eminent domain, may be taken for public use, and thus the corporation in effect destroyed, upon making due compensation, it would seem to follow that one or more of its franchises might be taken, or that they might be impaired or their enjoyment interfered with to any extent, under the same power of eminent domain, upon making due compensation. *Re Kerr*, 42 Barb. 119.

The state, in the exercise of the right of

eminent domain, or a corporation having the delegated power, is not bound to take the entire estate, but may take, and strictly should take, only such an interest and right as are necessary to be acquired to accomplish the public purpose in view. So long as the owner is compensated for the damages sustained, he has no cause of complaint; but he might, if more property, or a larger estate or interest, was taken than was required for public use, contend that his rights of property had been illegally invaded. *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330.

The state has the same power over property granted to a corporation that it has over a like grant to a private individual,—no more, no less. *Com. v. Pennsylvania Canal Co.* 68 Pa. 41, 5 Am. Rep. 329.

In the opinion of the Pennsylvania supreme court, it is no longer open to controversy that the right of eminent domain extends to corporate franchises. *Re Towanda Bridge Co.* 91 Pa. 216.

The principle is well settled that a franchise is property, and, like any other species of property, may be taken by the commonwealth by virtue of the right of eminent domain, upon making compensation. *Philadelphia & G. Ferry Pass. R. Co.'s Appeal*, 102 Pa. 123.

"It would be an affectation of learning to cite the authorities which establish this principle." *Ibid.*

The principle that the measure of damages upon the condemnation of property is the market value at the time of the taking, and that, in arriving at this value, the past annual net profits from the use of the property cannot be considered, does not apply when the property is a bridge and the corporate franchises of the company which owns it. The property and franchises of such a corporation are represented by its stock, and the market value of the stock may be said to represent the market value of the property taken, as near as it can be ascertained. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407.

What reason is there, asks Lumpkin, J., of the supreme court of Georgia, for hold-

or by proxy to make and carry out such contracts of consolidation or lease, sale, or other mode of acquisition or disposition," etc. Provision is made setting forth the terms of such contracts of lease, sale, etc., and requiring that a copy of the agreement be filed in the office of the secretary of state. The statute contains the following proviso: "Any stockholder who dissents from any such consolidation or sale may, within sixty days thereafter, apply by petition to the superior court of Warren county, or any county in this state of which the dissenting stockholder was a resident at the time of the ratification of this act, to determine the value of his stock, and shall be entitled to receive from said consolidated or purchasing corporation the

value as thus determined of such stock upon transfer thereof to the new corporation; such value shall be assessed by a jury trial if the same be requested by either party; and, if the owner of said stock shall be a nonresident of this state application may be made to United States courts having jurisdiction."

The following notice was issued:

To the Stockholders of the Raleigh & Gaston Railroad: Notice is hereby given that a special general meeting of the stockholders of the above named Company will be held at its office in the City of Raleigh, N. C., on the 20th day of May, 1901, at 9 o'clock A. M., for the purpose of taking into consideration articles of agreement of

ing a franchise more sacred than the land to which it is annexed? Or why should the rights of a company be more carefully protected than those of an individual? *Shorter v. Smith*, 9 Ga. 517.

b. Shares of stock.

There is a paucity of cases of the "red cow" order, but the power to take corporate stock by right of eminent domain is conceded, in terms, in New Hampshire and New Jersey, and, in the latter state by the Federal, as well as the state, court. *Vide Dickinson v. Consolidated Traction Co.* 114 Fed. 232.

In the exercise of the right of eminent domain the legislature may authorize shares in corporations and corporate franchises to be taken for public uses upon just compensation. The title to this species of property is no more secure against invasion when the public use requires than is the ownership of real estate. *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455.

There can be no doubt that a railroad company may be empowered to extend its road beyond the point to which it was built under its original grant, if due compensation be provided for stockholders who resist it. There is no difference in principle whether the original company, in order to secure a through route under one management, is authorized to take the land of individuals, or to take the property which the individuals have in the stock of an existing road. In the first case, to establish a through route, one kind of property, *viz.*, the land of individuals, is taken by the corporation; in the second case another kind of property, *viz.*, shares of stock of individuals in another corporation, is authorized to be condemned. The use is as clearly public in the one as in the other case. Property in stock can claim no superior right to protection. It, with all other private property, is held subject to the right of eminent domain. *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455.

The legislature may authorize shares of stock to be taken under the right of eminent 1 L.R.A. (N.S.)

domain for public purposes, and upon making due compensation to the owner. *Mills v. Central R. Co.* 41 N. J. Eq. 1, 2 Atl. 453. Inasmuch as the interest of unwilling stockholders, when a radical change in the scope and plan of a corporation is desired by a majority of the shareholders and authorized by an act of the legislature, cannot be taken or controlled *in invitum*, except by an exercise of the power of eminent domain, it is a legal conclusion from the lack, in the authorizing act, of any provision for condemning nonassenting shares by right of eminent domain, that the legislature, in enacting the statute, did not intend to exercise its power of eminent domain, but only to authorize the change to be made in case all the stockholders consented or transferred their shares by private contract. *Ibid.*

When a stockholder in a railroad corporation objects to a lease of the road for ninety-nine years to another railroad company, and such a lease has been authorized by statute and the consent of a majority of the shareholders, his objections may be obviated by taking his stock at its market value by an exercise of the power of eminent domain. *Gregg v. Northern R. Co.* 67 N. H. 452, 41 Atl. 271.

V. Some statutes in point.

In some instances an act of general legislation provides for the taking up of the shares of stockholders unwilling to engage in new enterprises, in which the majority of their associates desire to embark, and which have been authorized by law. A few of these acts will serve as types of this sort of legislation.

The act of Congress of July 12, 1882, provided (§ 5) for the appraisal, by a committee of three persons, of the national bank shares of stockholders in national banks who do not assent to amendments to the articles of association; for an appeal to the Comptroller of the Currency in case of dissatisfaction; and for payment by the bank of the value as a debt, surrender of

merger and consolidation of the following named railroad companies: Seaboard Air Line Railway, the Raleigh and Gaston Railroad Company [and other corporations named], heretofore entered into by the directors of said respective companies, and at which meeting a vote by ballot will be taken for the adoption or rejection of said agreement.

By order of the Directors:

J. M. Sheerwood, Secretary.

The plaintiff filed the following protest:

To the Stockholders of the Raleigh & Gaston Railroad Company in Session at Raleigh, May 20, 1901, and to the President and Secretary of said company:

Mrs. Ida T. Spencer, upon whom notice was served of the meeting of stockholders of the Raleigh & Gaston Railroad Co., on May 20th, at 9 A. M., in Raleigh, to consider articles of agreement of merger and consolidation of a number of Ry. Companies, to wit, the Seaboard Air Line Ry., the Raleigh & Augusta Air Line Ry. Co., and others, appears by attorney in meeting

the shares, and subsequent sale at public vendue.

Connecticut enacted, in 1895, a statute (chap. 232) providing that when any domestic railroad corporation should have acquired more than three fourths of the stock of any steamboat, ferry, bridge, wharf, or railroad company, and could not agree with the remaining stockholders for the purchase of their holdings; and it should be judicially found that such purchase would be for the public interest,—it might cause such outstanding stock to be appraised after the manner of appraising land condemned for railroad purposes; and upon payment of the appraised value, or depositing it as directed when payment could not be made, the stock and certificates should be surrendered and deemed canceled. The statute further gave the minority stockholder the reciprocal right to proceed in the case named if the railroad did not do so.

Inspired by the Connecticut statute just mentioned (Pub. Acts 1895, chap. 232), Mr. Leonard M. Daggett contributed to the Yale Law Journal of May, 1896 (5 Yale L. J. 205), a thoughtful paper upon the taking of corporate shares by right of eminent domain, the perusal of which may be commended to the reader.

The state of Massachusetts lately enacted a statute (Stat. 1900, chap. 426) first ratifying and confirming a lease between the Boston & Maine Railroad Company and the Fitchburg Railroad Company, theretofore approved by a majority of the stockholders in each road at meetings called for the purpose, and conferring the necessary power and authority to carry into effect; and, second, providing that the as-

only to protest against such action, and does hereby protest against the consideration of said agreement, or of the adoption of the same, as being *ultra vires*, and injurious to and in derogation of her rights as a stockholder.

Respectfully,

R. P. Spencer, Attorney
in Fact for Ida T. Spencer.

Pursuant to said notice, a meeting of the stockholders was held in the city of Raleigh, North Carolina, on May 20, 1901. The chairman submitted the proposed agreement of merger and consolidation which had been duly executed by the other corporations; also a certified copy of the resolutions of the board of directors of the Raleigh & Gaston Railroad Company in relation thereto. The plaintiff thereupon filed the protest set out herein. The following resolution was thereupon unanimously adopted by a stock vote by ballot: "Resolved," etc., "that they do hereby approve and adopt the agreement of merger and consolidation between," etc.; naming all the roads entering into the merger or con-

sent of every stockholder to the lease should be implied, unless within a stated time he filed with the clerk of the lessee corporation his written dissent, in which case his stock was to be acquired by the lessee after appraisalment, and payment, tender, or deposit of the value according to a method laid down. This statute was held not to apply to the case of a shareholder who had, before its enactment, voted for the lease, and after its passage dissented according to its terms. *Boston & M. R. Co. v. Graham*, 179 Mass. 62, 60 N. E. 405.

Late statutes of New Jersey, authorizing the formation of street-railway traction companies, the regulation thereof, and street railways generally to lease to traction companies their property and franchises, contain provisions (Gen. Pub. Laws, 1893, chap. 169, § 2, and chap. 172, § 17) for the appraising and paying of the value of the stock of dissentient stockholders.

New York, in 1867, enacted a general statute (chap. 960) authorizing any two or more corporations organized under the general manufacturing act, having the same or similar objects, to consolidate. That act provided (§ 2) that, if any stockholder objected within a stated time, and demanded payment for his stock, and the consolidation was afterwards effected, he might, upon application to the supreme court, have three appraisers appointed to value his stock as of the time he dissented; and that, when the corporation had paid him such value, he should cease to be a stockholder, and the corporation might hold and dispose of his stock.

There is a very similar statute in Ohio (Rev. Stat. § 3388, amended April 4, 1890,

solidation. It is not necessary to set out the terms of the agreement, as no controversy is made in regard thereto. The contract was duly executed as alleged in the complaint. His Honor upon the hearing rendered the following judgment: "In this cause the plaintiffs move the court for an order compelling the defendant the Seaboard Air Line Railway Company to bring within the jurisdiction of this court the records and books of the Raleigh & Gaston Railroad Company, and to permit plaintiffs to inspect the same. At the same time the defendants move the court to dismiss the action, and demur *ore tenus* to the complaint, because no cause of action is stated which plaintiffs can maintain, and that upon the pleadings the action cannot be sustained. The court is of opinion that under the provisions of the act of the general assembly ratified February 27, 1901 (Private Laws 1901, chap. 168, p. 463), and the other acts pleaded and referred to in the answer, the only remedy the plaintiffs have is given by said chapter 168, *etc.*, sue for the value of their stock at time of the consolidation, with interest thereon. The

defendants having consented thereto, the plaintiffs may, if desired, file within thirty days an amended or new complaint for the purpose of recovering the value of their stock, and having the value assessed in the manner pointed out in said act. After such complaint is filed it will be competent to require the production of such books, records, etc., of the Raleigh & Gaston Company as tend to show such value. If the plaintiffs shall elect not to file such amended complaint to recover the value of their stock, then the court adjudges that this action must be dismissed, and defendants go without day and recover costs." From which judgment the plaintiffs appealed.

Messrs. Busbee & Busbee, for appellants:

No consolidation can take place unless the power so to consolidate is expressly conferred upon both the consolidating corporations.

10 Cyc. Law & Proc. pp. 290, 293; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738. 12 Sup. Ct. Rep. 953.

87 Ohio Laws, 159), which was construed in Pittsburgh, C. & St. L. R. Co. v. Garrett, 50 Ohio St. 405, 34 N. E. 493.

A stockholder cannot be forced into a new company. In New Hampshire, by dissenting, he can compel the new company, under a statute of that state, to buy his stock at its value, ascertained in a manner provided by law. Jones v. Concord & M. R. Co. 67 N. H. 119, 38 Atl. 120.

The provisions found in statutes which empower corporations to consolidate, or to lease the property and franchises of other corporations, for appraising and paying the value of stock of dissentient stockholders, are deemed examples of the competent exercise of the power of eminent domain, and are construed as a taking of private property for public use. Dickinson v. Consolidated Traction Co. 114 Fed. 232.

VI. Conclusion.

It follows from the adjudications that there is naught in the nature of shares of corporate stock to differentiate them from other property subject to condemnation by right of eminent domain. Granted a public necessity for taking them, it is but a question of making due compensation to the stockholder, and just compensation is ever limited to the value of the property taken. In the case of shares of stock, it is ordinarily not difficult to ascertain their value with a small fraction of probable error. The contract created by the taking of stock in a corporation between the subscriber and his coadventurers cannot be impaired by legislation. He may stop the consummation of *ultra vires* acts. He cannot

be forced to continue his investment in new and different enterprises; but it is a contract insusceptible in its nature of specific performance by compulsory decree of a court of equity, and its final sanction is the right to recover damages for its breach. The measure of these damages must be neither more nor less than the value of the shares. The other parties to the contract, the fellow stockholders, cannot be compelled unless by the state to discharge public duties, to continue the corporation against their will or interest; they may dissolve, the state consenting, the corporation at any time, and have its property distributed to whosoever may be thereunto entitled; so, again, in its last analysis, the outstanding stockholder can get no more than the value of his holdings. When the state, by its statutes, provides a short cut to this result, enabling the majority to carry out their plans by taking over the corporation to a new use, and paying off their unwilling associates, the process is simpler and less complicated; but it is not more effective than dissolution, liquidation, and reorganization. And this act of the state is an exercise of the power of eminent domain. When the corporation affected is a public-service company, practically all question as to public purpose in the condemnation is shut out by the authorizing statute itself; but when the corporation is a purely private one, in which the public has no interest whatever, condemnation of shares may be resisted precisely as can condemnation of land, to wit, upon the ground that the use for which the property is to be taken is not, under any circumstances, public.

J. B. G.

Acts authorizing consolidations are merely enabling acts, and are construed as permissive only, and are not binding upon dissentient stockholders.

1 *Thomp. Corp.* § 343; *Clearwater v. Meredith* (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604.

The legislature cannot compel the consolidation of private corporations, unless the state has reserved the power to do so in the instrument creating them.

10 *Cyc. Law & Proc.* p. 297; *Mason v. Finch*, 28 Mich. 282; *Botts v. Simpsonville & B. C. Turnp. Road Co.* 88 Ky. 54, 2 L. R. A. 594, 10 S. W. 134.

The relation between a railroad company and a stockholder is one of contract; and any legislative enactment authorizing a material change in the powers or purposes of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon the stockholder without his consent.

McCray v. Junction R. Co. 9 Ind. 358.

The provision in the act authorizing the consolidation in the present case, for appraising the value of the dissenting stockholders' stock by a jury, is in no sense the exercise of condemnation proceedings under the right of eminent domain, and does not bind the dissentient stockholder.

Noyes, Intercorporate Relations, § 51; *Allen v. Cape Fear & Y. Valley R. Co.* 100 N. C. 397, 6 S. E. 105.

Even if the legislature has the power, by conferring the right of condemnation upon a corporation, to condemn the shares of its minority stockholders and take them, such power must not only be expressly conferred by statute, but must be exercised in fact before the consolidation takes place.

10 *Cyc. Law. & Proc.* p. 299; *Pittsburgh, C. & St. L. R. Co. v. Garrett*, 50 Ohio St. 405, 34 N. E. 493.

The question as to whether or not the exercise of the power would be for the public use is a matter of judicial inquiry.

State v. Glen, 52 N. C. (7 Jones, L.) 321; *State v. Lyle*, 100 N. C. 497, 6 S. E. 379.

Not only must such condemnation and appropriation of property be of benefit to the public; it must be primarily for the public use.

Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681.

The provision of this act, giving a minority stockholder a particular remedy, does not constitute it an exclusive remedy, nor deprive the plaintiff of any other remedy or right of action she possessed at the time the act was passed.

Const. art. 1, § 35; *Osborn v. Leach*, 1 L.R.A. (N.S.)

135 N. C. 628, 66 L. R. A. 648, 47 S. E. 811.

Where a consolidation between two corporations is wrongfully effected, a dissenting stockholder of one corporation may maintain an action in equity against the consolidated corporation for the damages which he has sustained. In such case he is not barred by a delay of two years, though such a delay might operate to prevent him from maintaining a suit to restrain the consolidation.

1 *Thomp. Corp.* § 352; 10 *Cyc. Law & Proc.* p. 299; *International & G. N. R. Co. v. Bremond*, 53 Tex. 96.

Messrs. Day & Bell, T. B. Womack, Shepherd & Shepherd, and Murray Allen for appellees.

Connor, J., delivered the opinion of the court:

The plaintiff attacks the validity of the contract of consolidation or merger whereby the Raleigh & Gaston Railroad Company, together with a number of other companies owning and controlling connecting lines, became a part of the Seaboard Air Line System, upon several grounds, which it will be convenient to consider in the order in which they are discussed in the very excellent brief of her counsel. It is, of course, conceded that, as the cause was disposed of by His Honor in the superior court, and is before us, upon a motion to dismiss as upon a demurrer *ore tenus*, every allegation made in the complaint, with such construction thereof as is most favorable to the plaintiff, must be taken as true. This, of course, is so for the purpose of drawing the legal conclusions therefrom. The plaintiff says that certain acts of the defendant are *ultra vires*. This is a conclusion of law to be drawn from the facts stated. It is also to be noted that although the complaint makes no reference to the several statutes enacted by the general assembly, which, being private acts, do not come under our cognizance unless referred to and proved, His Honor's judgment expressly refers to at least one of them, and, in the argument before us, counsel treated them as being properly before us. The plaintiff says that a careful analysis of chapter 168, p. 463, Private Laws 1901, fails to show that any authority is conferred upon the Seaboard Air Line Railroad Company to consolidate, merge with, or purchase from, any other railroad than the Seaboard Air Line Railroad Company; that the statute conferring such extraordinary power upon a railroad corporation should be clear and explicit, leaving nothing to construction or doubt. Why that single corporation should have

been named, in conferring the power, and other railroad companies referred to in general terms, does not very clearly appear. We think, however, that, by a fair and reasonable interpretation of the language of the act, the Raleigh & Gaston Railroad Company is included among those companies with which the Seaboard Air Line Company is empowered to consolidate,—“and any railroad or transportation company now or hereafter incorporated by the laws of the United States or any of the states thereof.” In conferring power upon other companies to consolidate, the language is equally comprehensive,—“power being hereby granted to any railroad or transportation company or companies now or hereafter incorporated by or under any act or acts of the general assembly of the state of North Carolina,” etc. The Raleigh & Gaston Railroad Company certainly comes within this classification. It would seem to follow that the other provisions of the act, unless otherwise expressed, must be construed as referring to all companies thus included in the class upon which the power is conferred to consolidate. Any other construction would render nugatory the power conferred.

The plaintiff next insists that no consolidation can take place unless the power to so consolidate is expressly conferred upon both consolidating corporations. This proposition is sustained by authorities cited. The reasons therefor are manifest. 10 Cyc. Law & Proc. p. 293. We think that such power is conferred upon both corporations. Private Laws 1901, chap. 168, § 1, p. 463, expressly confers upon the Seaboard Air Line Railroad Company the power, “with the approval of two thirds in amount of its stockholders,” etc., to lease, operate, consolidate with, or otherwise acquire,” etc. As we have seen the power is conferred upon the Raleigh & Gaston Railroad Company to enter into the contract of consolidation, etc. The evident purpose of the legislature was to enable the Seaboard Air Line Railway to form, by consolidation, merger, or purchase, a system of transportation through the state, connecting with railroads in Virginia and South Carolina. The legislation in this state, together with that in Virginia, in regard to the Seaboard Air Line Company which is expressly referred to in the preamble to Laws 1899, chap. 34, p. 127, Laws 1901, chap. 168, p. 463, shows this to be the purpose and scope of the several statutes. This being ascertained, the principle by which we should be guided in interpreting the statute is thus stated: “Every statute is to be construed with ref-

erence to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute.” Black, Interpretation of Laws, 56; Endlich, Interpretation of Statutes, 73. It is settled that the power to consolidate may be conferred either in the charter, or by a general enabling act. 10 Cyc. Law & Proc. p. 289.

The plaintiff next contends that, assuming that the statute confers the power upon the Raleigh & Gaston Railroad to consolidate, such power can be exercised only by the unanimous consent of the stockholders; that a dissenting stockholder cannot be compelled to surrender his stock in the corporation, and accept in lieu thereof stock in another company; that, unless such power is conferred upon the majority of the stockholders in the charter, or by amendment thereto made before the subscription of the dissenting stockholder, an act of the legislature conferring such power would be invalid, as impairing the obligation of the contract between the stockholders. This proposition is amply sustained upon principle and authority. The Supreme Court of the United States, in *Clearwater v. Meredith* (*Ferguson v. Meredith*) 1 Wall. 25, 17 L. ed. 604, discussing a statute permitting a consolidation of several railroad companies, says: “The power of the legislature to confer such authority cannot be questioned, and, without the authority, railroad corporations organized separately could not merge and consolidate their interests. But in conferring the authority the legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. . . . When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purpose and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and, it may be, new hazards, are added to the original undertaking. He may be willing to embark in one enterprise, and unwilling to engage in another; to assist in build-

ing a short-line railway, and averse to risking his money in one having a longer line of transit. *Botts v. Simpsonville & B. C. Turnp. Road Co.* 88 Ky. 54, 2 L. R. A. 594. 10 S. W. 134; *McCray v. Junction R. Co.* 9 Ind. 358. The defendant, conceding this to be the law, says that the statute conferring the power upon the several railroad companies consolidating expressly provides for paying the dissenting stockholder the full value of his stock at the time of the consolidation. This provision can only be sustained by invoking the right of eminent domain, and condemning the stock for a public use by making compensation therefor. The plaintiff contends that, at the date of the charter of the Raleigh & Gaston Railroad Company (1835), no power to amend charters of corporations was reserved by the Constitution of this state, and that, under the decisions of this court, they come within the protection of the doctrine of the Dartmouth College Case; that all of the stock was issued prior to the adoption of the Constitution of 1868, by which such power was reserved. He also says that no general statute was in force in this state authorizing such consolidation. This contention is undoubtedly correct. It will be noted, however, that Laws 1901, chap. 168, p. 403, does not undertake to amend the charter of the company, or to do more than empower a majority of the stockholders to consolidate with other companies. It is an enabling act, and imposes no duty or obligation upon the corporation or its stockholders. It must be conceded, also, that the act of the majority of the stockholders does not change the relation of the plaintiff towards the corporation. The legislature, in the exercise of its power, confers upon the majority of the stockholders the power to consolidate with the other constituent companies, and accept in consideration therefor such number of shares in the new or consolidated corporation as may be agreed upon. This can be done only with the consent of the legislature. The legislature, having decided that such consolidation was promotive of the public welfare, recognized that it had no power to compel a dissenting stockholder to accept stock in the new corporation. Therefore, in the exercise of the right of eminent domain it empowers the corporation to condemn the stock of such dissenting stockholder when it cannot otherwise be acquired. This power is entirely distinct from the power to amend the charter. The right of eminent domain which resides in the state is defined to be "the rightful authority which exists in every sovereignty to control and

regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare may demand." *Cooley. Const. Lim.* 324: 1 Lewis, Em. Dom. 1; 10 Am. & Eng. Enc. Law, p. 1048. This right or power is said to have originated in state necessity, and is inherent in sovereignty, and inseparable from it. It is a part of the sovereign power of every state. *Ibid.*; *Raleigh & G. R. Co. v. Davis*, 19 N. C. (2 Dev. & R. L. 45). When the state incorporated the Raleigh & Gaston Railroad Company, a contract was entered into with the corporation, the obligation of which could not be impaired. The state did not, in respect to the property of the corporation or its shareholders, divest itself of, or in any degree impair, its right of eminent domain. The legislature could not divest itself of a power so essential to the integrity of the state. *Mr. Justice Daniel, in West River Bridge Co. v. Dix*, 6 How. 531, 12 L. ed. 544, says: "No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of . . . protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of the governments; they reach and comprehend likewise the interior polity, and relations of social life, which should be regulated with reference to the advantage of the whole society. This power denominated the 'eminent domain' of the state is, as its name imports, paramount to all private rights vested under the government, and these last are . . . held in subordination to this power, and must yield in every instance to its proper exercise. . . . A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most unctimonious regard for the one is perfectly consistent with the possession and exercise of the other." 10 Am. & Eng. Enc. Law, p. 1050. "The legislature has power to authorize the consolidation of railroad and other quasi public corporations, without the unanimous consent of their stockholders, when it makes provision for appraising and paying for the stock of dissenting stockholders. This power is entirely unaffected by the constitutional prohibition against impairing

the obligation of contracts, and is based upon the sovereign power of eminent domain. Corporate shares, as well as other property, are subject to the paramount necessities of the state for the promotion of public interests." *Noyes, Intercorporate Relations*, 51; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 469. "In this busy age of reckless activity and enterprise, when the brain of man is exhausting itself in his struggle with time and space, the two forces that most oppose his progress, the taking of private property in the stock of such corporations to advance any of the purposes above indicated must be regarded as the taking of it for public benefit. There can be no doubt that a railroad company may be empowered to extend their road beyond the point to which it was built under the original grant, if proper compensation is provided for stockholders who may resist it; and I can see no difference, in principle, whether the original company, in order to secure a through route under one management, is authorized to take the lands of individuals, or to take the property which individuals have in the stock of an existing road. In the first case, for the purpose of establishing the through route, one kind of private property, to wit, the lands of individuals, is taken by the corporation; in the second case another kind of property, to wit, the shares of stock of individuals in an existing company, is authorized to be condemned. . . . The same rule applies to both cases, unless property in stock can claim a superior right to protection. This, with all other private property, is held under the dominant right of eminent domain."

In a very able opinion by Bigelow, J., in *Central Bridge Corp. v. Lowell*, 4 Gray, at page 481, it is said: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held in a measure, and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improve-

ments rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized." We have in the history of the Raleigh & Gaston Railroad Company a striking illustration of the operation of the principle so clearly stated by Justice Bigelow.

The right to take private property by condemnation proceeding for the purpose of constructing a railroad was first asserted, recognized, and enforced by this court in *Raleigh & G. R. Co. v. Davis*, 19 N. C. (2 Dev. & B. L.) 456. *Ruffin, Ch. J.*, wrote for a unanimous court an able and exhaustive opinion, tracing the power to its source, and giving it the application asserted by the defendant in this case. This opinion has always been cited and approved in this court as settling the law in this state. The same public convenience or necessity which would have justified taking the land of the citizen to open and construct a highway to meet the needs of the public in 1800 was invoked for taking the same land to meet the needs as they existed in 1836 to construct a railroad. The advancing needs and changed conditions in regard to transportation and travel are deemed by the legislature to demand the formation of a great trunk line or interstate system of railroad in 1901. If the Seaboard Air Line Company had, instead of consolidating with the Raleigh & Gaston Railroad Company, constructed a separate line or track from Ridgeway to Raleigh, every foot of land on the route necessary therefor could have been condemned for that purpose. We can see no reason why, in the exercise of the same inherent sovereign power, the legislature may not empower the corporation to condemn the plaintiff's stock. Whether the power is in this respect wisely conferred or exercised is beyond our province to say. This is a question for the decision of the legislature. We have examined with care all of the authorities cited by the plaintiff's counsel. In those cases where the consoli-

dating acts are declared invalid, no provision is made for assessing the value and paying for the dissenting stock. We find no more difficulty in holding that the condemnation of plaintiff's stock is for a public use than did Ruffin, Ch. J., and his learned associates, in finding that the railroad was originally constructed for such use. *Clark & M. Priv. Corp.* 1051; *North Carolina R. Co. v. Carolina C. R. Co.* 83 N. C. 489. We are of the opinion that the legislature had the power to confer on the corporation the right to condemn the dissenting stock, and that, upon a reasonable interpretation of the statute, it has done so. We find no valid objection to the mode prescribed for ascertaining the value of the stock. It is expressly provided that the value so assessed must be paid before the stock is transferred. It would seem that the mode prescribed is exclusive and must be pursued. *Carolina C. R. Co. v. McCaskill*, 94 N. C. 751. It seems to us to be the only practicable remedy.

The mode of trial is free from any reasonable objection.

There is another view of this case presented by the defendant's brief which we think fatal to plaintiff's action. The board of directors of the Raleigh & Gaston Railroad Company on April 29, 1901, met and adopted a resolution reciting that the consolidation would greatly facilitate the business and promote the interests of the company, etc. Thereupon a meeting of the stockholders was duly called, and May 20, 1901, fixed as the day for such meeting. Notice thereof was duly served on the plaintiff, and she filed her protest, setting forth that notice of the meeting and the purpose thereof had been served on her. At the meeting she appeared by her attorney and entered her protest. The tellers reported that all of the stock (14,988 shares) represented voted for the consolidation. It appears that the consolidation was entered into by eight separate railroad companies, traversing hundreds of miles, and representing millions of dollars of capital. The consolidation became operative at once, and new stock, common and preferred, to the amount of \$100,000,000, together with bonds secured by mortgage to the amount of many million dollars, were authorized to be issued and executed. It is a matter of general and public information, and known to the court by records before us at each term, the published reports of the corporation commission, and other public and official sources, that the consolidation of the roads forming the Seaboard Air Line System has become an accomplished fact; that vast private interests are involved and public duties assumed. The plaintiff, instead of

asserting her rights promptly by an appeal to the preventive jurisdiction of the court, waits more than two years before invoking the equitable power of the court to declare invalid and set aside the consolidation. It is not to be understood that the courts will refuse to protect the rights of a single stockholder, if invaded by the majority, however large, or refuse relief against aggression of consolidated capital, however powerful. The chancellor originally took jurisdiction in many cases because of the inability of the complainant to maintain his suit at law with his adversary, because of his great power and large number of retainers. The question is not whether the plaintiff is without remedy, but whether the law has given to her an adequate remedy otherwise than by the exercise of the extraordinary power vested in the court. She demands that the court declare the charter of the Raleigh & Gaston Railroad Company forfeited; that the merger and consolidation be declared void as to her; that a receiver be appointed etc., that an accounting be had of the receipts of the company since the merger, etc. It is an elementary principle of equity jurisprudence that relief is granted to the vigilant, and will be refused when there has been unreasonable delay amounting to laches. This is especially true where valuable rights have been acquired by innocent persons. This familiar principle was announced and enforced by this court in *Pender v. Pittman*, 84 N. C. 372, Smith, Ch. J., saying: "But this equity ought to be promptly asserted, and not deferred until by the sale other interests may intervene rendering it inequitable, if practicable, to reverse what has been done, and restore matters to their former condition." In that case it was held that "an injunction against carrying out a contract of sale made under a power contained in a mortgage will not be granted where the relief to which the plaintiff conceives himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened." Mr. Noyes says: "Acquiescence for an extended period, during which time the interests of third persons have intervened, may itself constitute laches, and prevent a stockholder from attacking a consolidation even on the ground of fraud." *Intercompany Relations*, 49. The authorities upon this subject are uniform and abundant. As was said by Sir John Romilly, Master of the Rolls: "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favorable and profitable to themselves, abide by it and insist

on its validity, but, if it prove unfavorable and disastrous, then to institute proceedings to set it aside." Gregory v. Patchett, 33 Beav. 595. The proposition is tersely stated by Van Fleet, V. C., in Rabe v. Dunlap, 51 N. J. Eq. 48, 25 Atl. 959: "If he wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." *McVicker v. Ross*, 55 Barb. 247; *Watts's Appeal*, 78 Pa. 370; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159.

We think that, in any view of the case, the plaintiff is not entitled to the extraordinary relief demanded. We are at a loss to see how it is practicable to preserve the status of the corporation as she suggests for her benefit. We notice that the defendant, in its answer, says that, notwithstanding the failure of the plaintiff to proceed to have the value of her stock ascertained within the time and by the method prescribed by Laws 1901, chap. 168, p. 463, it is now willing to pay her the value thereof. His Honor granted to the plaintiff, with the assent of the defendant, the right to amend her complaint and have the value of her stock ascertained. He also directs upon the trial of that issue that the books of the corporation be produced, etc. We think that the order of His Honor fully protects the rights of the plaintiff. She will have thirty days from the next term of the superior court to amend her complaint and proceed to have the value of her stock ascertained, and judgment rendered therefor.

Upon a full and careful consideration of the record, the agreement of counsel, and the authorities, we find no error in the judgment of His Honor. Let it be so certified.

Douglas, J., dissenting:

I wished to express my views more fully upon this case, but circumstances which I regret confine me to a few lines. I do not see how the right of eminent domain, one of the sovereign powers of the state, can be invoked in favor of railroad consolidation, where not a foot of additional road is built, and nothing is added to the public convenience. Private property can be taken only for a public use. What use can the public make of the private stock of a corporation, aside from its roadbed and other material property, which are already devoted to the use of the public? Is it not establishing a dangerous principle to permit the consolidation of railroads without the consent of their minority stockholders,—dangerous not only to private rights, but equally so to the great economic principle of railroad competition, in which the public is so vitally interested?

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NORTH CAROLINA SUPREME COURT.

THOMAS A. GREEN, Appt.,

v.

HARTFORD LIFE INSURANCE COMPANY.

(139 N. C. 309.)

1. Limitation of actions against nonresident.

Merely providing for service of process on a state official in actions against a non-resident corporation does not repeal the statute exempting such actions from the operation of the statute of limitations.

2. Life insurance—issuance of assessment policies.

One taking an assessment policy from a company having the right to issue life insurance under both the assessment and the reserve plans cannot, in the absence of express contract, require the company to continue the issuance of assessment policies.

3. Same—abandonment of policy.

One who voluntarily ceases to pay his insurance premiums and abandons his policy cannot maintain an action for damages for its cancellation.

(October 17, 1905.)

APPEAL by plaintiff from a judgment of the Superior Court for Craven County in favor of defendant in an action brought to recover damages for the alleged wrongful cancellation of an insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. M. DeW. Stevenson and A. D. Ward, for appellant:

A mutual life insurance company, by

Case Note.—The holding, in the above case, that one taking an assessment policy from a company entitled to issue policies under different plans cannot require the company to continue the issuance of assessment policies in the absence of express contract, in addition to the authorities cited therein, finds further support in *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479, which denies the right of the beneficiary in a certificate agreeing to pay a specified amount, or a sum equal to \$1 per member of the class to which the insured belongs, to set up as a breach of contract a change in the by-laws, regularly and honestly made, providing for payment of a fixed premium, thereby creating a new class of insurance, into which many of the members of the class to which the insured had belonged were induced to go because the payment of the premiums was less burdensome than the assessments previously required, although the number of members in such class was thereby reduced to such an extent that assessments of \$1 per member would raise only a small portion of the amount specified in the certificate; and holds that, even if such act constituted

whatever name called, after entering into a contract of insurance with one of its members, and receiving large sums thereunder, cannot, without that member's consent, so alter the contract as practically to destroy its value.

Strauss v. Mutual Reserve Fund Life Asso. 126 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699, 36 S. E. 352.

Mr. C. L. Abernethy also for appellant.

Mr. John W. Hinsdale, for appellee:

The change of place infringed none of plaintiff's rights.

Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Iversen v. Minnesota Mut. L. Ins. Co.* 137 Fed. 268; *Polk v. Mutual Reserve Fund Life Asso.* 137 Fed. 273; *Messer v. Grand Lodge, A. O. U. W.* 180 Mass. 321, 62 N. E. 252; 1 *Joyce, Ins.* § 350, p. 437.

Plaintiff acquiesced in the change.

Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159; *Supreme Council A. L. H. v. Lippincott*, 69 L. R. A. 803, 67 C. C. A. 650, 134 Fed. 824; *Supreme Council A. L. H. v. McAlarney*, 67 C. C. A. 546, 135 Fed. 72.

He voluntarily abandoned his contract, and cannot claim that the defendant has wrongfully canceled the policies sued on.

Broom, Legal Maxims, 7th ed. 268; *Peacock v. Terry*, 9 Ga. 137; 1 *Cyc. Law & Proc.* p. 652; *Ryan v. Mutual Reserve Fund Life Asso.* 96 Fed. 796; *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20

Sup. Ct. Rep. 906; *Mutual L. Ins. Co. v. Sears*, 178 U. S. 345, 44 L. ed. 1096, 20 Sup. Ct. Rep. 912; *Merchants' Mut. Ins. Co. v. Underwood*, 1 Sandf. 474; *De Bernardy v. Harding*, 8 Exch. 822.

Mr. W. W. Clark also for appellee.

Clark, Ch. J., delivered the opinion of the court:

This is an action for the wrongful cancellation of a policy issued to the plaintiff in 1882 by the defendant upon the assessment plan. The defendant was incorporated in the state of Connecticut and its charter is set out in the complaint. It appears therefrom that the defendant was authorized to issue legal reserve insurance policies, as well as accident and assessment insurance, and it was provided therein that the charter might be repealed or amended at the will of the legislature. In 1899 the defendant ceased writing assessment policies altogether, and restricted itself entirely to old line, or legal reserve, insurance, leaving the assessment members in a class to themselves, but not subdividing them, as in *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699, 36 S. E. 352. The plaintiff became alarmed at the defendant's ceasing to write policies on the assessment plan and the increasing annual assessments, and in 1901 he ceased to pay his assessments, whereupon the defendant declared his policy forfeited.

The defendant's plea of the statute of limitations, that more than three years had elapsed between the time his policy was declared forfeited and the bringing of this action, cannot avail. The statute of limitations does not run in favor of a nonresident,

a breach of contract, the damages were too remote, speculative, and conjectural to form the basis of a legal recovery.

But in *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 17 S. W. 625, an assessment company doing business on the endowment plan obtained from the legislature, without the knowledge or consent of one of the members, an act authorizing it to abandon such plan and adopt the straight insurance system. After procuring such change, it induced as many members as possible to surrender their old certificates for insurance under the new plan, or for a payment in money. In an action by a member, who refused to do either, or to continue to pay assessments after the change, to rescind the contract and recover back the amounts paid, the court said that he had a binding contract with the company; which it had no power to change or abandon without his consent, and that its act in intentionally inducing other members to abandon their contracts, thereby lessening the membership and reducing funds to which continuing members had to look for a compliance with the terms 1 L.R.A. (N.S.)

of their contract, was such a breach of contract as to absolve them from all obligations, and entitle them to recover back the consideration paid thereon.

And *Smith v. Northwestern Nat. L. Ins. Co.* 123 Wis. 586, 102 N. W. 57, holds that an assessment company which, after issuing a certificate agreeing to pay a specified sum on a given date if 80 per cent of an assessment on all its members at a specified rate would produce such amount, accepts the benefit of a statute authorizing it to accept fixed premiums payable at fixed times, instead of assessments payable at indefinite times as needed, after which all insurance taken is of the latter class, cannot claim that the recovery of a member remaining on the assessment list is limited to 80 per cent of the amount which would be raised by an assessment on those remaining on such list.—especially where a large number of the members therein had been induced to adopt the premium plan by allowing them credit because of their interest in a fund created out of excess of assessments previously made.

whether it is an individual or a corporation. Code, § 162; *Alpha Mills v. Watertown Steam Engine Co.* 116 N. C. 804, 21 S. E. 917; *Grist v. Williams*, 111 N. C. 53, 32 Am. St. Rep. 782, 15 S. E. 889. What is said at the conclusion of the opinion in *Williams v. Iron Belt Bldg. & L. Asso.* 131 N. C., at page 270, 42 S. E., at page 608, is in no wise an intimation that chapter 5, p. 66, Laws 1901, or chapter 54, § 62 (3), p. 175, Laws 1899, which authorized service of summons against nonresident insurance companies upon the commissioner of insurance, in any way abrogates or affects the suspension of the running of the statute in such cases. It merely holds that by reason of those statutes summons can hereafter be so readily and promptly served that no question as to the bar from the lapse of time is likely to arise; not that it will be a bar, if presented. That service can thus be had upon a nonresident corporation may be a reason why the general assembly should amend § 162 of the Code, so as to set the statute running in such cases; but it has not done so, and the courts cannot.

But we agree with his Honor below in his granting the judgment of nonsuit. The plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance, or that he was in any wise injured thereby. The charter of the defendant authorized it to issue the different kinds of policy, and there is nothing in the charter or in the plaintiff's policy which required the defendant to continue writing assessment insurance after the company should think it advisable to discontinue that kind of insurance. The annual premiums in assessment companies necessarily grow larger with the age of the assured and the reluctance of young men to come in to prevent by their premiums the increase of rates which come to an aging and diminishing class. This is the peculiar weakness of that particular kind of insurance. The plaintiff had no right, under its contract, or under the defendant's charter, to require it to continue to struggle for "new blood," as it is called, to keep down his assessments. His reliance must be upon the "safety fund" created out of the excess of premiums, invested for the purpose of making good the payment of policies, which, in a dwindling class, would otherwise require assessments too heavy to be carried solely by the survivors. In *Wright v. Minnesota Mut. L. Ins. Co.* 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549, the court sustained the validity of a statute which authorized assessment companies to convert themselves into old line or legal reserve companies; but here the defendant in its original charter had the right to issue

either kind of policy, and there was no provision requiring it to continue to issue both. In *Polk v. Mutual Reserve Fund Life Asso.* 137 Fed. 273, a company which had been purely assessment changed to old-line insurance against the protest of a dissatisfied member; the company keeping up, as in this case, its separate machinery and system for its assessment members. A bill was filed charging insolvency, and that the change in its plan of insurance was a violation of the insurance company's contract of insurance. The court dismissed the bill, and said that the insured had "no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." Here all the provisions of the original articles for carrying out the contracts between the assessment members and the company are continued unimpaired. The change of business relates only to future contracts to be made thereafter. The defendant had the charter right to issue both assessment and old-line policies, and there is nothing in its contracts with assessment members that it shall continue to do that kind of business, when experience may have satisfied the company that it was unsafe. In *Strauss v. Mutual Reserve Fund Life Asso. supra*, the contract with the plaintiff provided that "assessments should be made upon the entire membership," and the court held that the company violated this when it arbitrarily divided its assessment members into classes, and arbitrarily increased Strauss's assessment, when it continued to assess other members of the same age, in other classes, at much lower rates. In this case there is no evidence that the defendant arbitrarily increased in the plaintiff's assessment or discriminated in the amount as between him and other assessment members. There was no contract that only an assessment business would be done; but the plaintiff knew from the defendant's charter that it was authorized to issue both kinds of policy.

The plaintiff voluntarily ceased payment and abandoned his policy. He cannot now be heard to ask damages for its cancellation. *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906; *Mutual Life Ins. Co. v. Sears*, 178 U. S. 345, 44 L. ed. 1096, 20 Sup. Ct. Rep. 912; *Ryan v. Mutual Reserve Fund Life Asso.* 96 Fed. 796. In every case where damages have been allowed for the cancellation of a policy of insurance, it was alleged and proved that the cancellation was wrongful. *Braswell v. American L. Ins. Co.* 75 N. C. 8; *Lovick v. Providence Life Asso.* 110 N. C. 93, 14 S. E. 506; *Burrus v. Life Ins. Co.* 124 N. C. 9, 32 S. E. 323; *Hollowell v. Life Ins. Co.* 126 N. C. 398, 35 S. E. 616; *Strauss v. Mu-*

tual Reserve Fund Life Asso. 126 N. C. 971, 54 L. R. A. 605, 83 Am. St. Rep. 699, 36 S. E. 352; *Simmons v. Mutual Reserve Fund Life Asso.* 128 N. C. 469, 39 S. E. 966.

The exceptions to evidence are without merit. The plaintiff had already stated that he had ceased to pay because he "saw he could not keep up," and when again asked why he had written the company discontinuing his policy the court correctly held that the witness might state any facts connected with the matter. His motives, or the method of reasoning by which he arrived at his conclusion to abandon his policy, was irrelevant, as was also the other excluded question, whether the plaintiff subsequently took out other insurance in lieu of this which he had abandoned. The answer, whether it had been "Yes" or "No," could have thrown no possible light upon this controversy.

No error.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

SAMPSON BARRETT, Appt.

(138 N. C. 630.)

1. Intoxicating liquor—possession proof of intent to sell.

A statute making possession of more than one quart of liquor prima facie evidence of intent to violate the statute against illegal sales is not unconstitutional as invading the province of the judiciary and depriving accused of the presumption of

Case Note.—The power of the legislature to pass a statute making the possession of a certain amount of intoxicating liquor prima facie evidence of an intent to violate the law against illegal sales is supported by the authorities and text-book writers, and is based upon the right of the legislature to change the rules of evidence, and upon the doctrine that an accused person has no vested right in any presumption or rule of evidence which the lawmaking power cannot alter, within certain limits. When possession is shown, then the legal presumption of guilt arises, and it devolves upon the accused to give a satisfactory explanation. Such a statute does not make it obligatory upon the jury to convict after the presentation of such proof, but it shifts upon the accused the duty to explain. But statutes which undertake to make evidence of certain facts absolute or conclusive proof of guilt are unconstitutional; those, however, which merely declare statutory presumptions affecting the burden of proof are valid.

The text-books which lay down substantially the same doctrine are 2 Wigmore, Ev. § 1354; Black, Intoxicating Liquors, §§ 60, 525; Cooley, Const. Lim. pp. 409, 410; and Wharton, Crim. Ev. §§ 715, 715a. 1 L.R.A. (N.S.)

innocence, or as making prima facie evidence of guilt a fact which has no relation to, or does not tend to prove, the criminal act.

2. Same—local laws.

Local laws applicable to one county may be passed with respect to the regulation of the liquor traffic.

3. Same—equal protection of laws.

The equal protection of the laws is not denied to citizens of a certain county by a statute providing that having in possession in that county more than a quart of liquor without license to sell the same shall be deemed prima facie evidence of intent to make an illegal sale thereof.

(Brown, J., dissents.)

(April 11, 1905.)

APPEAL by defendant from a judgment of the Superior Court for Union County convicting him of violating the statute regulating the sale of intoxicating liquors. Affirmed.

Statement by Connor, J.:

Defendant was charged with unlawfully and wilfully keeping for sale, etc., spirituous liquors, contrary to the form of the statute, etc. Upon a plea of not guilty, the state introduced one J. A. Williams, who testified that on the night in question witness and Mr. Bivens went up the road to see if they could head the defendant off: that about a mile or two from town they met him. He had two 5-gallon kegs of corn whisky, a ½-gallon jug, and 1 pint in a

A provision that in prosecutions for selling intoxicating liquors possession of such liquors, except in a private dwelling unconnected with the place of business, by one without a license, shall be deemed prima facie evidence of possession for sale in violation of law, is upheld as constitutional in *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870.

And in *Parsons v. State*, 61 Neb. 244, 85 N. W. 65, the court sustained the validity of a statute making possession of intoxicating liquor, by one unauthorized to sell, presumptive evidence of violation of law, unless, after examination of one so charged, he shall satisfactorily explain the reason for his possession of it.

The same is true of a statute providing that whenever an illegal sale of liquor is alleged, and a delivery of it shown, it shall not be necessary to prove a payment; but that such delivery shall be presumptive evidence of the sale. *State v. Hurley*, 54 Me. 562; *Com. v. Wallace*, 7 Gray, 222; *Com. v. Rowe*, 14 Gray, 47.

A statute which provides that it shall not be necessary to prove an actual sale of intoxicating liquors in any building to establish the character of such premises as a common nuisance, but that the notorious

bottle, a little over a mile from town. He went on the public road in a top buggy. Whisky was covered over with a lap robe. Said he got it up the country from a colored man, whom he did not know. Said it did not belong to him; it belonged to some other people; that he would tell who it belonged to when it was necessary to do so; that he would prove it up. There was other testimony of the same character. It was admitted that the defendant had no license to sell liquor. He introduced no testimony. Defendant requested the court, in writing, to charge the jury "that, upon the whole evidence, you cannot find the defendant guilty. The verdict should be not guilty." This was refused. Defendant excepted. The court charged the jury, among other things, as follows: "Under the rules of evidence, in all cases where defendant is charged with crime, it is the duty of the state to satisfy the jury, beyond a reasonable doubt, of the defendant's guilt. The statute under which the defendant is indicted provides that, if any person, other than licensed retail dealers under state laws, shall keep in his possession liquors to the quantity of more than 1 quart within said county, it shall be prima facie evidence of his keeping it for sale, within the meaning of this act. The state insists that it has shown to you that the defendant had more than 1 quart of liquor in his possession in said county of Union. The state insists that makes a prima facie case of guilt against the defendant, and that therefore it has shown to you, under the rules of evidence prescribed by this statute, that the defendant

is guilty. The law is that it is presumed, or, rather, it is a prima facie case,—that is, a case upon first impression made out,—nothing else appearing, that the defendant had it for sale, if he is shown to have kept more than 1 quart of liquor in his possession within the county at one time. That is what the state insists upon. It insists that it has shown you that the defendant had the liquor, and that this statute is applicable, and that it is your duty to find him guilty. The defendant contends that, at the time the prosecuting witness met him, that he stated that the liquor was not his; that he gave no account of it, further than to say that it belonged to some other parties. The state does not rely upon his confession for a conviction in this case, but upon the fact that the liquor was found in his possession, and upon the statute. Taking this, and applying this rule of evidence, if you find beyond a reasonable doubt that he had the liquor and kept it for sale, you will return a verdict of guilty; if the state has not satisfied you upon all of the testimony, you will return a verdict of not guilty." To this charge the defendant excepted. A verdict of guilty. Motion for new trial. Motion denied. Judgment and appeal.

Messrs. R. B. Redwine and A. M. Stack, for appellant:

The acts declared prima facie evidence of the crime must have some relation to the criminal act, and tend to prove the crime.

1 Jones, Ev. § 194, p. 429; State v. Bes-

character of the premises shall be evidence of that fact, is valid; the word "character" being used as a synonym for "reputation." State v. Wilson, 15 R. I. 180, 1 Atl. 415; State v. Thomas, 47 Conn. 546, 36 Am. Rep. 98. The court, in State v. Wilson, *supra*, in speaking of the case of State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26, which is cited in the prevailing and dissenting opinions in STATE v. BARRETT, said that the fault with the provision condemned in that case as invalid was that it made it the duty of the jury to convict of illegal sales of intoxicating liquor upon prima facie evidence, if un rebutted, whether satisfied by it of the guilt of the accused or not.

It is within the power of the legislature to enact a statute making the fact that persons are allowed to enter a saloon on days or hours when the sale of intoxicating liquors is prohibited by law prima facie evidence of guilt, upon a trial charging the saloon keeper with violation of law in the sale of liquor during prohibited times. State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469.

But in People v. Lyon, 27 Hun, 180, which was cited with approval in the dissenting 1 L.R.A. (N.S.)

opinion in STATE v. BARRETT, it was held that a conviction under a statute which provides that "whenever any person is seen to drink in such shop or house, outhouse, yard, or garden belonging thereto, any spirituous liquors or wines, forbidden to be drank therein, it shall be prima facie evidence that such spirituous liquor or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein,"—was illegal, and the statute unconstitutional as depriving the accused of his right to a jury trial; as the statute made the act of a third person, with which the proof did not show the accused to be connected, prima facie evidence of an illegal sale.

The case of Board of Excise v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, which is also cited in STATE v. BARRETT, was a prosecution under the same section of the statute as is mentioned in People v. Lyon, 27 Hun, 180. The court said that the claim that this provision of the statute is unconstitutional on the ground that it violates the constitutional guaranties of due process of law and trial by jury, is unfounded. The court also said that "the general power of

wick, 13 R. I. 211, 43 Am. Rep. 26; State v. Divine, 98 N. C. 784, 4 S. E. 477.

The act is unconstitutional and void, because it is an invasion by the legislature of the judicial department of the government.

Cooley, Const. Lim. p. 377; State v. Divine, 98 N. C. 783, 4 S. E. 477.

The legislature has deprived the citizens of Union county of certain rights which the citizens of other counties of the state are still permitted to enjoy.

Fed. Const. art. 14, § 1.

Mr. Robert D. Gilmer, Attorney General, for appellee:

It is competent for the legislature to determine the burden of proof, and to declare that any evidence shall make a prima facie case.

State v. Hurley, 54 Me. 562; Board of Excise v. Merchant, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; Edwards v. State, 121 Ind. 450, 23 N. E. 277; Com. v. Wallace, 7 Gray, 222; Com. v. Rowe, 14 Gray, 47; State v. Mellor, 13 R. I. 666; State v. Cunningham, 25 Conn. 195; State v. Sartori, 55 Iowa, 340, 7 N. W. 604; State v. Norton, 41 Iowa, 430; State v. Baskins, 82 Iowa, 761, 48 N. W. 809; State v. Arie, 95 Iowa, 375, 64 N. W. 268; American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450.

The meaning of prima facie evidence is defined to be "evidence which, standing alone and unexplained, would maintain the proposition, and warrant the conclusion to support which it is introduced."

State ex rel. Turner v. Turner, 104 N. C. 566, 10 S. E. 606; State v. Mitchell, 119 N. C. 784, 25 S. E. 783, 1020.

The conviction is supported by the doctrine laid down in the cases relating to the presumption growing out of the possession of concealed weapons.

State v. Lilly, 116 N. C. 1049, 21 S. E. 563; State v. Reams, 121 N. C. 556, 27 S. E. 1004; State v. Anderson, 129 N. C. 521, 39 S. E. 824.

the legislature to prescribe rules of evidence and methods of proof is undoubted. . . .

So long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds. . . . Here the act which is made prima facie evidence of an illegal sale takes place upon the premises of the person charged, has some relation to and furnishes some evidence of the alleged illegal sale, and occurs in a place where liquors are authorized to be kept and sold. To make drinking the liquor in such a place and under such circumstances 1 L.R.A. (N.S.)

Also those cases in which the burden of proving contributory negligence is placed by statute upon the defendant.

Wallace v. Western North Carolina R. Co. 104 N. C. 442, 10 S. E. 552; State v. Geer, 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 732, 22 Atl. 1012; Com. v. Hall, 128 Mass. 410, 35 Am. Rep. 387.

A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected, by the Constitution.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469.

A state may prohibit the manufacture of liquor for drinking purposes, even for private use.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State v. Ray, 131 N. C. 814, 60 L. R. A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; Bailey v. Raleigh, 130 N. C. 209, 58 L. R. A. 178, 41 S. E. 281; State v. Barringer, 110 N. C. 525, 14 S. E. 781; Paul v. Washington, 134 N. C. 363, 65 L. R. A. 902, 47 S. E. 793; Freund, Pol. Power, 1904. § 455, pp. 485, 486.

Connor, J., delivered the opinion of the court:

The defendant is indicted for violating the provisions of chap. 434, p. 749, Laws 1903, which provides that it shall be unlawful for any person, etc., other than licensed retail dealers, to sell, exchange, barter, or dispose of, for gain, or to keep for sale, within the county of Union, any spirituous, vinous, malt, and intoxicating liquors, etc.; that if any person other than licensed retail dealers, under state laws, shall keep in his possession liquor to the quantity of more than 1 quart within this county, it shall be prima facie evidence of

prima facie evidence of an illegal sale to the person drinking violates no constitutional guaranty."

The court, in State v. Momberg (N. D.) 103 N. W. 566, sustained the validity of a statute which declared that, in all cases other than those where intoxicating liquor is sold by virtue of the provisions of this chapter, the fact that any person engaged in any kind of business possesses a United States liquor license shall be prima facie evidence against the one who has it that he is keeping or selling intoxicating liquor contrary to law. The court said that such a statute does not raise a conclusive presumption against the accused, and that it is error to instruct the jury that such evidence, though uncontradicted, is conclusive.

his keeping it for sale, within the meaning of this act.

The defendant contends that the section of the statute under which he was convicted is unconstitutional and void, for that (1) it is an invasion by the legislative of the judicial department of the government; (2) that it deprives the defendant of the presumption of innocence, and puts upon him the burden of showing that he is not guilty.

There can be no serious doubt of the power of the legislature to change the rules of evidence, and to prescribe different rules in different classes of cases, subject to well-defined limitations. "Laws which prescribe the evidential force of certain facts by enacting that upon proof of such facts a given presumption shall arise, or which determine what facts shall constitute a prima facie case against the accused, casting the burden of proof upon him of disproving or rebutting the presumption, are not generally regarded as unconstitutional, even though they may destroy the presumption of innocence. An accused person has no vested right in this or any other presumption or law of evidence or procedure that the lawmaking power cannot, within constitutional limits, deprive him of. The existing rules of evidence may be changed at any time by legislative enactment. But the legislative power must be exercised within constitutional limitations, so that no constitutional right or privilege of the accused is destroyed. He cannot be deprived of a fair and impartial trial by a jury of his peers according to the law of the land." *McClain, Crim. Law*, § 16; *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503; *State v. Cunningham*, 25 Conn. 195. Discussing a statute in some respects similar to ours, the supreme court of Massachusetts, in *Com. v. Williams*, 6 Gray, 1, says: "Nor does it appear that the establishment of this new rule of evidence is in any degree the result of judicial instead of legislative action; or that it does in any way infringe upon the indisputable right of the accused to have his guilt or innocence ascertained, and the charge made against him passed upon, by a jury. The statute only prescribes, to a certain extent, and under particular circumstances, what legal effect shall be given to a particular species of evidence, if it stands entirely alone and is left wholly unexplained. This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the government to establish the accusation which it makes. . . . The only purpose and effect of the particular clause of the 1 L.R.A. (N.S.)

statute objected to are to give a certain degree of artificial force to a designated fact until such explanations are afforded as to show that it is at least doubtful whether the proposed statutory effect ought to be attributed to it; but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors. . . . Making out a prima facie case does not change the burden of proof. . . . But if the government, in proving the delivery of any quantity of spirituous liquor, in support of a prosecution for an alleged violation of the law, prove also, as it must almost necessarily do, as a part of the transaction, the circumstances attending it, then those circumstances immediately become evidence in the case, to be weighed and considered by the jury; and, although the naked delivery would be prima facie evidence of the sale, and so, indirectly, of the guilt of the accused, yet, this proof being accompanied by evidence of the manner in which the delivery occurred, and of the surrounding circumstances, he is not to be convicted, unless, upon just consideration of all the facts thus disclosed, and placed before the jury, they are satisfied beyond a reasonable doubt of his guilt." *Board of Excise v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484; *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; *Voght v. State*, 124 Ind. 358, 24 N. E. 680; *Lincoln v. Smith*, 27 Vt. 328; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *Black, Intoxicating Liquors*, 60. The legislature of this, and we presume every other, state has frequently changed the rules of evidence, and declared that certain facts or conditions, when shown, shall constitute prima facie evidence of guilt. The power to do so has always been sustained. By § 983 of the Code it is made a "high misdemeanor," punishable by imprisonment in the penitentiary not less than five years, to sell liquor "found to contain any foreign properties or ingredients poisonous to the human system." If such liquors are found, upon analysis of "some known competent chemist," to contain any poisonous matter, "it shall be prima facie evidence against the party making this sale." By § 1005, prohibiting the carrying of concealed weapons off one's own premises, it is declared that, if any person shall have about his person any such weapon, such possession shall be prima facie evidence of concealment. The construction of this statute has been frequently before this court, but the power of the legislature has not in any case been questioned to prescribe the rule of evidence, although the effect of it has been frequently decided, as in *State v. Gilbert*, 87 N. C. 527, 42 Am. Rep. 518,

wherein Ruffin, J., says: "The statute declares that the having of a deadly weapon upon one's person shall be prima facie evidence of its concealment, and this of itself seems necessarily to imply that it may be done under such circumstances as will not amount to an offense." In this and other cases this court has held that, upon all of the facts brought out by the state, the presumption was rebutted and the defendant acquitted. By § 1077 it is made a misdemeanor for any dealer to sell, etc., liquor to any minor, etc., knowing the said person to be a minor, "provided that said sale or giving away shall be prima facie evidence of such knowledge." Section 1089, declaring it to be a misdemeanor to sell mortgaged property, makes the failure of the sheriff, etc., to find the property, prima facie evidence of a sale with intent to hinder, defeat, etc., the rights of the mortgagee. Section 1109 makes it a misdemeanor to secrete or harbor any seaman who has deserted, knowing of such desertion; declaring that the concealment shall be deemed prima facie evidence of knowledge. These and others statutes not necessary to cite show the course of our legislation in this state on this subject.

The author of the latest work on the Law of Evidence, in discussing the subject, says: "A rule of presumption is simply a rule changing the burden of proof; i. e., declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the legislature has the entire control over such rules, as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations of evidence expressly enshrined in the Constitution.

Yet this elementary truth has been repeatedly questioned, and courts have repeatedly vouchsafed an unmerited attention to the question, chiefly through a hesitation in appreciating the true nature of a presumption, and a tendency to associate in some indefinite manner the notion of conclusively shutting out all evidence, and that of merely shifting the duty of producing it. Fortunately, sound principle has almost everywhere prevailed, though at an unnecessary expense of argument and hesitation." Wigmore, Ev. § 1354. "With what intent a person keeps intoxicating liquors is always a question of fact for the jury, to be determined upon a view of all the evidence. And in disposing of that question they are required by the statute to consider the keeping of the articles in the manner specified in the statute as presumptive evidence of an unlawful intent. But that evidence may be rebutted and controlled by

the circumstances, as would be the case in the instances of the sexton and carman alluded to, as well as by other evidence in the case, whether shown by the accused in his defense, or by the state in connection with the evidence proving the possession. With such evidence, the jury may also take into consideration the presumption of the innocence of the accused." *State v. Cunningham*, 25 Conn. 195. The defendant says that, conceding this to be true, the statute is void, for that it arbitrarily makes an act lawful in itself prima facie evidence of a guilty intent. This criticism would apply to almost every case in which an act is made prima facie evidence of guilt. As illustrating this, carrying a weapon off one's own premises is entirely lawful, and the right to do so, it has been said, is secured by the Constitution. Const. art. 1, § 24. It has been expressly held that the act in this respect is constitutional. In *State v. Cunningham*, 25 Conn. 195, the court says: "It has been said that the keeping of spirituous liquors is a lawful act, and, being such, the legislature has no constitutional power to make it evidence of an unlawful act. Many acts at common law are lawful, and yet the performance of them is prohibited by the legislature, in the legitimate exercise of their sovereign power. Even the sale of such liquors is not by the common law unlawful. It is only made so by statute. And if the legislature can constitutionally prohibit such sale, we see not why they may not properly prescribe what acts shall be considered as evidence of an intent to make the sale." The slightest reflection will show that, if this objection to the statute could be sustained, the power of the legislature would be practically denied.

The defendant next calls into question the validity of the statute because he says the fact made prima facie evidence of the guilty intent has no relation to the criminal act, and does not tend to prove it, first, because the possession of liquor does not tend to show an intent to sell it; and, second, the possession of a quantity more than 1 quart is entirely consistent with such possession for personal or domestic use. It must be conceded that some of the courts have placed this limitation upon the legislative power. *Peckham, J.*, in *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, says: "The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary; and the accused must have in each

case fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper." *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26. This case has been criticised in the following language: The opinion discloses confused notions as to the nature of presumptions and burden of proof. "It has occasionally been suggested that these legislative rules of presumption or any legislative rules of evidence must be tested by the standard of rationality, and are invalid if they fall short of it. But this cannot be conceded. If the legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth. Apart from the Constitution, the legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science. All that the legislature does in such an event is either to render admissible a fact which was before inadmissible, or to place the burden of producing evidence on the opposite party. When this has been done, the jury is free to decide; or, so far as it is not, this is because the party has voluntarily failed to adduce contrary evidence. There is here nothing conclusive, nothing prohibitive. So long as the party may exercise his freedom to introduce evidence, and the jurors may exercise their freedom to weigh it rationally, no amount of irrational legislation can change the result." *Wigmore*, Ev. § 1354.

We think that a full recognition of the limitation does not invalidate the statute under discussion. Certainly the legislature has the power to prohibit the keeping of liquor with intent to sell. *Black, Intoxicating Liquors*, 387. It is equally clear that, without any statutory rule of evidence, the keeping is an essential fact to be proved, and necessarily relevant. The quantity, place, circumstances, etc., in and under which it is kept, are to be considered by the jury in passing upon the intent. *Black, Intoxicating Liquors*, 525. This for the manifest reason that they have a relation to the offense charged, to wit, the keeping with intent to sell. Therefore, when the legislature gives an additional intensity to the proof of the fact which is, without any statute, relevant as tending to prove the fact in issue, we are unable to see how it can be said that it exceeds its constitutional limitation in this respect. The defendant, however, contends that the quantity named, to wit, "more than a quart," has no relation to, and does not tend to prove, the offense. The power being conceded, it is difficult to

conceive how the court could undertake to fix the limit in respect to the quantity prescribed, as the basis of the presumption. It will be observed that it is not the keeping of a quart, or any fixed quantity beyond a quart, which is made a prima facie case, but "more than a quart." Of course, the prima facie case would be stronger or weaker according to the quantity kept in excess of a quart. We would find it exceedingly difficult to prescribe any limit to the power of the legislature in this respect. We must ever keep in mind the fundamental principle that courts must not call into question the validity of statutes because they may not think them wise or wholesome. To do so would be to introduce untold confusion and uncertainty into our jurisprudence. It has been so frequently and forcibly said that, within the sphere of its power, the legislature is supreme, that it does not need the citation of authority or extended reasoning to sustain it. As enforcing this truth, we quote: "Whether the legislature acted wisely or not is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it; that must be for the legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the legislature to act in a given case. It would be rank usurpation for us to inquire into the wisdom or propriety of their acts." *Nash Ch. J.*, in *Taylor v. Newberne*, 55 N. C. (2 Jones, Eq.) 141, 64 Am. Dec. 566. "It will not throw much light on a question like this to put extreme cases of abuse of such a power to test the existence of the power itself." *Shaw, Ch. J.*, in *Norwich v. Hampshire County*, 13 Pick. 60. "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary." *Black, Ch. J.*, in *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759. See also *Iredell, J.*, in *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648. In *Cunningham's Case*, 25 Conn. 195, the act provided that the finding of spirituous liquor in possession of a person, except in his dwelling house, should constitute prima facie evidence that it was kept for sale. In *William's Case*, 6 Gray, 1, the statute provided that the delivery of liquor in any other place than a dwelling house should constitute prima facie evidence. In *Merchant's Case*, 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, the act provided that, where the person is seen to drink intoxicating liquors on the premises of one who had license to sell liquor not to be drunk on the premises, it should constitute prima facie evidence of guilt. In *Cannon's Case*, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N.

E. 759, the act made the possession of a junk seller of secondhanded bottles and kegs presumptive evidence of the unlawful use. In *Santo's Case*, 2 Iowa, 165, 63 Am. Dec. 487, the statute made the keeping of liquor in any other place than the dwelling or its dependencies prima facie evidence of keeping liquor with intent to sell. These acts were all sustained. See also *Lincoln v. Smith*, 27 Vt. 328; *American Fur Co. v. United States*, 2 Pet. 358, 7 L. ed. 450. Notwithstanding the decision in *Beswick's Case*, 13 R. I. 211, 43 Am. Rep. 26, we find the supreme court of Rhode Island at the same term, in *State v. Mellor*, 13 R. I. 666, holding that a statute providing that evidence of the sale or keeping of intoxicating liquors for sale shall be evidence that the sale or keeping is illegal, was valid; the court saying: "This inference or presumption, without the aid of the statute, would not be available as legal evidence, but we think that it was in the power of the general assembly to make it so; and, when it once becomes evidence, it is for the jury, not the court, to say whether or not it is sufficient to prove the fact, for the proof of which it is adduced." We know of no rule based upon sufficiently general observation or experience which would enable this court to say, as matter of law, that the keeping of more than a quart of liquor in one's possession has no relation to an intent to sell. It will be observed that this is a local statute, applying only to the county of Union. Upon what basis the legislature adopted the standard, we are not informed. There is no evidence before us how much liquor is usually kept for private or domestic use by citizens of that county. The evidence in this case is the extent of our information. Certainly there is nothing here to bring us to the conclusion that the standard fixed is so unreasonable and arbitrary as to have no relation to the offense charged. An examination of a large number of cases from those states which have enacted repressive legislation in regard to the liquor traffic shows that it has been found necessary to incorporate this and similar provisions in their statutes, and the courts of such states have, with the exception of the one case in Rhode Island, uniformly sustained them. That court has sustained statutes similar to the one before us. If we should say that the keeping of "more than a quart" has no relation to the offense, what standard shall we set? Upon what more rational basis could we fix the limit.—at a gallon or any other quantity? It is not our province or duty to supervise the legislative mind in this regard. To the suggestion that this law may be abused in its execution, and the personal and property rights of the citizen

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invaded, it is sufficient to say that human wisdom has never yet devised any system of legislation or jurisprudence to which the same objection may not be urged. It would be difficult to find any principle of the common law or any statutory law which does not contain within itself the germ from which an oppressive administration may not develop. After all that can be said and done, the safety of the citizen is dependent upon the observance and enforcement of his constitutional rights, as interpreted and enforced by officers of his own selection. As was said by a great jurist and statesman, whose life was devoted to the defense of constitutional liberty: "There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do if its members forget all their duties; disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice." *Black, J., Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759. While we are to keep a watchful eye, clear mind, and firm hand upon every threatened invasion of the constitutional guaranties of the citizen, we are to accord to the several departments of the government, and those who may administer them, the same jealous regard in that respect which we ourselves exercise.

As indicating the purpose of the general assembly, in its desire to suppress the liquor traffic in the county of Union, in response, as we must assume, to the wishes of the citizens of that county, we note that it has carefully guarded the sanctity of the dwelling by requiring any person applying for a warrant to search suspected premises to file an affidavit setting forth that the affiant has reason to believe that the owner of such premises is keeping for sale liquors as prohibited by this act, which reasons shall be set forth in the affidavit, and, if the justice of the peace shall deem such reasons sufficient, he shall issue his warrant. It will thus be seen that no citizen may be disturbed in his premises, under this statute until a judicial officer shall determine, upon sworn evidence, that sufficient reason exists therefor. While the statute may be open to criticism in respect to its rigid provisions, such criticism must be addressed to the legislative department of the government, which represents and gives expression to "the state's collected will," rather than to us, who are confined to the question of its validity, measured by the Constitution of the state.

The defendant next suggests that the statute violates the Constitution, in that it prescribes a rule of evidence applicable only to the citizens of Union county, and not to other counties in the state. The force of

this contention depends upon the power of the legislature to declare that the keeping of spirituous liquors with intent to sell in Union county is a misdemeanor, or, in other words, to pass statutes of local application upon the subject. This power has been so long recognized by the court and exercised by the legislature that we do not deem it necessary to re-examine the foundations upon which it rests. In *State v. Muse*, 20 N. C. (4 Dev. & B. L.) 463, Ruffin, Ch. J., says: "There can be no doubt that the legislature hath power, and that there is an obligation in sound morals and true policy on that body, to protect the decency of divine worship by prohibiting any actual interruption of those engaged in worship, or any practices at or near the place in which the legislature may see a tendency to produce such interruptions." The act referred to prohibited the sale of spirituous liquors near a church. This court, in *State v. Joyner*, 81 N. C. 537, says: "Nor is the competency of the legislature to pass local acts such as the present now an open question. The power has been so long and so often exercised and recognized in cases coming before this and other courts that its existence must be considered as settled." *State v. Stovall*, 103 N. C. 416, 8 S. E. 900; *Black, Intoxicating Liquors*, § 40. The power to pass the law of local application being conceded, we are unable to perceive any reason why the legislature may not prescribe rules of evidence, within the limitations fixed, applicable to charges for its violation; nor are we cited to any authorities to the contrary.

The defendant suggests that the statute violates article 14, § 1, of the Federal Constitution, which prohibits any state from making or enforcing any law which denies to any person within its jurisdiction equal protection of the law. The question, viewed from this standpoint, has been so thoroughly and ably discussed and settled by the Supreme Court of the United States in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, that we do not deem it necessary to do more than refer to that case.

It is seriously insisted, however, that to sustain this act would be to overrule *State v. Divine*, 98 N. C. 778, 4 S. E. 477. We have carefully examined the opinion of the chief justice in that case, and find nothing in the question decided which conflicts with the conclusion at which we have arrived. The defendant was indicted under a statute containing very peculiar provisions, the only one of which it is necessary to be considered here is that declaring that, when any live stock should be killed, or injured by any car or engine running on a railroad in certain enumerated counties, such injury should be

a misdemeanor; that the president, superintendent, engineer, or conductor may be indicted therefor. It was further provided that, when any stock was killed or injured in such counties, it would be prima facie evidence of negligence. The defendant (superintendent of the road) was indicted under the statute. The jury found that the defendant was not upon the train or engine when the stock was injured, and in no way connected therewith. The eminent counsel for the defendant insisted, among other manifest reasons, that the statute was invalid for that it rendered the act criminal in one locality which was not so in another, and raised out of an act done by one employee, a presumption of guilt against another employee, who did not in any way participate in it. This court sustained the objection. The distinction between the statute then under consideration and the one before us is manifest. The act which was made the prima facie evidence of guilt in our case can be committed only by the person accused. The "keeping" made prima facie evidence must be the personal act of the defendant.

We have given to the questions discussed by the defendant's able and zealous counsel more than usual consideration. His Honor carefully guarded the right of the defendant to be tried by a jury of his county, and convicted only when they were satisfied beyond a reasonable doubt, upon the whole of the evidence, that he kept liquor for sale; expressly stating to the jury that, if the state had not thus satisfied them upon all the testimony, they should return a verdict of not guilty. It would seem that, in the light of the testimony, no other conclusion could have been reached.

No error.

Walker, J., concurring in result:

Having with him so large a quantity of liquor, in packages of different size, and covered over with a lap robe, was sufficient of itself to constitute prima facie evidence of the defendant's guilty possession. When proof of a certain fact is made prima facie evidence of the main fact to be established, the law does not mean that there is any presumption of guilt thereby created, but that there is sufficient evidence to go to the jury, and upon which they may convict, if there is no countervailing testimony. It does not shift the burden of proof, but the state is still required to prove its case beyond a reasonable doubt. *Wigmore, Ev. § 2494 (2)*; *Womble v. Merchants' Grocery Co.* 135 N. C. 474, 47 S. E. 493. The case was submitted to the jury in this view of the law, and I am unable to see how any substantial error was committed by the

court when the jury were permitted to consider all of the evidence. The mere fact that reference was made to the statute did not prejudice the defendant, when his possession, under the circumstances clearly shown by the evidence, and not disputed, was sufficient to carry the case to the jury. He had the full benefit of the doctrine, of reasonable doubt upon the whole evidence, which was submitted to the jury, and this case was fairly and correctly tried.

Brown, J. dissenting:

I dissent from so much of the opinion of the court as undertakes to sustain the constitutionality of § 3, chap. 434, p. 450, Pub. Laws 1903, relating to the citizens of Union county, to wit: "That if any person other than licensed retail dealers under said laws shall keep in his possession liquors to the quantity of more than a quart within said county it shall be prima facie evidence of his keeping it for sale within the meaning of this act." The provisions of this act make it an indictable offense to keep liquor in one's possession with intent to sell it, and at the same time prohibit the sale of intoxicating liquors within the county of Union. Irrespective of the provisions of the act, I am of opinion that there was sufficient testimony to be submitted to the jury that the defendant did have in his possession liquor with intent to sell it. But, inasmuch as His Honor, in charging the jury, gave force and effect to the prima facie case contemplated by the statute, I think a new trial should be granted, because it is impossible for us to determine upon what view of the evidence the jury rendered their verdict. I am of opinion that the legislature has no power to declare that the mere possession of more than a quart of liquor shall be prima facie evidence that the possessor intends to sell it, and thereby subject himself to the penalties and pains of a criminal prosecution. The legislature has not seen fit, even if it had the power to do so, to prohibit the use and possession of intoxicating liquors within Union county. It has only prohibited the keeping in possession of intoxicating liquors with intent to sell. The possession and use of intoxicating liquors are lawful acts, which any citizen of that county may do with impunity. The legislature has very extensive powers in respect to fixing, changing, or modifying the rules of evidence to be applied by the courts; but the exercise of this power in relation to criminal proceedings is subject to very important limitations prescribed by the organic law of the country, which legislatures, courts, and all others in authority must respect. Among other limitations, the legislature cannot deprive any citizen of 1 L.R.A. (N.S.)

Union county of that equal protection of the laws of the land, which is guaranteed by the 14th Amendment of the Constitution of the United States; nor can it deprive such citizen of the protection of that fundamental principle which declares him to be innocent until he is proved guilty to the full satisfaction of a jury of his peers. This presumption of innocence is thrown around the accused, and he is entitled to it at every stage of the legal proceedings instituted against him. In prosecutions under the liquor laws, there have been many legislative provisions in the different states tending to facilitate the conviction of offenders by admitting presumptive or indirect proof of certain facts, and generally these acts have been so framed as to meet with no valid constitutional objection; but there is one underlying principle which has been observed in the preparation of all such acts except the one now under consideration. "In criminal cases the limitation has been imposed that the acts declared prima facie evidence of the crime must have some relation to the criminal act, and tend to prove the crime." 1 Jones, Ev. § 194, and cases cited.

One of the most sacred rights which guard the liberty of the citizen in this and all other states of this Union is the presumption of innocence which the law throws around him. While the legislature may make certain acts of the individual, and certain facts connected with him, prima facie evidence of guilt, yet it is everywhere conceded that the act is obnoxious to the organic law unless the facts have some tendency to prove guilt. In other words, the legislature cannot, by its arbitrary will, give to a perfectly lawful and innocent act an unlawful and criminal effect, or draw from acts warranted by law, and which everyone may rightfully do, an unlawful, improper, and criminal intent. By this act the legislature has withdrawn from the citizens of Union county the equal protection of the law which is given to the other citizens of the state. In no other county in North Carolina is the citizen so situated that he may perform a perfectly lawful act and enjoy a legal right, and at the same time, by the mere force of an arbitrary statute, have inferred from it a wrongful and criminal intent. The question as to what is a denial of the equal protection of the laws is one which has been before the Supreme Court of the United States in a great many cases. The decisions of the highest courts of the states will show that it is one not easily determined. No rule can be formulated that will cover every case, but it has been generally said that no person or class of persons shall be denied the same

protection of the laws which is enjoyed by other persons or other classes in the same jurisdiction and in like circumstances. *Missouri v. Lewis* (*Bowman v. Lewis*), 101 U. S. 31, 25 L. ed. 989. Justice Field says in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, that the 14th Amendment means that equal protection and security shall be given to all persons under like circumstances in the enjoyment of their personal and civil rights. "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570. No duty rests more imperatively upon the courts than the enforcement of these fundamental provisions intended to secure with equality the rights which are the foundation of all free government. It doubtless conduces greatly to the peace, happiness, and morality of a community to prohibit the illicit sale of intoxicating liquors; but in doing so it is of equal, if not greater, importance that the fundamental rights of the citizen under our organic law should not be ruthlessly destroyed. "The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but, if by their necessary operations its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." *Connolly v. Union Sewer Pipe Co.* 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 439.

I do not question the right of the legislature to make the possession of intoxicating liquors with intent to sell an indictable offense, any more than I question its right to prohibit the sale of it entirely within the entire state, or any county or township in it; but I do deny its right, in the prosecution of crime under such laws, to take away from the citizen the fundamental rights which are thrown around him to protect him from the penalties and pains of a criminal prosecution.

It will be seen by an examination of the cases. I think, that there is absolutely no authority against the position I have taken, although innumerable cases can be found in which the legislature has made the possession of intoxicating liquors in certain cases, and under certain circumstances, prima facie evidence of an intent to sell. But I do not think my brethren can find any statute where the mere fact of the possession of 3 pints of intoxicating liquors under any and all circumstances has ever been made prima facie evidence of a criminal intent to

sell, or where any such statute has ever been upheld by any court in this country. I refer to a number of cases: *State v. Cunningham*, 25 Conn. 195; *State v. Morgan*, 40 Conn. 44; *Com. v. Wallace*, 7 Gray, 222; *Black, Intoxicating Liquors*, § 60. In most of these cases the statutes under consideration relate to certain houses wherein liquor is found. Some of them provide that, where liquor is delivered in certain quantities, such delivery shall be sufficient evidence of sale. *State v. Hurley*, 54 Me. 562. Other statutes provide that, where persons are seen drinking intoxicating liquor on certain premises, it shall be prima facie evidence that it was sold by the occupant of such premises with intent to be drunk thereon. Statutes have been upheld which provided that proof of the finding of liquor in the possession of the accused under certain circumstances specified in the act shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to law. Again, the notorious character of certain premises, when proved, has been held to be prima facie evidence of certain facts. The statutes are too numerous to set out or comment upon at length. Suffice it to say that all of them contain specific circumstances, or relate to certain premises, and none of them provide that the mere fact of the possession of a quantity of liquor exceeding a quart, without any exception whatever, shall be prima facie evidence of crime.

In *Board of Excise v. Merchant*, 103 N. Y. 148, 57 Am. Rep. 705, 8 N. E. 485, Judge Earl says: "It would not be possible to uphold a law which made an act prima facie evidence of crime . . . which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act. . . . 'But such is not the effect of declaring any circumstance or any evidence, however slight, prima facie proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it. . . .' Here the act which is made prima facie evidence of an illegal sale takes place upon the premises of the person charged, has some relation to, and furnishes some evidence of, the alleged illegal sale, and occurs in a place where liquors are authorized to be kept and sold." Judge Peckham, now of the Supreme Court of the United States, in *People v. Cannon*, 139 N. Y. 43, 36 Am. St. Rep. 668, 34 N. E. 762, says: "It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the legislature may, with some limitations, enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. . . . The limita-

tions are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary." In *State v. Shank*, 74 Iowa, 652, 38 N. W. 525, it is said: "The defendant being authorized to keep intoxicating liquors for lawful purposes, . . . no presumption arises against him that they were kept for unlawful purposes; but the law will rather presume, in the absence of proof to the contrary, that he [the defendant] kept them for lawful purposes, for men are presumed to act in obedience to the law when their acts are not shown to be unlawful." The supreme court of Indiana says: "We should unhesitatingly declare a statute void which attempted to enact that a person should be convicted of an offense upon proof of facts which might be consistent with innocence; . . . yet it has often been held that the legislature, in defining a crime, may also enact that proof of facts which are universally recognized as indicating guilt shall be sufficient prima facie evidence of the commission of the offense defined by statute." *Voght v. State*, 124 Ind. 361, 24 N. E. 681. In the case of *People v. Lyon*, 27 Hun, 180, Judge Learned says: "In the present case the defendant is charged with having sold liquors with intent that they should be drunk on the premises. It is his right to have the question . . . tried by jury. That means that the jury are to determine from their own judgment upon the facts legally given in evidence whether or not the defendant is guilty. If the legislature can declare that a certain fact is prima facie evidence of the defendant's guilt, such a declaration means that the jury must convict unless the defendant explains away this evidence." In giving a number of pertinent illustrations, the learned judge says: "If the legislature can legally enact such a clause, they might enact that, . . . if a dead body were found in any house, that should be prima facie evidence that the occupant of the house had murdered the deceased, because the legislative enactment is merely arbitrary, and need have no regard to the connection or want of connection between the evidence and the conclusion which is to be proved." In *State v. Beswick*, 13 R. I. 218, 43 Am. Rep. 26, the court says: "It will be observed that the statute makes proof of the facts mentioned in it not only evidence against the accused, but prima facie evidence of his guilt, so that upon proof of them it is not only the right, but the duty, of the jury to convict unless the presumption is rebutted by other evi-

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dence. . . . We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. . . . It virtually strips the accused of the protection of the common-law maxim that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. . . . Certainly the accused does not have the judgment of a jury if the jury is compelled by an artificial rule to convict him . . . upon proof of a fact which is consistent with his innocence. . . . Suppose that the general assembly were to enact that, if any person were generally reputed to be guilty of murder, it should be prima facie evidence that he was guilty. . . . Could it be said that his life or liberty had been taken from him by the judgment of his peers? . . . Indeed, to hold that a legislature can create artificial presumptions of guilt from facts which are . . . consistent with innocence . . . is to hold that it has the power to take away from the judicial trial . . . the very element which makes it judicial. . . . It is true the accused has the right of defense, and may, if he can adduce satisfactory evidence, rebut the statutory presumption; but the production of such evidence is not always easy, even with the right to testify in his own behalf." In *State v. Beach* (Ind.) 43 N. E. 951, it is said: A law which makes an act prima facie evidence of crime, which has no tendency whatever to establish a criminal act, is unconstitutional and void.

The right of which the legislature deprives the citizens of Union county is probably the most sacred and valuable of all the rights guaranteed to the citizens of this country in our national and state Constitutions. The words "due process of law" and "equal protection of the laws," as used in the 14th Amendment, mean practically one and the same thing. The words "the law of the land" were borrowed from *Magna Charta*, and have a recognized significance. Judge Cooley, in his work on *Constitutional Limitations*, § 355, cites with approval a definition by Judge Edwards in *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160: "Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." The effect in criminal prosecutions is to secure to the accused a judicial trial according to the general principles of the common law, and not in violation of those fundamental rules which have been established by the common law for the protection of the citizen. Among these rules there is none which is more fundamental

than the rule that every person shall be presumed innocent until he is proved guilty. "This rule," said Judge Selden in *People v. Toynbee*, 2 Park. Crim. Rep. 490. "will be found specifically incorporated into many of our state Constitutions, and is one of those rules which in our Constitution are compressed into the brief, but significant, phrase, 'due process of law'." In the case of *State v. Divine*, 98 N. C. 783, 4 S. E. 483, Chief Justice Smith quotes with approval from Judge Cooley's *Constitutional Limitations*, p. 309: "The mode of investigating the facts, however, is the same in all, and this is through a trial by jury surrounded by certain safeguards, which are a well-understood part of the system, and which the government cannot dispense with." "Meaning, as we understand," says Judge Smith, "that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done." In *Cummings v. Missouri*, 4 Wall. 328, 18 L. ed. 364, Mr. Justice Field says: "The clauses in question subvert the presumptions of innocence, and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable." In *Wynehamer v. People*, 13 N. Y. 446, the court says that the legislature "cannot subvert that fundamental rule of justice which holds that everyone shall be presumed innocent until he is proved guilty." In *San Mateo v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722, the Supreme Court of the United States says: "Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to everyone, on similar terms,—in his life, his liberty, his property, and in the pursuit of happiness."

Subjecting the statute under consideration to the test as laid down by these authorities, the conclusion to my mind is irresistible that it is obnoxious to our organic law, both Federal and state. What is the fact to be proved which constitutes the gravamen of the offense? It is certainly not the mere possession of more than 1 quart of liquor. That is a perfectly lawful act, not only in Union county, but in every other county in North Carolina. It is the intent to sell which constitutes the crime. Does the possession of 3 pints of liquor under any and all circumstances tend to prove that the possessor intends to sell it? If it does, the act is constitutional. If it does not, it is violative of the organic law of the land, if the authorities I have quoted are worth anything. What is there in the mere possession

of 3 pints of liquor which would tend in the least degree to indicate that the owner of it kept it for sale or ever intended to sell it? There are 5,000 individuals in this country who purchase liquor for their own consumption to one who purchases it for sale. To give the act the effect contended for, it must be construed with reference to the purpose of the one, without having any regard whatever to the purpose of the 5,000. The act must not be tested by the evidence in this case. Independent of the act, I am willing to admit that the evidence was amply sufficient to support a conviction. But the act in question is purely arbitrary, and it has been given that effect. It does not, as the cases I have referred to, give any specified circumstances under which the presumption shall arise. It applies to the possession of 3 pints of wine with as much force as to the possession of 3 barrels of whisky. A lady who places on her dinner table for the entertainment of her guests 3 pints of claret is as much a *prima facie* criminal as the peddler who hauls around in his covered wagon a barrel of "untaxed corn," with his pint pot tied to the spigot. The latter might justly and legally constitute a *prima facie* cause of "intent to sell," but it would be impossible to infer such an intent from the former. The possession of 3 pints of liquor in ninety-nine cases out of a hundred is far more indicative of an intent to drink than of an intent to sell. Yet the statute makes no distinction. It "feeds all out of the same spoon," and invests all persons with equal criminality in the eyes of the law, regardless of circumstances or surroundings, reason or logic. The individual in Union county who dares to have in his residence 3 pints of scuppernong wine, prescribed as a tonic for his ailing wife, is in danger of having his liberty taken from him, and sent to break rock upon the county roads, by virtue of a few little words in this statute. It will not do to say that no jury would convict a man under such circumstances. He is placed on the defensive. The shield and panoply of innocence is stripped from him, and he is at the mercy of twelve men. Fanaticism has done worse things than convicting a man under such circumstances, however unjustifiable we think it may be. This protection is given to the citizen, not to prevent his conviction alone when charged with crime, but it is given him to protect him from unjust, improper, mortifying, and expensive criminal prosecutions; and it is the most valuable and priceless possession the individual has. The citizens of Union county are as much entitled to it as any other citizens of North Carolina or the United States.

The court does not undertake to explain

how the possession of more than 1 quart of liquor can possibly be significant of a purpose to sell, and I am at a loss to know. The mere possession of 3 pints of liquor is no more indicative of the owner's purpose and intent in relation to it than is the possession of 3 pints of flour, meal, or anything else. Men sell liquor, it is true, and so they do other things; but, inasmuch as the vast majority are buyers of such articles, and not sellers, I fail to see how mere possession of so small a quantity indicates an intent to sell as strongly as it does a purpose to consume. Unless the court can show that the possession of such a quantity of liquor indicates a purpose to sell, it must hold that the legislature can, by arbitrary enactment, make a perfectly innocent and lawful act evidence of a criminal intent, although such act has no tendency to prove guilt. And such is really the effect of the decision in this case.

I have cited from the opinions in a few of the leading precedents referred to in the judgment of the court and the citations sustain fully my contention. All the statutes referred to in the opinion of the court, or in the cases cited therein, make certain acts which tend to prove guilt *prima facie* evidence of it. None of them undertake to make a purely lawful act, from which no unlawful intent and purpose can be reasonably inferred, evidence of crime. But all the cases, without an exception, so far as I can discover, declare that cannot be lawfully done. Space will not permit me to comment on all these statutes, but I will cite our own statute against carrying concealed weapons as an illustration: The statute makes the possession of the weapons named in it (pistols, bowie knives, etc.) off one's premises *prima facie* evidence of concealment. That act is plainly constitutional. Why? Because the weapons named in the act may be, and commonly are, carried in the pocket, and concealed from view. When the weapon is seen in the hand of the owner off his premises, it is a fact tending to prove that he took it from his pocket, and thereby had it concealed on his person. If I had space, I could point out the true significance of every act of the legislature mentioned by the court, and easily show that the facts declared to be *prima facie* evidence of crime have some tendency to prove it, while the fact stated in the act under consideration has no such tendency. The general assembly, in my opinion, has just as much right to declare that, in all indictments in Union county for having liquor in possession with intent to sell, the defendant shall be presumed to be guilty, and shall be required to establish his innocence, as it had to enact the statute in question, wherein, by mere ar-

bitrary words, a perfectly lawful and innocent act is declared to be *prima facie* evidence of a guilty intent. There are some things the general assembly cannot do. It may declare that hereafter "black shall be white," but it cannot make it so. Nor can it lawfully, by the exercise of its arbitrary will, turn innocence into *prima facie* guilt. It has just as much right to declare that the possession of a gun shall be *prima facie* evidence of an intent to kill.

The court declares that *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, is a plain authority that the act under consideration does not violate the 14th Amendment to the Federal Constitution. With the utmost respect for the opinion of my brethren, I am constrained to say that the case has no bearing whatever on the question at issue in this appeal. In *Mugler v. Kansas* it is decided (1) that the state of Kansas had the right to prohibit the manufacture and sale of intoxicating liquors in the state; (2) that *Mugler* could not recover the value of his brewery; (3) that, in prosecutions under the Kansas act, it is not necessary for the state to affirmatively prove that the defendant did not have a permit to sell intoxicating liquors. I do not controvert anything decided in that case. The third proposition has always been the law in North Carolina in indictments for selling intoxicating liquors without license. The possession of the license is matter of defense. The utter lack of pertinency of the *Mugler* Case to the one at bar can be seen from the following quotation: "It is only a declaration that, when the state has proved that the place described is kept and maintained for the manufacture or sale of intoxicating liquors,—such manufacture or sale being unlawful except for specified purposes, and then only under a permit,—the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the state." How very different is the act we are considering! Under it the state can prove the possession of the 3 pints of wine in a citizens' private dining room, who is not engaged in any business connected with intoxicating liquors, and rest its prosecution upon the *prima facie* case thus made out under the statute, whereby a lawful and innocent act is arbitrarily converted into evidence of a criminal intent. If the jury should, from prejudice or fanaticism, refuse to believe the defendant's explanation, he is helpless. Why? Because the statute has robbed him of the greatest protection the citizen has against unwarranted prosecution, viz., the presumption

of innocence thrown around him by the fundamental law. The court would have done well to quote some of the forcible utterances of Judge Harlan in the *Mugler Case*. He says: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go." And again: "Undoubtedly the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument."

In conclusion, I will say that I sympathize deeply with all legislative efforts to extirpate illicit traffic in intoxicating liquors, and will be found sustaining all such laws, when within the legislative power. But I cannot conscientiously assist in laying the judicial axe to the most valuable and sacred of all the fundamental rights of civil liberty, *viz.*, the legal right to be adjudged by the court innocent unless the state has offered evidence tending to prove the commission of a crime. The citizens of Union county are as much entitled to the protection of this organic law in the prosecution of any and all offenses as are the other citizens of the state, and, when it is denied to them, as it is by this statute, they are denied the equal protection of the law of the land, and are at the mercy of capricious and uncertain jurors.

For the reasons I have attempted to give, I think there should be a new trial, and the court below directed to submit the case to the jury upon the evidence, without reference to any *prima facie* case under the statute.

TENNESSEE SUPREME COURT.

LESLIE L. HARRELL, Plff. in Err.,

v.

R. A. SPEED.

(113 Tenn. 224.)

Ferry—tax for bar privileges.

A state may, under its police power, require the keeper of a bar on a ferryboat making regular trips from another state,

where it is owned, to pay a license tax for the privilege of selling liquors while the boat is within its jurisdiction.

(June 4, 1904.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of defendant in an action brought to recover back money alleged to have been illegally exacted as a license tax for a bar privilege. Affirmed.

The facts are stated in the opinion.

Messrs. Randolph & Randolph for plaintiff in error.

Messrs. Charles T. Cates, Jr., Attorney General, and C. D. M. Greer for the State.

Beard, Ch. J., delivered the opinion of the court:

This case is before us on an agreed statement of facts, from which it appears that the West Memphis Ferry Company is a corporation duly created under the laws of the state of Arkansas, having its situs at West Memphis, in the county of Crittenden, in that state, on the western bank of the Mississippi river; that the corporation, by its charter, has a right to own and use water craft on that river, and for three years, under the license duly and legally issued to it by the county of Crittenden, it has been operating ferryboats across the Mississippi river, carrying passengers and freight from West Memphis, and landing at its dock at the wharf at the city of Memphis, in this state, where it would discharge the same, and take on other passengers and freight for transport to its home port and one or two other ports in the state of Arkansas; that a bar was maintained on each of its boats, where liquors were sold; and that the privilege of keeping the bar on one of these boats was rented to Harrell, the plaintiff in error, who had been, and was, engaged in selling intoxicants by retail to passengers on its boats, and such other persons as happened to come on board, and desired to make purchases thereof.

For the exercise of this privilege, the state of Tennessee, through a proper officer, required Harrell, under the menace of a distress warrant, to pay the license tax which it was insisted was due under that portion of § 4 of chapter 257, p. 615, of the Acts of 1903 which reads as follows: "Persons selling beer or any quantity of liquor on steamboats, flat boats, or any other vessel or

Case Note.—The power of the states to adopt police regulations affecting interstate commerce, at first regarded as extending to all subjects on which no action had been taken by Congress, has been limited by later decisions to subjects local in their
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nature, such as pilotage and quarantine (see *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114), in which the rules that should govern may be better understood and more wisely established by the local author-

water craft, or from railroad cars, shall pay a tax, each in lieu of all other taxes, to be paid in any county they may elect per annum \$200." This payment was made under protest, and the present suit was brought to recover the money so paid, upon the ground that it was illegally exacted.

That the steamboats used by the West Memphis Ferry Company in carrying on its business of transporting freight and passengers could be taxed in the state of Arkansas, at the home port of the company, and their situs when at rest, is settled in *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412. It is also settled that the state of Tennessee could neither impose a tax on the capital stock of this ferry company, incorporated as it was by the state of Arkansas (*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826), nor upon the boats, engaged, as they were, in interstate commerce, and making, as they did, only temporary landings at the wharf in the city of Memphis (*St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192).

The question then presented is, Does the principle which thus restrains the taxing power of this state, both as to the capital

stock of this company, and of its boats employed in ferry purposes, also prevent the exaction of a privilege tax from one running a bar on one of these boats while at its landing within the jurisdiction of this state?

We think it beyond doubt that the legislature of Tennessee could not impose a privilege tax upon this company for disembarking its passengers and discharging its cargoes of freight at the wharf in the city of Memphis, or for gathering passengers and freight to be transported across the river to the state of Arkansas. *Gloucester Ferry Co. v. Pennsylvania*, *supra*. The exemption from this tax rests upon the fact that receiving and landing passengers and freight were incident to their transportation, without which there could be no such thing as transportation of either across the Mississippi river. Such a tax would be a burden on interstate commerce, and clearly unenforceable. *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543.

But can the same thing be said as to the privilege license required for maintaining a bar for the sale of spirituous liquors on one of its boats? So far as the agreed statement of facts shows, the charter conferred no right on the company to maintain a bar,

ities. As to subjects national in character, the absence of congressional legislation is held to indicate an intention that interstate commerce shall be free and untrammelled.

Within the latter category intoxicating liquors were placed by the decisions in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, and *Leisy v. Hardin*. 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, discussed in *HARRELL v. SPEED*. But the effect of the act of 1890, known as the Wilson bill, was "to deprive liquor of its national character as a subject of commerce, make it local in its nature and subject to the police power of the state, until Congress sees fit to legislate upon it." *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, 20 S. E. 221.

It is therefore competent for a state, under this statute, to regulate, restrict, or prohibit the sale of imported intoxicants in the original package, after delivery to the consignee (see *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664). Its power to control the sale of liquor in less quantities in the absence of such statute is unquestionable, since it has ceased, upon the breaking of the original package, to be a subject of interstate commerce.

An extensive search has disclosed no case involving the right of a state to control the sale of intoxicating liquors on cars or vessels engaged in interstate traffic, excepting *State v. Frappart*, 31 La. Ann. 340, cited in the *HARRELL CASE*. It was there held 1 L.R.A. (N.S.)

that a license tax could not be imposed at an intermediate port on a person who, it was conceded, only sold liquor on board of a steamer "in the course of her voyage." The court gives as its reason that "a boat plying upon navigable waters between different states cannot be considered as conducting or doing a business at each and every point where she touches, so as to become subject to taxation at each of said points. Such a proposition would give the local authorities power, not only to regulate, but to destroy, commerce between the states; which power by the Constitution belongs exclusively to Congress. . . . After a vessel has completed her voyage, and is at her port of destination, it is, perhaps, competent to enforce on board of her such local police regulations as are necessary to the good order of society. But when on her voyage she is not within the jurisdiction of state tribunals for purposes like this." Unfortunately, the report of this case does not make it quite certain whether the sale, which is said to have been made "in the course of her voyage," or "on her voyage," was made while the ship was at anchor at the intermediate port, or whether it was made while the ship was actually proceeding between ports. From the language above quoted, as to the nonliability of a boat lying in navigable waters to taxation at each intermediate point where she touches, there is some reason to infer that the court was treating the case of a sale made on a voyage between ports, and not while in any port. If so, there would be a distinction between that

or rent the privilege of doing so to another; nor can we see that the exercise of such a privilege forms an essential part of the business which it is authorized to do.

But again, it is not disclosed that the liquors and beer dispensed to customers over the bar on the boat in question were brought into this state from Arkansas, or from any other foreign state, so as, in any form, to give the plaintiff in error the benefit of the interstate clause of the Federal Constitution or of any of the laws of Congress regulating commercial intercourse between the states. For all that appears in the record, the intoxicants kept and sold at this bar may have been purchased in Tennessee by Harrell for retail at the port of Memphis, within this state. If this be the fact, we can see no reason why the plaintiff in error, so retailing, should stand on any higher ground than the seller of drinks over the bar of any one of the saloons of that city.

But we do not deem it necessary to place this case on narrow or technical ground, as we think the judgment of the trial court can be rested on the broader ground that the imposition of the tax or license fee was distinctly within the police power of the state.

With regard to the retailing of intoxi-

cants, there has never been a question as to the right of the several states to control the subject. The long line of cases found in the Reports of the Supreme Court of the United States agree in affirming the general proposition that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the states, and within their police power, which has not been surrendered to the Federal government. *License Cases*, 5 How. 504, 12 L. ed. 256; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Eilenbecker v. District Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424.

In the earliest and most celebrated of these cases, reported under the title of the "*License Cases*," *supra*, there was involved a question of the constitutionality of certain laws passed by the legislatures of Massachusetts, New Hampshire, and Rhode Island, restricting the sale of liquors in these different states. In the New Hampshire case the courts of the state applied the statute

case and the HARRELL CASE. It may be further suggested that the Louisiana case is treated by the court as one of the taxation of interstate commerce, while the HARRELL CASE is treated, not as a case of taxation, but as one of the exercise of the police power of the state. It distinctly concedes that the state of Tennessee could not tax the boat, which belonged in another state, but pointed out that the privilege of running a bar on the boat did not constitute an essential part of the interstate commerce business in which the boat was engaged. But the court said it did not deem it necessary to place the case on narrow or technical ground, but placed it on the broader ground that the imposition of the tax or license fee was distinctly within the police power of the state.

The decision in the Louisiana case was rendered before the enactment of the Wilson bill, which expressly makes intoxicating liquors brought from another state subject to the operation and effect of the laws of the state into which it is brought "upon arrival" therein.

Another case of the sale of intoxicating liquor on a boat on navigable waters, though there the boat was not engaged in interstate commerce, is that of *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883, where it was held that the courts of Indiana had jurisdiction over the sale of intoxicating liquors in violation of the Indiana statutes upon a boat anchored in the Ohio river, even if it were south of the southern boundary of the state. The right of the 1 L.R.A. (N.S.)

state of Indiana to exercise both civil and criminal jurisdiction, concurrent with the state of Kentucky, over the Ohio river, is secured by the act of the commonwealth of Virginia, December 18, 1789 (1 Va. Rev. Laws, p. 59), and by the Constitution of the state of Indiana. The court, while pointing out that this was not a matter of interstate commerce, said that the case of one who anchored his boat near the Indiana line, and engaged in the sale of liquors without a license, fell both within the letter and spirit of the statute, although the law made no provision for granting a license to sell liquor at that place. A case somewhat analogous to this was that of *State v. Mullen*, 35 Iowa, 199, holding that the courts of the state had jurisdiction to punish the offense of keeping a house of ill fame on a boat in the Mississippi river, although a portion of the time the boat might rest on the bottom of the opposite side of the river. The court placed its decision on the act of Congress for the admission of the state, by which it was granted concurrent jurisdiction over the Mississippi river with the other states bordering thereon, so far as the river constituted their common boundary. Such concurrent jurisdiction is shown in *Farnham on Waters*, page 35, to be the common rule where a navigable river constitutes the boundary between states. In the light of these decisions, it seems reasonable to hold that, under the terms of the Wilson bill, a sale of liquors such as that made in the HARRELL CASE is subject to the police power of the state.

then in force to the sale by the importer of a barrel of gin, which was unbroken and in the same condition that it was when brought into the state. The justices of the Supreme Court of the United States agreed in maintaining the constitutionality of this statute, though they rested their conclusion on different grounds. Chief Justice Taney, in an opinion universally recognized as of great ability, while conceding the power of Congress to deal exclusively with the subject of the importation of intoxicants, and, when so dealing with it, that its action would supplant all repugnant statutes passed by the states, yet held that the acts in question were valid, because Congress had not legislated with regard thereto. This view was the prevailing one with that court for many years, as the reasoning of the chief justice was often referred to, and the decision was as often cited with approval.

But in *Bowman v. Chicago & N. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, the authority of these cases was greatly weakened. The *Bowman* Case involved the validity of a statute of the state of Iowa which imposed a penalty upon any railroad company or other common carrier that should knowingly bring into the state any intoxicating liquors without first having obtained a certificate from the proper authority, certifying that the consumer was authorized by the laws of Iowa to sell such liquors. While the court recognized that this statute had been passed for the purpose of carrying out the general legislative design to protect the health and morals of the people of that state, yet it was held to be unconstitutional, upon the ground that it was an effort to regulate commerce between the states. While the court did not in express terms overrule the *License Cases*, and the later cases resting for authority on them, yet there was a clear suggestion throughout the argument of a doubt as to the soundness of the conclusion announced therein. But what the court seemed to hesitate to do in the *Bowman* Case was expressly done by a majority opinion in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. There it was held that the importation of liquors from foreign countries, and from one state to another, was a subject which required a general and uniform rule for its regulation, free from state interference; and therefore the states were without authority to control the subject, even though Congress had not enacted any legislation with regard thereto.

The opinions in these two later cases attracted great attention, and produced a feeling of discontent among those who believed 1 L.R.A. (N.S.)

the liquor traffic, in all of its power, should be under the supervision of the various states. This conviction was so widespread, and such pressure was brought to bear upon Congress, that in 1890 it passed an act, popularly known as the "Wilson bill" (Act August 8, 1890, 26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), which provides that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The constitutionality of this law was attacked in *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 561, 35 L. ed. 576, 11 Sup. Ct. Rep. 865, but it was there sustained as a proper exercise of legislative power.

But it is to be observed that the authority of *Bowman v. Chicago & N. W. R. Co.* *supra*, and of *Leisy v. Hardin*, *supra*, never extended further than to protect the importer of original packages of fermented or distilled liquors or beer as long as they were unbroken, and, by necessary implication, excluded from the exemption from state control those persons engaged in the mere retail liquor business. As to them and their business, no doubt ever did exist of the state's power of regulation by the imposition of privilege taxes or otherwise, and the only effect of the Wilson bill was to hand over the importer, even with his original package, after the terminus of its transit had been reached, to the control of the state.

So it is that the importer of intoxicants, whose packages had reached such terminus, and the retailer now stand on the same ground, and are equally under the strong and restraining hands of the several states.

But it is said, however, in the argument of the counsel for plaintiff in error, that this act was not intended to interfere with the interstate commerce of intoxicants, but its operation was confined to liquors or liquids introduced into a state or territory after they had become mingled with the mass of the taxable property of such state or territory, and for this proposition *Re Rahrer* (*Wilkerson v. Rahrer*) *supra*, *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, and *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 674, are cited by counsel.

To this contention it may be replied that, were this its only effect, then it was idle legislation. For it was never a matter of doubt,—the absolute right of the state to control, by taxation or otherwise, either in-

toxicants or any other character of property, when once incorporated with the general mass of property within the state. As has been seen, as to intoxicants, the struggle upon the part of some of the states was to assume control while they were in unbroken packages in the hands of the importer. It was against this claim the cases of *Bowman v. Chicago & N. W. R. Co.* and *Leisy v. Hardin*, *supra*, were levied. It was there, however, conceded, and, so far as we know, it has been uniformly so, that, when once the original package is broken, it has passed beyond the limit of Federal control, and into that of the state.

Nor do the cases upon which the counsel of plaintiff in error rests for this contention support it. In *Re Rahrer* (*Wilkerson v. Rahrer*) *supra*, the court, having discussed the restrictive effect upon the legislation of the several states of the *Bowman* and *Leisy* Cases, then adds (referring to the *Wilson* bill): "Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival into a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?" In *Rhodes v. Iowa*, *supra*, it is said, "It has been settled that the effect of the act of Congress is to allow the statutes of the several states to operate upon packages of imported liquor before sale;" but it was at the same time held that state legislation of a restrictive character could not attach to such packages "the moment they reached the state line, and before the completion of the act of transportation." The first of the syllabi in *Vance v. W. A. Vandercook Co.* 42 L. ed. 1100, clearly shows that it is in accord with the *Wilkerson* and *Rhodes* Cases. It is as follows: "Under the act of August 8, 1890 [*Wilson* bill; 26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177], the restrictions and regulations of state laws become operative on the original packages of intoxicating liquors imported into a state before the sale thereof, and therefore such packages cannot be sold if the state law forbids the sale, or can be only so sold in the manner and form prescribed by the state regulations."

We have been referred to the case of *State v. Frappart*, 31 La. Ann. 340, where it was held that the imposition of a license tax for selling beer and liquors from a bar on a steamboat plying between ports in the states of Louisiana and Mississippi, at one of the intermediate ports, was an unauthorized interference with commerce between the states. This case, it may be conceded, sustains the contention of plaintiff in error; but we are not able to agree with it, as, in 1 L.R.A. (N.S.)

our view, the retailing of liquor does not, in any event, constitute interstate commerce.

It follows that the judgment of the lower court is affirmed.

Affirmed by Supreme Court of United States *sub nom.* *Foppiano v. Speed*, on December 4, 1905.

TENNESSEE SUPREME COURT.

MRS. C. E. CONDON et al.

v.

GEORGE W. CALLAHAN.

(.... Tenn.)

1. Partnership—compensation on death of partner.

Where partners who have undertaken to perform a construction contract have agreed that each shall contribute his services without compensation, one who, upon the other's death, performs the entire work of supervision, is entitled to compensation for that part of the work which deceased would have contributed had he lived.

2. Same—enterprise continued.

The rule that a surviving partner is not entitled to compensation for winding up the affairs of the partnership does not apply where the affairs are not immediately wound up, but the work in which the partnership was engaged is carried to completion with the consent of the personal representatives of the decedent.

3. Tender of compromise—effect.

A rejected offer by a surviving partner to take a certain amount in payment for his

Case Note.—While under the general rule a surviving partner is not entitled to compensation for his services in merely closing out and winding up the firm business, there is no doubt but that *CONDON v. CALLAHAN* applies a well-recognized exception in cases where the surviving partner does not immediately liquidate the affairs of the firm, but continues the business for a time in order to effect an advantageous settlement. Whether such a partner has been engaged in merely winding up a firm's business, or in continuing it for a time in order to effect an advantageous settlement, must often be a hazy question of fact; and it is this, no doubt, which leads to the general recognition that the right to compensation must depend upon the circumstances of each case. As said by Justice Holmes in *Thayer v. Badger*, 171 Mass. 279, 50 N. E. 541: "It is true, no doubt, that there is a disinclination to allow pay to a surviving partner for winding up; . . . but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules." A commission was allowed in this case to the surviving partner as member of a firm to which the goods of the part-

services in completing the enterprise in which the partnership was engaged does not prevent his recovering a reasonable allowance therefor in case he applies to the courts, although it is in excess of the amount named in his offer.

4. Partnership—settlement—allowance for wages.

Personal representatives of a deceased partner in a firm which has taken a contract for railroad construction cannot compel the surviving partner to contribute the entire amount paid to the engineer of the railroad company for services rendered by him to the enterprise, where the services were engaged and utilized with knowledge of the deceased partner and of his representatives, and there was nothing in the transaction in violation of the rights of the railroad company, or without its consent.

5. Same—subcontracts—division of profits.

Under a contract for the formation of a partnership to engage in railroad construction, which entitles either partner, under certain conditions, to subcontract portions

nership of which he was the surviving member were turned over by him for disposal.

Perhaps the rule is nowhere better stated than in *Schenkl v. Dana*, 118 Mass. 236, cited in the opinion: "Upon the dissolution of an ordinary mercantile partnership by death, the surviving partner is not entitled, as matter of law, in the absence of special agreement, to be paid for his personal services in winding up the business and disposing of the assets. But this rule, in its practical application to the final settlement of partnerships, must, in equity, be largely varied by the nature of the business carried on, the capital employed, the state of the accounts with the deceased partner, the necessity of continuing the business for the purpose of realizing most from the assets, and especially by the fact that such continuance is known and assented to by the legal representative of the deceased partner."

... Under the general rule above stated, all that can be required of the surviving partner is that he proceed at once to wind up the partnership and account with the legal representative of the deceased partner. In the absence of special agreement, he is entitled to no pay for his personal services in the strict discharge of this duty. But if, with the assent of the administrator of the deceased partner, he employs extra labor to finish existing contracts; if he enters upon new contracts, employing the machinery, patents, and property of the firm therein,—then, to the extent of his personal services devoted to such extra work, he is entitled to compensation."

The just rule deduced in *Robinson v. Simmons*, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558, which involved the affairs of a firm engaged in the business of manufacturing and selling clothing, is that, in the absence of circumstances rendering it inequitable, the profits accruing after the decease of one partner should be divided ac-

cord to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner.

6. Same—settlement—interest on undivided funds.

A surviving partner who continues a deposit of partnership funds in bank, awaiting a settlement of the partnership affairs, without realizing any interest or profit therefrom, is not liable for interest thereon.

(October 13, 1905.)

CROSS-APPEALS from a decree of the Court of Chancery Appeals, which modified a decree of the Chancery Court for Knox County, settling the affairs of a partnership; plaintiffs appealing from so much of the decree as allowed the surviving partner compensation and disbursements, and the defendant appealing from so much

ording to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner.

Where the firm business, that of operating a quarry, was not closed out upon the death of one of the partners, but continued by the survivors, pursuant to the deceased's will and with the consent of the administrator, for the profit of all concerned until the appointment of a receiver by the court, it was held that they were entitled to the same salaried compensation for their services as they had been entitled to under the partnership agreement during the life of the deceased partner. *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

The case of *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138, extensively quoted from in the opinion, was that of a railroad construction partnership. The contract under which the construction was to have been made was repudiated by the railroad company during the lifetime of both partners; before recovery for the breach, however, one died, and compensation to the other was allowed for his services in prosecuting the action, which appears to have been carried on with the consent of the executrix of the deceased.

So in *Griggs v. Clark*, 23 Cal. 427, also quoted in the opinion, the partnership funds were invested in cattle. At the time of the decease of one of the firm the stock market was poor. By carrying the herd over for a year, an additional profit of \$6,000 was made. For the services of the partner who had charge of the stock, the court awarded \$1,400, and deducted this from the \$6,000 before distributing the profit. The court distinctly confines the right of a partner to compensation for winding up the affairs of the firm, however, to those cases in which the "partnership business has been continued for a considerable period of time

as rejected a portion of his claims. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Webb, McClung, & Baker, for plaintiffs:

Neither a partner, nor a surviving partner, is entitled to compensation for his services, except "upon the fullest, most cogent, and satisfactory proof" of contract to that effect.

Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Piper v. Smith, 1 Head, 94; Berry v. Jones, 11 Heisk. 207, 27 Am. Rep. 742.

The employment of the engineer was to bribe and corrupt him. This was clearly an illegal, immoral, and corrupt transaction, and against public policy; and Callahan cannot now claim contribution from his copartners.

22 Am. & Eng. Enc. Law, 2d ed. p. 121, and note 3; Pratt v. McHatton, 11 La. Ann. 260; Smith v. Ayrault, 71 Mich. 475, 1 L. R.

in order that the affairs of the partnership may be advantageously wound up."

In winding up a lumber partnership business, a surviving partner, after the lapse of much time, and through his unaided efforts, secured a considerable sum of money on lumber property in which the firm had an interest. For his efforts he was held, in Zell's Appeal, 126 Pa. 329, 17 Atl. 647, entitled to compensation under the exceptional circumstances of the case.

For managing an extensive tract of land bought in a partnership venture, until advantageous disposition could be made, an allowance was made, in Hite v. Hite, 1 B. Mon. 177, to the surviving partner who took charge.

Reasonable compensation for merely winding up the affairs of a grocery firm after the decease of his partner was allowed to the survivor in Royster v. Johnson, 73 N. C. 474.

Specific provision for compensation to the surviving partners appears in the articles under consideration in Sangston v. Hack, 52 Md. 173, and in the will of the deceased partner, directing a salary to the executors, one of whom was a partner, in carrying on the firm business, in Allen's Appeal, 125 Pa. 544, 17 Atl. 453.

Upon dissolution of a partnership between surgeons by the death of one, it was held, in Featherstonhaugh v. Turner, 25 Beav. 382, that, in the event of no sale of the deceased partner's portion in the firm being possible, then his interest in the business should be estimated, and the surviving partner compelled to pay the same to the executors of the deceased partner. In estimating such interest, Sir John Romilly, master of the rolls, states that, while the deceased partner was entitled to a share in the profits of the firm down to the date of the sale of his interest, yet that share would have to be calculated by ascertaining the

A. 315, 39 N. W. 724; 2 Lindley, Partn. 377; Shea v. Knoxville & K. R. Co. 6 Baxt. 277.

Messrs. Shields, Cates, & Mountcastle, for defendant:

The services rendered by Callahan were in excess of the mere winding up of the partnership affairs, and entitled him to compensation.

2 Bates, Partn. § 773, p. 822; Maynard v. Richards, 166 Ill. 466, 57 Am. St. Rep. 150, 46 N. E. 1138; Gilmore v. Ham, 142 N. Y. 1, 40 Am. St. Rep. 570, 36 N. E. 826; Brown v. De Tastet, Jacob, 284; Cameron v. Francisco, 26 Ohio St. 190; Schenkl v. Dana, 118 Mass. 236; Griggs v. Clark, 23 Cal. 427; Newell v. Humphrey, 37 Vt. 265.

Wilkes, J., delivered the opinion of the court:

This is a bill by the executrix of M. J. Condon, deceased, to settle up the partnership that existed between M. J. Condon and the defendant, George W. Callahan. This

amount of the net profits made by the concern (after making a liberal allowance and compensation to the surviving partner, Mr. Turner, for his knowledge, time, and trouble in carrying on the business), and it would then have to be divided into fifths, according to the division of profits under the articles of agreement.

The case of Brown v. De Tastet, Jacob, 284, quoted in the opinion in the passage from Bates on Partnership, was that of a mercantile partnership between London merchants. Upon allowance, by the master, of proportionate profits to the estate of the deceased partner, in business carried on after his death, an appeal was taken, the surviving partners alleging that much of the profit was attributable to their own personal influence and connections and exertions, and that just allowance therefor should be made. This was allowed by the vice chancellor and affirmed by the chancellor (Lord Eldon). "I do not mean to intimate," he says, "whether the master should allow wages, as they are called, or compensation, but it cannot be denied that, if the business be such that on the death of the party other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances, which, till the master has thoroughly sifted it, the court cannot determine."

This opinion by Lord Eldon would seem to put an end to the usual interpretation of his opinion in Crawshay v. Collins, 15 Vea. Jr. 218, as establishing the English doctrine that the surviving partner is, under no circumstances, entitled to compensation for his services in winding up firm business. See also, to like effect with Brown v. De Tastet, Cook v. Collingridge, Jacob, 607; Wedderburn v. Wedderburn, 2 Keen, 722;

partnership was entered into for the purpose of constructing certain railroad work, and there is no controversy about its terms, nor the proportionate interests of the parties thereunder.

The partnership entered into an important and very expensive contract for railroad construction around Keogan tunnel, near Harriman, Tennessee. Soon after the work was commenced, M. J. Condon was killed, and the work was carried on and the contract was completed by Callahan, as surviving partner, by the consent of the executrix.

It was one of the terms of the partnership that the services of each member of the firm should be compensated for by similar services of the other member of the firm, and there was no contract as to the status of the parties in the event either died. The profits were from time to time divided, and when a final settlement was attempted to be made Callahan claimed certain items of expense which it was alleged were not in accord with the partnership contract. Thereupon this bill was filed to have the partnership of M. J. Condon and Callahan wound up and the rights of the parties determined. The contract resulted in a profit of some \$67,000, and there was a fund of \$6,119.87 in the East Tennessee National Bank to the credit of M. J. Condon & Company, where it was originally deposited, and where it had ever since remained until paid into court. The chancellor passed upon the rights of the parties, and declared the proportion in which they should share these funds, and adjudicated the costs. The complainants prayed a broad appeal, and the defendant Callahan prayed an appeal from so much of the decree as failed to charge the estate of M. J. Condon with 12½

per cent profit upon the gross amount of work which was sublet by M. J. Condon & Company to Ed L. Condon and M. J. Condon on a prior contract in South Carolina, and because he was refused proper salary as walking boss in connection with the work at Harriman, and for his services in completing the Harriman contract. In the court of chancery appeals a number of assignments were made by both parties, and the decree of the chancellor was affirmed, except that the defendant Callahan was allowed an additional sum of \$903.73, on account of the South Carolina contract, and both parties have appealed to this court.

The first assignment made by the defendant Callahan is that the chancellor and the court of chancery appeals should have allowed him \$6,300 compensation for carrying out and completing the contract made by M. J. Condon & Company to build the railroad around Keogan tunnel, which resulted in a profit to the firm of about \$67,000. For this service he was actually allowed by the chancellor and the court of chancery appeals the sum of \$2,700. Upon this feature of the case, the complainants assign as error that Callahan should not have been allowed any compensation whatever for his services after the death of his copartner, M. J. Condon.

We will consider these assignments of error together.

The court of chancery appeals report that it was a provision of the contract between the partners that each of them should devote his entire time to the business of the partnership, and that the work of one partner should offset the work of the other. That court reports that Callahan, in negotiating with Mrs. Condon and her son for a settlement, was willing to accept the \$2,700

Willett v. Blanford, 1 Hare, 253; Yates v. Finn, L. R. 13 Ch. Div. 839.

In *Mellersh v. Keen*, 27 Beav. 236, an allowance for "their personal superintendence and management of the business" was made to banking partners who continued the business after they had given notice of dissolution by reason of the insanity of one of their firm.

A distinction is made between commercial and professional partnership by the Federal Supreme Court in a *dictum* in *Denver v. Roane*, 99 U. S. 359, 25 L. ed. 478, a case involving the affairs of a law partnership. The right to compensation in the case of a surviving partner in a professional partnership is suggested on the ground that the profits of the firm are the result solely of the professional skill and labor of its members.

This distinction is recognized *obiter* in *Osmont v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731, and *Sterne v. Goep*, 20 1 L.R.A. (N.S.)

Hun, 396, both cases involving law partnerships.

See also *Honore v. Colmesnil*, 1 J. J. Marsh. 524, *Hutchinson v. Onderdonk*, 6 N. J. L. 277, and *Bradley v. Chamberlin*, 16 Vt. 613, where, upon voluntary dissolution, the partners winding up the affairs of the partnership were deemed entitled to compensation for their services.

Also analogous are cases of neglect on the part of one partner to perform his duties toward the firm business, thereby imposing the entire burden upon the remaining partners. In such cases it has been held that the latter are entitled to compensation for their services. *Airey v. Borham*, 29 Beav. 620; *Newell v. Humphrey*, 37 Vt. 265; *Gyger's Appeal*, 62 Pa. 73, 1 Am. Rep. 382.

From *Hite v. Hite*, 1 B. Mon. 177, and *Griggs v. Clark*, 23 Cal. 427, it would appear the compensation, where there are several surviving partners, is made only to that one who actually takes charge of the business and carries it on.

for his services. They further report that she at first agreed to this allowance, but afterwards repudiated her agreement. That court says that, while the weight of the proof tends to show that Callahan performed double service, in addition to the service of a walking boss, and that his extra service, aside from his walking-boss service, was worth the sum claimed by him, still that his own valuation of his services when the settlement was attempted between him and Mrs. Condon was the most reasonable basis to accept. That court declined to allow Callahan \$150 per month for services as walking boss, because those services were rendered as surviving partner, in the prosecution and completion of the work; and the amount allowed him of \$2,700 was allowed him by that court presumably upon the idea that it was a proper compensation for his services in carrying out the contract; and these services were rendered as surviving partner. So that, as we view the findings of the court of chancery appeals, the \$2,700 allowed to Callahan by that court was for his services as surviving partner, and not simply as walking boss. The question presented, then, is whether, under the contract between the partners and the facts developed in this record, the defendant Callahan should be allowed anything for his services as surviving partner, and, if so, how much. As we construe the contract, it is not that neither partner should receive anything for his services, but that the work of the one should offset the work of the other. In other words, it was contemplated that the services of each would be worth the same, and that each should receive his share of the compensation in the services of the other.

On account of the death of M. J. Condon, he was unable to comply with his part of the contract and do his part of the service. We think the law in such case would imply that the partner doing the whole of the work should have reasonable compensation for that part of it which would have been done by the deceased partner if he had lived; or, in other words, he was entitled to compensation for that part of his work which his deceased partner would have contributed. Now, the general rule is that, as between partners, the surviving partner is entitled to make no charge for his services in winding up the partnership. Still this rule does not apply in all cases, but only to cases where the business is immediately put an end to and no further work is done, except to close up the matter of account as between the partners, pay the debts, and distribute the surplus, if any.

In the case of *Godfrey v. Templeton*, 86 Tenn. 167, 6 S. W. 49, it is said: "It is well 1 L.R.A. (N.S.)

settled that surviving partners will not generally be allowed compensation for services rendered in winding up and settling the business of the firm; but that is not this case. The business of the firm was continued for the sake of profit, and the object was accomplished, resulting beneficially alike to the surviving partners and the estate of the deceased partner; the continuance of the business even for a longer time being expressly authorized by the will of the deceased partner, and with the knowledge and consent of the administrator with the will annexed."

In the present case the contract was continued by Callahan, as surviving partner, with the express consent of the executrix and sole legatee. It was necessary that it should be so continued, in order to realize the benefits of the existing contract by completing it, and to prevent loss by abandoning it; and it did result in a profit of about \$50,000 to the representatives of M. J. Condon, and about \$17,000 to Callahan.

Bates on Partnership states the rule as follows: "The principle applies to the burden of winding up after death, and the surviving partner can claim no extra compensation for it, the death of a copartner being one of the risks necessarily incurred by each; . . . but the rule applies merely to the simple and immediate winding up by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of a partnership and implied in the contract. But for time, skill, and trouble expended beyond this, and inuring to the general benefit, the reason of the rule fails, as where, after dissolution, a partner successfully continues the business of the firm, using the original capital, good will, or other assets, and a benefit is received from his efforts, he is allowed to deduct from the profits a compensation, varying according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and, perhaps, its necessity or desirability. The most usual application of this limitation of the principle is in the case of a surviving partner continuing the firm business, or completing the enterprise of the partners. In *Brown v. De Tastet, Jacob*, 284, where the surviving partner continued the business with the original capital and was required to account for the profits, allowances were ordered to be made to him, not necessarily as wages, but such as the master should find proper. In *Cameron v. Francisco*, 26 Ohio St. 190, where the surviving partner, without being under contract to do so, continued the business (the publication of a newspaper), and, by thus being enabled to sell it as a going concern,

preserved a valuable good will which would otherwise have been lost, and the personal representative, on electing to share the profits, were required to deduct a reasonable compensation. In *Schenkl v. Dana*, 118 Mass. 236, the property of the firm consisted of patents for improvements in weapons of war and valuable contracts with the government, and a manufactory and stock for fulfilling them; and the surviving partner, having completed the contracts and entered on new ones, was held entitled to extra compensation for all services in excess of mere winding up. In *Griggs v. Clark*, 23 Cal. 427, where the value of the assets was enhanced by the labor and time of the surviving partner to the extent of \$6,000, he was allowed \$1,400 out of the profit from the enhanced value. . . . In *Newell v. Humphrey*, 37 Vt. 265, partners in the business of buying cattle on commission had canvassed the territory, made many contracts, and ascertained who would have cattle to sell, without contracting with them, and then one partner died. Much time and labor having been spent, the commissions on these inchoate transactions were held to be partnership assets; but an allowance to the surviving partner for his time and expenses in completing them was held just and proper." 2 Bates, Partn. §§ 772, 773, pp. 821-824.

"The rule that a surviving partner is entitled to no extra compensation applies to his services in winding up the partnership. The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, paying the firm debts and advances of the partners, returning the capital contributed by each partner, and dividing the profits. Where, however, the surviving partner renders services in excess of the mere winding up of the partnership affairs, he will, under certain circumstances, be entitled to compensation for such excess. 17 Am. & Eng. Enc. Law, pp. 1154, 1183; 2 Lindley, Partn. 1046; Collyer, Partn. § 328; Parsons, Partn. § 346. It is said in *Bates on Partnership*, at § 773: 'The rule applies merely to the simple and immediate winding up, by collecting the assets, paying the debts, and accounting for the surplus, as is necessarily involved in the creation of the partnership and implied in the contract; but for time, skill, and labor expended beyond this, and inuring to the general benefit, the reason of the rule fails.' The most usual cases where the surviving partner is allowed compensation are cases where he successfully continues the business of the firm, or successfully completes an enterprise in which the firm has been en-

gaged, so that a substantial benefit is received from his efforts. The amount of compensation will vary according to the state of the accounts, the nature of the business, the difficulty and results of the undertaking, and its necessity or desirability. 17 Am. & Eng. Enc. Law, p. 1183. If he performs such extra services with the consent of the representatives of the deceased partner, such consent is sometimes an important factor in determining the question whether he is entitled to compensation. His claim to compensation will, in connection with the circumstances already mentioned, be looked upon with favor, if the representatives of the deceased partner elect to share in the profits realized from his services as surviving partner." *Maynard v. Richards*, 166 Ill. 406, 57 Am. St. Rep. 151, 152, 46 N. E. 1138, 1142.

"The business may be of such a character that, on the dissolution of the partnership, it cannot be closed at once to advantage, and it is therefore continued with the expressed or implied assent of all the partners, and, by a like assent, is committed to the care and management of some only of them. In such cases the partner or partners in possession of the assets and continuing the business will, in equity, be regarded as in some respects occupying the position of trustees, and as such entitled to be compensated for services in the management of the trust property; and, whether or not any personal claim can be maintained therefor against the other partners, the value of the services may at least be deducted before accounting for profits realized from the business. *Mellersh v. Keen*, 27 Beav. 236; *Airey v. Borham*, 29 Beav. 620; *Newell v. Humphrey*, 37 Vt. 265; *Schenkl v. Dana*, *supra*;" *Gilmore v. Ham*, 40 Am. St. Rep. 570, note.

The cases of *Piper v. Smith*, 1 Head. 84, and of *Berry v. Jones*, 11 Heisk. 207, 27 Am. Rep. 742, are not in conflict with these authorities, or with the decisions of this court in the case of *Godfrey v. Templeton*, 86 Tenn. 161, 6 S. W. 47.

In the case of *Berry v. Jones* a bill was filed to wind up a partnership, and one of the partners insisted upon his right as surviving partner to act as receiver in winding up the partnership's affairs. This court simply held that the surviving partner was not entitled to compensation for his services in winding up the affairs of the partnership; that is, in selling the assets, collecting the moneys due the firm, paying its debts, and distributing the profits among the partners. This is the general rule as laid down by all the authorities.

The case of *Piper v. Smith*, *supra*, was also a case of winding up a partnership. It

is true the firm at the time of the death of one of the partners was building some houses for itself, which had to be completed for the benefit of the firm, and it was there said that the surviving partner was not entitled to compensation for his services in superintending the finishing of said buildings. The question of carrying out an enterprise with a third party was not involved in that suit.

We are of opinion that, under the law and the facts of this case, the defendant Callahan was entitled to reasonable compensation for his skill, services, and labor in completing the contract; and the allowance should be made in view of the results realized. It is left a little indefinite by the finding of the court of chancery appeals, and under the claim of Callahan, what this amount should be, or, rather, the length of time he was engaged in completing the contract is differently stated,—in some places at eighteen months, and at other places at twenty-three months; and the defendant Callahan claims that he is entitled to compensation at the rate of \$300 per month for the time thus employed. The court of chancery appeals, in effect, reports that his services were worth all or more than he claims.

Upon the basis of eighteen months, the compensation would be \$5,400; upon the basis of twenty-three months, it would be \$6,900. The defendant makes claim in round numbers for \$6,300. Under this state of the record, we think we should fix the amount at \$6,300. The offer to take \$2,700, on the part of Callahan, was one based upon his services as walking boss. It was not offered as compensation to carry out the contract. It may be, if the proposed settlement had been accepted, no claim would have been made for services as surviving partner. The offer, moreover, was tentative merely, in order to arrive at a settlement. When Callahan was put to his legal rights, he insisted upon reasonable compensation, and the court of chancery appeals report that \$6,300 is reasonable.

The complainant assigns as error that defendant Callahan should have been charged personally with \$3,100, which he claims to have paid to G. Bottinger, the engineer of the railroad company. It is said that such payment, if made, was for the purpose of bribing and corrupting the engineer of the railroad company, and was immoral and against public policy, and Callahan should not have compensation for the same. It appears that this man Bottinger was employed with the approval of M. J. Condon before he died; and the court of chancery appeals report that the work which he was employed to do, and which he did do, was not in conflict with his duty and work with 1 L.R.A. (N.S.)

the railroad company. That court says that the evidence wholly fails to show any fraud or collusive purpose in the employment of this man to beat or defraud the railroad company or to contravene any rule of sound public policy. No effort was made to conceal his employment from the railroad company, and it does not appear that the railroad was ignorant of his employment or the nature of the services he was rendering to the defendant. That court continues that, in addition to all this, it reasonably appears from the evidence that complainants knew that he was employed, or that such services as Bottinger rendered were being paid for as the work progressed, and charged up to the general expense account; and, indeed, it does not appear that they ever objected to allowing the credit assailed. Under this state of facts, we think the credit of \$3,100 was properly allowed as a credit to Callahan, and the assignment of error complaining of the same is not well taken.

Complainants' fourth assignment of error is that the court of chancery appeals erred in charging M. J. Condon's estate with \$3,614.95, profits alleged to have been made on a subcontract with M. J. Condon and Ed L. Condon in South Carolina. It appears that Callahan and M. J. Condon, previous to the contract now under consideration, had a contract to build 81 miles of track from Cheraw to Columbia, South Carolina, for the Seaboard Air Line. One of the provisions of that contract was that either member of the firm might subcontract enough work from the firm to give employment to any men and teams which either party might own or have individually, and which might not be sold to M. J. Condon & Company, and that, in the event that either or both of said parties should subcontract for any part of said 81 miles, he or they should be dealt with as other subcontractors on said line of 81 miles. M. J. Condon did sublet a part of this work to himself and Ed L. Condon at the same price that the company was to get from the railroad company. The company made an average profit of 12½ per cent on the aggregate amount of the work done under other subcontracts, and this rate of 12½ per cent under the contract to the Condons would amount to \$3,614.95. Condon died before there was a settlement of the South Carolina business, as between himself and his partner, Callahan, and this matter was never adjusted between them. The court of chancery appeals finds that, under the South Carolina contract, this sum belonged to the firm to be distributed in the proportion called for by that contract; that is, three fourths to Mrs. Condon, as executrix, and one fourth to Callahan. This

one fourth would amount to \$903.73. The court of chancery appeals reports that this sum should be allowed to Callahan in the adjustment of his account with the Condon estate, and that any delay in claiming the same was satisfactorily accounted for by the fact that there had never been any final settlement of the South Carolina business, and that Condon had died unexpectedly and suddenly, just as the firm was entering upon a new and important construction job, and, in addition, the object of the bill was to wind up the partnership of Condon & Company, and this item, being unadjusted, legitimately came within the scope of the settlement. Under these facts, we are of opinion that the court of chancery appeals was correct in allowing Callahan this credit of \$903.73.

The complainants' fifth assignment of error is because the court of chancery appeals refused to charge Callahan with interest on the money in his hands and under his control, belonging to the firm, after the 25th of January, 1902. It appears that, when the settlement was attempted between Callahan and Mrs. Condon, as executrix, there was in the East Tennessee National Bank, to the credit of Condon & Company, the sum of \$6,119.87. This account had been opened by M. J. Condon in his lifetime, and Callahan after his death continued to make deposits of all the firm money to the same account, and it had all the time remained in the bank to the credit of Condon & Company. Callahan never used this money in any way, and never realized any interest or profit upon the same. It stood to the credit of M. J. Condon & Company, awaiting settlement between the parties, upon the terms of which they could not agree. We are of opinion that Callahan is not liable for any interest on this amount.

The sixth assignment of complainants, in reference to taxation of costs, is not well made. Under our view of the case, we are of opinion that complainant should pay all the costs of the appeal.

The decree of the court of chancery appeals is affirmed, except as to the item of compensation to be allowed Callahan for completing the contract and winding up the partnership, and as to that and the adjudication of costs it is modified, so as to allow Callahan compensation of \$6,300, instead of \$2,700, as fixed by the court of chancery appeals.

The costs of the appeal will be paid as heretofore indicated, the costs of the court below will be paid as adjudged by the chancellor, and the cause is remanded to the court below for further proceedings.

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GEORGIA SUPREME COURT.

H. P. EADY, Plff. in Err.,
v.

NEWTON COAL & LUMBER COMPANY.

(123 Ga. 557.)

1. Partnership—private accounts—set-off.

An agreement between a customer and a member of a partnership, that its goods may be purchased and paid for by the customer in commodities furnished by him for the private use and benefit of such member of the firm, is void, as being beyond the scope of the partner's apparent authority.

2. Same—authority of partner—custom.

Articles of partnership may be enlarged by implication from a general usage and habit of the firm, acquiesced in by all of the partners. But, before such a custom would become binding upon a partner who did not expressly authorize it, the circumstances would have to be such as to indicate that he not only knew of the course of dealing in particular instances, but contemplated and tacitly assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases.

(August 1, 1905.)

ERROR to the City Court of Griffin to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on an account. **Reversed.**

Statement by Evans, J.:

A partnership was formed in 1893 or 1894, under the firm name of H. P. Eady & Company, between H. P. Eady and J. A. Brooks, for the purpose of engaging in the wagon

Headnotes by EVANS, J.

Case Note.—The authorities and text-book writers agree that one partner has no authority, by virtue of the partnership relation, to cancel his own debt to a third party by furnishing to the latter partnership property without the assent of his copartner, or charging himself with its value on the firm books; nor has one partner the right to use partnership funds for the same purpose; nor can one partner claim the right to receive for his own exclusive benefit cash or commodities given by a customer of the firm in payment of firm goods. There can be no distinction between the payment of a private debt with firm assets and furnishing firm property to one who agrees to give his own commodities in exchange, for the exclusive benefit of one of the partners. Although each partner in the transaction of partnership business is an agent for and authorized to represent the firm, yet, he has no implied authority to apply property of the firm to the satisfaction of other than partnership debts, and, hence, is not justified in paying his own debts out of partnership

and buggy business and conducting a blacksmith and general repair shop. Brooks had charge of the books and looked after the office affairs of the firm, while Eady assumed the management of the shop. Shortly after the partnership was formed Brooks approached J. M. Mills, manager of the Newton Coal & Lumber Company, and solicited the business of that concern, proposing to Mills that, if he would give the patronage of his company to Eady & Company, the individual accounts of its members for supplies purchased from his company would be allowed as a credit on such account as he might run with the partnership, and that they would in this manner "swap" accounts. Mills assented to this arrangement, and

Brooks afterwards purchased from the Newton Coal & Lumber Company supplies for his individual use to the amount of \$113.51, and supplies for his firm to the amount of \$59.02. In January, 1898, Mills and Brooks effected a settlement of accounts, which included the individual indebtedness of the latter. Brooks made no entry of this settlement on the books of his firm, and his partner had no knowledge thereof, or of the arrangement under which it was made. In June, 1902, Brooks effected another settlement with a representative of the Newton Coal & Lumber Company, whereby an account of \$19.36 against Eady & Company and an account against Brooks of \$121.44 were satisfied. Eady was not present and

funds, or by a transfer of partnership property.

On the subject of the use of firm property for private purposes, Parsons on Partnership, 4th ed. § 90, says "that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time or before existing, or by way of settlement of or security for a debt, the indebtedness or obligation of the firm in any form, the presumption of the law is that the partner gives this and the creditor receives it in fraud of the partnership."

These principles are applied in cases taken from various jurisdictions. Thus, in *Hartness v. Wallace*, 106 N. C. 427, 11 S. E. 259, the court denied the right of one partner, without the knowledge or consent of his copartner, to transfer a firm note in discharge of his individual indebtedness. The court said: "It is very clear that one partner has no right, without the consent of his copartners, to use, devote, or apply the funds, securities, or other effects of the partnership to the payment or discharge of debts, contracts, or obligations binding upon himself individually, and with which the partnership has no connection. Such use of such securities would be, not simply a misapplication thereof, but, as well, a fraud upon the partnership, participated in by the partner so misapplying the same." The same rule is applied in *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 So. 676, to a similar statement of facts.

In *Rogers v. Batchelor*, 12 Pet. 221, 9 L. ed. 1063, the rule was established that one partner cannot apply the funds of the partnership in discharge of his own separate, pre-existing debts without the express or implied assent of the other partners; and it makes no difference, in such case, that the creditor did not at the time know that the property was partnership property.

In *Union Nat. Bank v. Underhill*, 102 N. Y. 336, 7 N. E. 293, the court denied the right to recover on a firm note, executed by one partner without the knowledge or consent of his copartner, in payment of his own debt, the holder of the note knowing that it was so executed. The court said: 1 L.R.A. (N.S.)

"Each member of a firm is the general agent of the firm in relation to all the business of the firm, and can bind the firm in what he says and does in such business. But, when one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the transaction." In *McNaughton's Appeal*, 101 Pa. 554, the same doctrine was applied.

In *Cotzhausen v. Judd*, 43 Wis. 213, 28 Am. Rep. 539, it was held that a desire to retain patronage will not authorize one partner, without the consent of his copartners, to apply a partnership claim in payment of an individual debt.

In *Forney v. Adams*, 74 Mo. 138, the court sustained the right of one partner to recover the value of firm goods which his copartner had transferred in payment of his private debt without the former's consent.

In *Janney v. Springer*, 78 Iowa, 617, 16 Am. St. Rep. 460, 43 N. W. 461, the court held that an agreement between a member of a partnership dealing in feed and his individual creditor, who was engaged in selling horses, by the terms of which the latter was to receive feed in payment of the former's note, is void as against the firm, unless the other member ratifies it.

In *Woolson Bros. v. Fuller*, 71 Vt. 335, 45 Atl. 753, it was held that a tailor who delivers suits to a member of a hardware firm is not entitled to a judgment against the firm for nonpayment for the goods, although there was an understanding between him and such member, unknown to his copartner, that the goods so delivered should apply in payment of the firm's account against the tailor.

Some other cases applying the same principles are *Carter Bros. v. Galloway*, 36 La. Ann. 734; *Johnson v. Crichton*, 56 Md. 119; *Rogers v. Betterton*, 93 Tenn. 630, 27 S. W. 1017; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Buck v. Mosley*, 24 Miss. 170; *Farwell v. St. Paul Trust Co.* 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326; *Davies v. Atkinson*, 124 Ill. 474, 7 Am. St. Rep. 373, 16 N. E. 899; *Pepper v. Peck*, 17 R. I. 55, 20 Atl. 16.

took no part in this settlement, and the transaction was not entered on the books of his firm, nor did Brooks charge his individual account with the amount which he received thereunder. In April, 1903, the partnership was dissolved, and Eady became the sole proprietor of the business. Brooks was at the time hopelessly insolvent. On December 5, 1904, Eady, as the successor of the firm and as transferee of the accounts which it held against its debtors, brought suit against the Newton Coal & Lumber Company and the individuals who conducted business under that firm name to recover \$200.80 on an open account claimed to be due by it to Eady & Company. The defendants filed an answer in which they admitted an indebtedness of \$16.65, but by special plea they set up the agreement made between the manager of the Newton Coal & Lumber Company and Brooks, one of the members of the firm of Eady & Company, and the settlement of the accounts made in pursuance of that agreement. The defendants alleged that Brooks was authorized to enter into this agreement; that it was made in the usual course of dealings which had prevailed for a number of years, with the knowledge and approval of all of the members of the two partnerships; and that the settlement of accounts was made with knowledge and consent of Eady and in accordance with the custom recognized and followed by his firm in settling accounts between it and other firms in Griffin with which it transacted business.

On the trial of the case Brooks testified that he had no direct authority from Eady to enter into the agreement made with the manager of the Newton Coal & Lumber Company, but that Eady had knowledge that settlements of the character made with that company were effected with parties with whom his firm had business dealings, and that he never raised any objections to settlements being made which included the individual accounts of its members. Eady testified that he never authorized any such agreement, had no knowledge that it was entered into, and never consented to any settlement in accordance with its terms. As to transactions with other firms in Griffin, he explained that on certain occasions he had consented that, when parties called for a settlement of accounts, the indebtedness of the members of his firm should be entered as a credit on the demands which his firm had against such parties, but that in each instance the account against him individually had been presented to him, he had marked it "O. K.," and he and his partner had agreed that the settlement with the firm should embrace an allowance of the indebtedness held by its debtor against them individually. He 1 L.R.A. (N.S.)

denied that he had ever conferred upon Brooks any authority to make any such settlement without his express assent and approval. A number of merchants testified to having made settlements with the firm of Eady & Company, in which demands against the members of that firm were allowed. In some instances Eady was present and consented to this arrangement; in other instances the settlement was made with Brooks in the absence of Eady. Only one of the transactions of this nature which was made by Brooks without the express consent of his partner appeared on the books of the firm, and Eady undertook to swear positively that the entry thereof was made after the firm was dissolved, by changing a former entry of \$2.75 to \$580.95, and that he had no knowledge of this transaction till after he had become the sole owner of the business. After the dissolution of the partnership, Eady repudiated the agreement entered into between Brooks and the manager of the Newton Coal & Lumber Company, saying he had no information in regard to it, and that the company would have to look to Brooks for the payment of his individual indebtedness to it. The defendants sought to show that Eady in point of fact knew of and tacitly assented to that agreement, but the only evidence adduced on this point was to the following effect: After this arrangement was agreed on between Brooks and Mills the latter was asked by Eady if he "didn't want a wagon" Mills replied, "You don't owe us quite enough to get a wagon yet," and Eady then said, "We will owe you enough." Subsequently Eady & Company wanted to buy a car load of coal. Mills went to the office of the firm, and in the presence of both members said that coal was sold at a very small profit, and that he could not charge it,—that he "could not swap accounts as to this." They accordingly paid cash for the coal, giving him a check for the price of it, and Eady took part of the car load, Brooks part of it, and a part of it was devoted to the use of the firm. Several bookkeepers, who had at different times been in the employ of the firm, knew of the custom of settling the individual indebtedness of its members when settlements were effected between the firm and other business concerns, and they were under the impression that Eady knew of this practice, as he looked pretty closely after the business.

After both sides had announced closed, the court, on motion of the defendants, directed the jury to return a verdict for only the amount which they admitted to be due, \$16.65, holding that the plaintiff was not entitled under the evidence to recover the amount sued for. To the direction of this verdict exception is taken. Complaint is

also made that the court admitted, over the plaintiff's objection, evidence as to the making of the agreement under which Brooks settled his individual indebtedness to the Newton Coal & Lumber Company, and as to the general custom of the firm of Eady & Company to make with persons with whom it dealt settlements of the character effected by Brooks with the defendant partnership.

Mr. Robert T. Daniel, for plaintiff in error:

Brooks could not use the firm assets to settle his individual debts without express authority.

Wise v. Copley, 36 Ga. 508; Harlow v. Rosser, 28 Ga. 219; Brown v. McCluskey, 26 Ga. 577; Standard Wagon Co. v. Few, 119 Ga. 296, 46 S. E. 109; Harper v. Wrigley, 48 Ga. 495; Clarke v. Farrell, 80 Ga. 622, 6 S. E. 20; Logan v. Bond, 13 Ga. 197.

A partner does not have to keep posted as to the acts and doings of the other partners, and to govern himself accordingly.

Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122.

To bind one by ratification of an illegal act, it must be shown that he had full knowledge, at the time of the alleged ratification, of the facts which would make such act illegal or void.

DeVaughn v. McLeroy, 82 Ga. 688, 10 S. E. 211; Sibley v. American Exch. Nat. Bank, 97 Ga. 127, 25 S. E. 470.

There was no error in refusing to allow proof of an alleged custom of trade, when it did not appear from the evidence offered for this purpose that it was of such universal practice as to justify the conclusion that it became by implication a part of the contract.

Wheelwright v. Dyal, 99 Ga. 247, 25 S. E. 170; People's Sav. Bank v. Smith, 114 Ga. 188, 39 S. E. 920; American Exch. Nat. Bank v. Georgia Constr. & Invest. Co. 87 Ga. 651, 13 S. E. 505; Robertson v. Wilder, 69 Ga. 341; Fleming v. King, 100 Ga. 449, 28 S. E. 239.

Mr. Marcus W. Beck also for plaintiff in error.

Mr. Lloyd Cleveland, for defendant in error:

The general usage or habit of the firm, acquiesced in by the firm, is equivalent to an agreed enlargement of the articles.

1 Bates, Partn. ed. 1888, p. 319; Parsons, Partn. 4th ed. ¶ 115; Miller v. Hines, 15 Ga. 198.

Evidence of numerous settlements extending over a long series of years was clearly admissible.

Bray v. Gunn, 53 Ga. 148; Weaver v. Ogletree, 39 Ga. 586; Sibley v. American Exch. Nat. Bank, 97 Ga. 140, 25 S. E. 470; McRae v. Campbell, 101 Ga. 662, 28 S. E. 920; 1 L.R.A. (N.S.)

Sparks v. Flannery, 104 Ga. 328, 30 S. E. 823.

All the partners are bound by the acts of any one partner within the legitimate business of the partnership.

Code, § 2643; Roberts v. Barrow, 53 Ga. 317; Perry v. Butt, 14 Ga. 699; White v. Toles, 7 Ala. 569; Greeley v. Wyeth, 10 N. H. 15; Strong v. Preserved Fish, 13 Vt. 277; Eaton v. Whitcomb, 17 Vt. 641.

One partner has a right to sell the goods of the partnership, and he may take payment therefor, in behalf of the partnership, in either specific articles or money; and his application of such articles is immaterial.

Greeley v. Wyeth, 10 N. H. 15; White v. Toles, 7 Ala. 569; Strong v. Preserved Fish, 13 Vt. 277; Halls v. Coe, 4 M'Cord, L. 136; Henderson v. Wild, 2 Campb. 561; M'Kee v. Stroup, Rice, L. 291; Arnold v. Brown, 24 Pick. 89, 35 Am. Dec. 296; Yale v. Yale, 13 Conn. 185, 33 Am. Dec. 393; Eaton v. Whitcomb, 17 Vt. 641.

Evans, J., delivered the opinion of the court:

1. Counsel for the defendant in error insists that the agreement between Brooks and the manager of the Newton Coal & Lumber Company was an engagement in furtherance of the partnership business, which Brooks had the right to make, and by which his co-partner is bound. This proposition is claimed to be supported by the case of Perry v. Butt, 14 Ga. 699. The report of that case discloses that the partnership concern did a cash and credit business and bartered goods for other articles. The defendant was a tavern keeper, and, in a conversation with one of the partners upon the subject of boarding, said that, when merchants or their clerks boarded with him, it was his custom to trade it out, and that he did not expect cash. It was the understanding that the tavern keeper's charge for the board of one of the partners was to be allowed for any goods he might buy of the firm. The tavern keeper had twice settled his account with the firm for goods purchased prior to the time the note on suit had been given, and in each settlement the partner's board had been allowed as a credit. These settlements were duly entered on the books of the firm. Upon these facts the great judge who delivered the opinion of the court said that one partner, in furtherance of the joint business, may agree with a hotel keeper that, if he will deal with the firm, his account shall be settled by the board of the partners, and the contract will be binding on the firm. It is perfectly clear and manifest from the entire report of the case that the court did not intend to hold that one partner could sell the firm's goods for his private benefit. Other-

wise it would have been entirely useless for the court to discuss ratification because of prior entries on the books. And to make it more clear that such was not the intent is the express recognition of the principle that one partner cannot appropriate the partnership effects in payment of his individual debt. Still, as the language used is susceptible of the construction placed upon it by counsel for the defendant in error, leave was granted to review the ruling announced in the fifth division of the opinion filed in that case.

We think the true rule of liability is well stated in *Warder v. Newdigate*, 11 B. Mon. 177, 52 Am. Dec. 567: "If a firm sells goods and receives various commodities in payment, the act of one partner in relation thereto binds the firm, because it is in the course of its trade and done in the name and for the benefit of the partnership. But, when goods are purchased to be paid for in commodities furnished, not for the firm, but for one of the partners individually, and this fact is known to the purchaser, the act of one partner in such a case does not bind his copartners, unless they assent to it." To bind the partnership it is essential that a contract of this character be made not only in the name of the firm, but at least ostensibly for the firm's benefit. Otherwise it will not be binding on the partnership. One of the reasons advanced why such a contract would be binding on the copartners is that a partner has a right to accept specifics in payment of the goods of the firm; and, when firm goods are sold under a contract to be paid for in specifics for the individual use of one of the partners, and the goods are paid for in this way, a suit in the firm name to recover the value of the goods is not maintainable, because the goods have been paid for in terms of the contract under which they were purchased. *Fay v. Green*, 1 Aik. (Vt.) 71; *Strong v. Preserved Fish*, 13 Vt. 277; *M'Kee v. Stroup, Rice*, L. 291; *White v. Toles*, 7 Ala. 569 (overruled in *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 So. 676). The fallacy of this argument is that the truth of the premise is assumed. The goods have never been paid for. The firm has never received any *quid pro quo* from the customer. As was said in *Thomas v. Pennrich*, 28 Ohio St. 55: "The assumption is true, if the setting off of a debt due the firm against the private debt of the partner is a payment of that debt; but it is conceded that a partner cannot pay his own debt by using the firm property to that end." Other cases are based on the observation of Lord Ellenborough, in *Henderson v. Wild*, 2 Campb. 561, to the effect that a receipt by one of the partners discharging the firm debtor in consideration of the settlement of a private

debt of the partner executing the receipt is binding on the firm. *Halls v. Coe*, 4 M'Cord, L. 136. But this doctrine is repudiated by the great weight of authority, and recognition is given to the principle that one member of a partnership has no implied authority to dispose of property of the partnership in satisfaction of his individual debt or for his individual benefit. *Columbia Nat. Bank v. Rice*, 48 Neb. 428, 67 N. W. 165; *Evernghim v. Ensworth*, 7 Wend. 326; *Thomas v. Pennrich*, 28 Ohio St. 55; *Minor v. Gaw*, 11 Smedes & M. 322; *Flower v. Williams*, 1 La. 22; *Atkin v. Berry*, 1 Lea, 91; *Thomas v. Stetson*, 62 Iowa, 537, 49 Am. Rep. 148, 17 N. W. 751; *Dob v. Halsey*, 16 Johns. 34, 8 Am. Dec. 293; *Cotzhausen v. Judd*, 43 Wis. 213, 28 Am. Rep. 539; *Chase v. Buhl Iron Works*, 55 Mich. 139, 20 N. W. 827; *Brooks Waterfield Co. v. Carpenter*, 21 Ky. L. Rep. 851, 53 S. W. 40; *Taylor v. Rasch*, 5 Nat. Bankr. Reg. 399, Fed. Cas. No. 13,801; *McNair v. Platt*, 46 Ill. 211; *Bell v. Faber*, 1 Grant, Cas. 31; *Gullat v. Tucker*, 2 Cranch, C. C. 33, Fed. Cas. No. 5,866.

Several American courts have followed the English case of *Jones v. Yates*, 9 Barn. & C. 532, assigning as the reason why a partnership could not sue for the value of goods sold by one of the partners to a customer, under an executed agreement that the goods were to be paid for by delivery of specifics to the partner's private use, that it would allow a plaintiff in a court of law to rescind his own act on the ground that such act was a fraud on some other person. *Greeley v. Wyeth*, 10 N. H. 15; *Homer v. Wood*, 11 Cush. 62; *Craig v. Hulschizer*, 34 N. J. L. 363. As was clearly demonstrated in *Purdy v. Powers*, 6 Pa. 494, "this action does not proceed upon a suggestion of *mala fides* or imputed fraud in one of the parties, but upon the foot of the original claim springing from the debt contracted with the firm in the usual course of dealing, and therefore there is nothing standing in the way of the action which requires to be rescinded." An agreement between one partner and a purchaser to sell partnership goods and receive in exchange therefor commodities to be applied to the private benefit of the individual partner is a void act, in that it is beyond the scope of the authority of a partner to make such an agreement, and the very nature of the agreement informs the purchaser that the firm is parting with its property and receiving nothing in exchange. A private agreement by one partner for his separate advantage would work a great injury to partnership assets, and thereby to associates in the firm and the creditors of it. Several cases upon practically the same facts as are involved in the case under consideration have been before the courts, and a brief reference

to some of them may aid in illustrating our position. In *Brickett v. Downs*, 163 Mass. 70, 39 N. E. 776, *Brickett* and *Shorey* were coal dealers, and the defendant was a dentist. The suit was for the price of coal, and the defendant pleaded that *Shorey* was having teeth fixed in the defendant's office, and proposed that defendant take coal in part payment for dental work done and to be done for *Shorey* and his family, and to this proposition the defendant assented. At that time *Shorey* owed defendant from \$23 to \$27, and defendant soon afterwards did work that increased the bill to \$38.75. He had received the coal in part payment of his bill for dental work. *Knowlton, J.*, said: "To receive property of a partnership, from one of the partners in payment of his personal debt, without the consent of his copartner, is no less a fraud upon the partnership than to pay a debt due the firm by doing or furnishing something for the personal benefit of one of its members. Such an arrangement, accompanying the receipt of partnership property, would be void against the other partner, and would leave the party receiving the property liable upon an implied contract to pay the firm its value." In North Carolina it was held that, in an action by a surviving partner for a debt alleged to be due to the firm, the defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, which was for the board of this partner, should be paid out of the store in which the plaintiff and the defendant's debtor were partners. *Norment v. Johnston*, 32 N. C. (10 Ired. L.) 89. In *Goode v. McCartney*, 10 Tex. 193, the plaintiff brought suit upon an account for merchandise sold the defendant. The latter pleaded in set-off an account for medical services rendered a partner of the plaintiff, who had furnished the goods under an agreement that the medical services rendered him by the defendant should be received in satisfaction. The court held that such an agreement between the customer and one of the partners did not bind the copartners, and the plaintiff was allowed to recover. To the same effect is *Pierce v. Pass*, 1 Port. (Ala.) 232.

It has frequently been held that, while a partner may apply partnership property to the payment of a partnership debt contracted in the prosecution of the partnership enterprise, he has neither a legal nor a moral right to appropriate partnership effects to the payment of his individual debt without the assent of his partner. *Wise v. Copley*, 36 Ga. 508; *Harper v. Wrigley*, 48 Ga. 495; *Murphey v. Bush*, 122 Ga. 715, 50 S. E. 1004. There can be no distinction in reason between the payment of a private debt with

partnership assets and the delivery of partnership goods to one who engages to do or to give something in exchange for the exclusive benefit of one of the partners. In either instance the transaction amounts to a conversion of partnership property to the private use of one of the partners, with the knowledge of the person who receives the firm's property. Hence we conclude that an agreement between a customer and a member of a partnership that its goods may be purchased and paid for by the customer in commodities furnished by him for the benefit of such member of the firm is neither in furtherance of the partnership business nor within the scope of his apparent authority. See *Parsons on Partnership*, § 90, and cases cited. In so far as the decision rendered in *Perry v. Butt*, 14 Ga. 669, conflicts with the views above announced, that decision is formally overruled. We are not constrained to follow the early English decisions hereinbefore referred to, as they were pronounced subsequently to the period mentioned in our "adopting statute" as the period to be looked to in ascertaining what was the common law as understood and declared by the courts of England prior to the Revolution.

2. During the course of his examination as a witness, *Brooks* was permitted to testify as to the custom of his firm with reference to making settlements with its customers which embraced accounts held by them against its members as individuals. This testimony was admissible, as the witness undertook to swear that his partner had knowledge of the custom which prevailed, and raised no objection thereto. It is pertinent to remark, however, that, before such a custom or business usage would become binding upon a partner who did not expressly sanction or authorize it, the circumstances would have to be such as to indicate that he not only knew of settlements being made in particular instances in accordance with the custom, but contemplated and tacitly assented to a regular course of dealing with the public, rather than with a few customers who held small demands against the individuals composing the firm. The mere fact that in two or more isolated instances he agreed to a settlement whereby the customer was given credit for a private debt against his copartner would not suffice to establish his assent to a practice so general as to amount to a custom. It would have to appear that there was a general usage or habit of so conducting the affairs of the firm, acquiesced in by all of its members. 1 *Bates, Partn.*, § 319. In a case where a partnership had frequently drawn checks against its funds in bank for the purpose of paying the individual debts of its members, this court held there was not sufficient proof of such "a course of deal-

ing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. *People's Sav. Bank v. Smith*, 114 Ga. 185, 39 S. E. 920. A customer has no right to assume that, because a partner expressly assents on one occasion to the allowance of a set-off of a demand for a particular amount held against his copartner, a like assent will be given to a similar settlement on another occasion, or that his copartner has any authority to bind the firm by any promise to settle its accounts in this manner.

What is said above disposes of all the questions which the record before us presents for determination. The next trial of the case should be conducted in accordance with the rulings above announced.

Judgment reversed.

All the Justices concur, except *Simmons*, Ch. J., absent.

ALABAMA SUPREME COURT.

C. C. MONTGOMERY, Appt.,
v.

WILLIAM E. HENRY.

(.... Ala.)

Unnumbered ballots—validity.

Unnumbered ballots are not void under a statute merely providing that each ballot shall be numbered to correspond with the name of the person voting the same on the poll list, although omission to number the ballots is made a misdemeanor.

(November 21, 1905.)

A PPEAL by contestant from a judgment of the Probate Court for St. Clair County in favor of opponent in an election contest. Affirmed.

The facts are stated in the opinion.

Case Note.—The opinion of the court quite extensively reviews the other decisions on the question of the effect of failing to number ballots as the statute requires. Its conclusion, that the failure to number ballots in the manner provided by statute does not necessarily render them void unless the statute expressly provides that they shall not be counted, is supported by the following cases in addition to those which are cited in the opinion:

In *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232, under a statute which required the rejection of unnumbered ballots if they were in excess of the 1 L.R.A. (N.S.)

Messrs. Inzer & Montgomery, Smith & Herring, and James T. Greene for appellant.
Messrs. Goodhue & Blackwood for appellee.

Denson, J., delivered the opinion of the court:

At the general election held in November, 1904, C. C. Montgomery and William E. Henry were opposing candidates for the office of tax collector in St. Clair county. When the returns from the various precincts in the county were canvassed by the board of supervisors, it was ascertained that Montgomery had received 963 votes and Henry 976 votes, and Henry was declared duly elected to said office. Montgomery then instituted a contest against Henry before the judge of the probate court in said county. The cause was tried by the judge on an agreed statement of facts, judgment was rendered in favor of the contestee, and from that judgment Montgomery prosecuted this appeal.

By the agreed statement of facts it is shown that the election was in all respects fairly held and the result in each precinct was correctly ascertained and properly returned by the inspectors. There is no imputation of fraud or evil practice against any candidate, voter, or election officer. But in four of the precincts the inspectors neglected to number the ballots, and as shown by the agreed statement of facts, this irregularity on the part of the inspectors in failing to number the ballots constitutes the basis for the contest; or, as stated in the agreed statement of facts: "It is agreed that, if the court should hold that the unnumbered ballots should not have been counted, then the contestant is entitled to judgment." Thus, by the agreed statement of facts all questions except the rightfulness of the counting of the unnumbered ballots were eliminated. And so the record stands before us. The case involves a construction of §§ 34½ and 78 of the act of the legislature approved October 9, 1903, entitled "An Act to Further Regulate

number of ballots shown by each of the three poll lists to have been cast, it was held that, where there was one unnumbered ballot, and the total number was one in excess over the number shown on one of the poll lists, it was error to reject the ballot, because it did not appear that the other poll lists agreed with the one examined.

And in *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704, it was held that where there was an excess of one ballot over the number shown by all the poll lists, an unnumbered ballot among them could not be counted; but where the total number of ballots cast was one in excess of the lists, and

Elections in the State of Alabama." Gen. Acts 1903, p. 438. Those sections of the act are in the following language:

"Sec. 34½. Each ballot shall be numbered by one of the inspectors to correspond to the number of the voter voting the same on the poll list. A voter may write his name on his ballot. The number corresponding with the voter's name on the poll list must be plainly entered in ink on the back of the ballot of the voter. Any person who compares the number on the ballot with the poll list shall be guilty of a misdemeanor, and on the conviction shall be fined not less than \$100; provided, this shall not apply on the trial of any contested election case."

"Sec. 78. The inspector receiving the ballot shall detach the stub and pass the ballot to each of the other inspectors, and it must then, without being opened or examined, be deposited in the proper ballot box, after being numbered to correspond with poll list."

The acute question is, Are the requirements of the sections mandatory or directory? We deem the exigencies of the case do not call for a discussion of the origin and purpose of the enactment. Anyone who may desire to prosecute that inquiry may be greatly aided by consulting the cases cited in the briefs of counsel, wherein similar statutes were discussed and construed, and some of which will be hereinafter cited. In the discussion we shall endeavor to be as brief as we possibly may be, considering the importance of the question. As has already been disclosed, the case does not involve the act of any candidate or voter, but the acts of the inspectors of the election in the four precincts mentioned in the agreed statements of facts and the acts of the inspectors assailed are untainted with fraud or dishonesty. Section 190 of the Constitution authorized the legislature to enact laws not inconsistent with that instrument to regulate and govern elections. And the legislature shall provide by law for the manner of holding elections and of ascertaining the result of the same, and of registration, etc.

"Such laws will necessarily sometimes have the effect of preventing the elector from voting or of having his vote counted. For instance, a law for the registration of voters, to be effectual, must provide that one not registered shall not vote, and may require of the elector other conditions. But in all these matters the voter had the privilege of voting by a compliance with the law, and his failure to do so is somewhat owing to his negligence or misfortune. . . . The right to vote and have the vote counted should not be taken away by any doubtful construction of a statute, and before the voters should be shorn of the privilege it must be clear that, under the circumstances then existing, the legislature intended such to be the case."

We deem the doctrine well settled that statutes tending to limit the citizen in the exercise of the right to vote and of having the vote counted should be liberally construed in his favor. This doctrine, we think, should be applied in construing the statute before us. *Lynip v. Buckner*, 22 Nev. 426, 30 L. R. A. 354, 41 Pac. 702; *Owens v. State*, 64 Tex. 500; *State ex rel. Law v. Saxon*, 30 Fla. 668, 18 L. R. A. 721, 32 Am. St. Rep. 46, 12 So. 218. The courts, in order to give effect to the will of the majority and to prevent the disfranchisement of legal voters, have uniformly held those provisions to be formal and directory merely which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself. In *McCrary on Elections*, § 190, the rule is stated as follows: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply

there were two of them that were unnumbered, only one of them should be rejected and the other counted.

In *People ex rel. Bradshaw v. Bidelman*, 69 Hun, 596, 23 N. Y. Supp. 954. under a statute which required the ballots to be numbered consecutively, and some of them were not, but were given much higher numbers, it was held that, in the absence of any fraud, they were not void. The court laid stress on the fact, that as the stubs showing the numbers had been removed before the ballots were deposited, they could not be identified, and there was no provision of the statute against counting them.

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But under the Missouri statute requiring ballots to have registration numbers on them, and expressly providing that no ballot not so numbered shall be counted, it is held that the lack of such registration numbers on the ballots makes them void. *Donnell v. Lee*, 101 Mo. App. 191, 73 S. W. 997.

The effect of numbering ballots improperly is considered in various cases, but the question raised in respect to them is a different one, and usually arises under provisions of the statutes against marking ballots.

provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." Section 225, and citations in note 2. Paine, in his work on Elections (§ 498), expresses the same view in the following language: "In general, those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and return of the results, are formal and directory. Statutory provisions relating to elections are not rendered mandatory, as to the people, by the circumstance that the officers of the election are subjected to criminal liability for their violation. The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Generally such rules are directory, not mandatory, and a departure from the mode prescribed will not vitiate an election, if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them." Judge Post, speaking for the supreme court of Nebraska in the case of *State ex rel. Waggoner v. Russell*, 34 Neb. 116, 15 L. R. A. 740, 33 Am. St. Rep. 625, 51 N. W. 465, said: "The view expressed by these authors has the support of the great majority of cases in this country and England. In fact, we are not aware that there is to be found in the reports any diversity of opinion on the subject. The following are a few of the many cases in point: *Gass v. State*, 34 Ind. 425; *Piatt v. People*, 29 Ill. 54; *Barnes v. Pike County*, 51 Miss. 305; *Fry v. Booth*, 19 Ohio St. 25; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *State ex rel. DuBerry v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545." *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. Rep. 254, 30 N. E. 790; *Stackpole v. Hallahan*, 16 Mont. 40, 28 L. R. A. 502, 40 Pac. 80.

As to whether language should be construed as mandatory or directory, the doctrine is thus stated in *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736: "The word 'may' is construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. And so, on the other hand, the word 'shall' 1 L.R.A. (N.S.)

may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction. But, if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely." *Endlich, Interpretation of Statutes* (1888) §§ 433, 436, 437. Mr. Wigmore, in an appendix to the second edition of his *Treatise on the Australian Ballot System* (p. 193), after examining all of the reported cases upon the subject, concludes in the following language: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention, and if, in a given case, the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials; that is, as objects in themselves, and not merely as means." *State ex rel. Waggoner v. Russell, supra*. The rule of construction was thus stated by the supreme court of Kansas in the case of *Jones v. State*, 1 Kan. 273, and approved in *Gilleland v. Schuyler*, 9 Kan. 569: "Unless a fair consideration of the statute shows that the legislature intended a compliance with the provision in relation to the manner [and procedure] to be essential to the validity of the proceeding, it is to be regarded as directory merely." In the case of *Lee v. State*, 49 Ala. 54, 55, which was a case that involved irregularities on the part of a manager of an election, this court said: "Did the irregularities in the conduct of the election. . . as stated in the record, render the election . . . invalid, in the absence of any fraud, or intended fraud, on the part of the persons who actually performed the duties of inspectors of election in conducting it; it not appearing that there was any misconduct on their part calculated to prevent a free, fair, and full exercise of the elective franchise? We think this question ought to be answered in the negative. Statutes directing the mode of proceeding by public officers are directory, and a strict compliance with their provisions is not essential to the validity of their proceedings, unless it is so declared by the statute; . . . and the court say that this rule should have a liberal application in respect to the duties of inspectors of elections, when we consider the character of the duties and of the men who are necessarily selected to fill these of-

fices." *Lee v. State*, 49 Ala. 43; *People v. Cook*, 14 Barb. 259, and the same case on error, 8 N. Y. 67, 59 Am. Dec. 451. In those jurisdictions where the law requires the inspectors to number the ballots, but does not provide that unnumbered ballots shall be rejected or not counted, the courts have held that the law is directory. 10 Am. & Eng. Enc. Law, p. 716; *Hodge v. Linn*, 100 Ill. 397; *Blankinship v. Israel*, 132 Ill. 514, 24 N. E. 615; *State ex rel. Waggoner v. Russell*, *supra*. But in other jurisdictions, where the statute required that the ballots should be numbered, and that an unnumbered ballot should not be counted, it has been held that the requirement is mandatory. 10 Am. & Eng. Enc. Law, p. 716; *West v. Ross*, 53 Mo. 350; *Ledbetter v. Hall*, 62 Mo. 422; *Hugher's Election*, 3 Lack. Jur. 313; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

The law of Nevada directs that the number of each ballot shall be the same as that of the corresponding stub, and that the number of the ballot shall be written upon the registry list opposite the name of the voter receiving it. After preparing the ballot, it must be delivered to the inspector, who shall separate the strip bearing the number from the ballot and deposit the ballot in the ballot box. At one of the precincts the inspector, through ignorance of the law, and not wilfully, neglected to separate the strip bearing the number from the ballot. The entire vote of the precinct was cast in this way. The law further provided that no ballot should be deposited in the ballot box unless the slip containing the number of the ballot had been removed therefrom by the inspector. It was held by the supreme court of that state in the case of *Lynip v. Buckner*, 22 Nev. 426, 30 L. R. A. 354, 41 Pac. 762, that the ballots should not be rejected. The court, among other things, remarked that "it is to be observed that the voters of this precinct were themselves in no wise in fault. They possessed every qualification for voting, and had complied with every requirement of the law as to registration, marking their ballots," etc. The law of Missouri requires the ballots to be numbered, and provides that any ballot not numbered shall not be counted. "The judges of election through inadvertence neglected to number any of the ballots; but the court held that the statute was mandatory, and all of the ballots were rejected." *West v. Ross*, *supra*. Rev. Code Miss. 1880, § 137, provided that all ballots shall have "a space of not less than one fifth of an inch between each name," and that a ticket different from that described should not be received or counted. The supreme court, construing the statute in the case of *Keller v. Toulme*, (Miss.) 7 So. 508, said: "Under § 137, a ballot L.R.A. (N.S.)

lot other than that prescribed is not to be received or counted by the election officers. The standard prescribed is arbitrary, and, by the unequivocal provision of this section, its provisions are made mandatory, and not directory." The precedents referred to seem to support the correctness of the rule heretofore referred to as stated by the supreme court of Kansas.

In the case in hand no fault whatever has been ascribed to the voters nor to the candidates, but the trouble arose from what must have been ignorance of the law, or inattention to it on the part of the inspectors. The ballots were voted by the voters without any challenge, and were counted by the inspectors as they were cast, without a protest from any source. No one questions that the votes were the expression of the will of the voters, and that, when given to the contestee, entitled him to be declared the successful candidate. The court below held that the votes were properly counted for the contestee, and we are by this appeal asked to hold that the requirement of the statute with reference to the numbering of the ballots is mandatory, and that the unnumbered ballots should not be counted. Section 34½ (p. 453), while it provides that the ballots shall be numbered by one of the inspectors, does not direct that the ballots shall not be counted if not numbered. Neither does § 78 (p. 470) contain any prohibition against counting an unnumbered ballot. Section 87 (p. 473) is the only section in the act that has a requirement with reference to the rejection of votes; it is in this language:

"Sec. 87. In counting, the returning officer or one of the inspectors must take the ballots, one by one, from the box in which they have been deposited, at the same time reading aloud the names of the persons voted for and the office for which such person is voted for; they must separately keep a calculation of the number of the votes each person receives and for what office he receives them; if the elector has marked more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the elector's choice for any office to be filled, his ballot shall not be counted for such office; but this shall not vitiate the ballot so far as properly marked, nor shall any ballot be rejected for any technical error which does not make it impossible to determine the elector's choice, and nothing in the election law shall be construed so as to prevent any elector from voting for any qualified person other than those whose names are printed on the ballot."

It is true, that § 50 of the act (p. 456) makes it a misdemeanor punishable by fine

for any officer without lawful excuse to neglect, fail, or refuse to perform any official duty required by the act. But we have seen that provisions in statutes relating to elections are not rendered mandatory, as to the people, by the circumstances that the officers of the election are subject to criminal liability for their violation. *Paine, Elections*, § 498; *Lindstrom v. Board of Canvassers*, 94 Mich. 467, 19 L. R. A. 171, 54 N. W. 280. In the case of *Lindstrom v. Board of Canvassers*, *supra*, it was said by the supreme court of Michigan, that "it may be stated as a general rule that the provisions of law relating to the manner of conducting elections will not be held so far mandatory as that a departure . . . [from the rule] will result in the disfranchisement of a district or a class of voters, or the defeat of a candidate, himself free from fraud, except in cases where the legislative intent that such departure [from the prescribed rule] shall have that effect is clearly and unequivocally expressed." To the same effect is the ruling by the supreme court of Kansas in the case of *Boyd v. Mills*, 53 Kan. 594, 25 L. R. A. 480, 42 Am. St. Rep. 306, 37 Pac. 16.

The legislature, by § 87 of the act under consideration, safeguards the elector against the loss of his vote on account of technical errors committed by himself which do not make it impossible to determine his choice. But in the case at bar, we repeat, no complaint is made with reference to the conduct of any elector; but it is on account of the inadvertence of the inspectors that the contestant would have votes of four precincts in the county rejected and the will of the majority of the county (conceded to have been fairly and honestly expressed) thwarted. While it is well enough to insist on a proper and strict performance of duty by officers conducting elections, and to have been regular the officers should have followed the letter of the law in this instance, yet, the legislature not having declared irregularities like the one complained of in this case fatal, we conclude that the provision of the law with reference to numbering the ballots, pertaining, as it does, to the mode of procedure in the election, is directory, and not mandatory, and, of consequence, that the judge properly rendered judgment against the contestant. *Paine, Elections*, § 498; *McCrary, Elections*, § 225; *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754, 33 Am. St. Rep. 491, 20 S. W. 101; *Lee v. State*, *supra*.

The judgment appealed from will be affirmed.

Haralson, Dowdell, and Anderson, JJ., concur.
1 L.R.A. (N.S.)

CALIFORNIA SUPREME COURT.

WILLIAM R. MORTON et al., Respts.,

v.

JOHN MORTON, Appt.

(.... Cal.)

1. Unfair trade—injunction.

One who has established a business under a particular name, which he places on the hats of his agents to inform customers that they are his representatives, may enjoin another of the same name, who has engaged in the same business, from using such name as a hat label in such a way as to deceive the public into believing that the one bearing it is connected with the former's business.

2. Same—insolvency not necessary.

Insolvency of one attempting to make fraudulent use of another's trade name need not be shown to entitle the latter to an injunction.

3. Same—pendente lite.

An injunction to restrain a person and his agents from representing themselves to be connected with another's business, and from wearing his badge on their hats, is prohibitive, and not mandatory, and therefore may be granted *pendente lite*.

(October 14, 1905.)

A PPEAL by defendant from an order of the Superior Court for the City and County of San Francisco granting an injunction.

Case Note.—The doctrine that every person has the right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, is well settled. A person cannot make a trademark of his name, so as to prevent others of the same name from using it honestly in their own business. The inconvenience and injury that may result by the legitimate use of one's own name to one having the same name, and engaged in the same kind of business, is *damnum absque injuria*.

But, while the right of no one can be denied to employ his name in connection with his business, or with articles of his own production, so as to show the business or product to be his, yet he will not be allowed to designate his article by his own name in such a way as to cause it to be mistaken for the manufacture or goods of another, already on the market, or to use his name in such a way as to deceive the public into believing that his business is that of another. The maxim that one must so use his own as not to injure the possession or right of another applies to the use of one's own name as well as to the use of any other possession. *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129, 52

tion to restrain defendant from making wrongful use of plaintiffs' trade name. Affirmed.

The facts are stated in the opinion.

Mr. William J. Herrin, for appellant:

There is nothing to show absence of remedy at law.

Gardner v. Stroeve, 81 Cal. 150, 6 L. R. A. 90, 22 Pac. 483; Mechanics' Foundry v. Ryall, 62 Cal. 418; Tomlinson v. Rubio, 16 Cal. 204.

The showing is not such as to entitle respondents to have the objectionable sign removed from appellant's hat pending the final determination of the rights of the parties in the disputed name.

Gardner v. Stroeve, *supra*; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; Hagen v. Beth, 118 Cal. 330, 50 Pac. 425.

N. E. 487; Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 53 L. R. A. 384, 82 Am. St. Rep. 346, 63 Pac. 480; Frazier v. Dowling (Ky.) 39 S. W. 45; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

In other words, one man will not be allowed, although his name be the same as that of another person or manufacturer, to represent his goods as and for the goods of another. Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

But in such cases, however, an injunction issues, not because the name of the person first in the market is a trademark, but because such conduct on the part of the second comer is fraudulent. Brown Chemical Co. v. Myer, 31 Fed. 453.

As stated in Jamieson v. Jamieson, 15 Rep. Pat. Cas. 169, it is not a question, as has been sometimes suggested, of the right of the law to restrain a man from using his own name. The right and duty of the court always is to restrain a man from using a name that has come to be recognized as the name of a particular trader's goods, so as to suggest that the second comer's goods are the goods of the other party, and to pass them off as such.

And the court in Valentine Meat Juice Co. v. Valentine Extract Co. 83 L. T. N. S. 250, says that there is no distinction between cases as to the right of a person to use his own name to describe goods sold by him, where that name has already become associated with the goods of another party, and cases as to the right to adopt a fanciful name or particular words which by long use have become associated with the goods of another; though the court said that "of course, it is more difficult to deal with cases where the name is the name of the person, or the name of both the persons, as distinguished from a fancy name which has been created for the purpose of the particular goods," and that it is more abundantly necessary, where the name is that of the person accused of wrongfully using it, that it should be clearly established that the name has come to designate in the market the goods of the other party.

1 L.R.A. (N.S.)

Messrs. Naphtaly, Freidenrich, & Ackerman, for respondents:

A person cannot use his own name as against another person of the same name unless he uses a form of stamp or label different from the stamp or label used by the other person.

Gilman v. Hunnewell, 122 Mass. 139; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Weinstock, L. & Co. v. Marks, 109 Cal. 529; 30 L. R. A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; Schmidt v. Brieg, 100 Cal. 672, 22 L. R. A. 790, 35 Pac. 623; Sperry v. Percival Mill. Co. 81 Cal. 252, 22 Pac. 651; Draper v. Skerrett, 116 Fed. 206; Shaver v. Heller & M. Co. 65 L. R. A. 878, 48 C. C. A. 48, 108 Fed. 821.

The injunction is prohibitive, and not mandatory.

While the fact that another person of the same name has already made a reputation in a particular business cannot prevent a person from entering into that business under his own name, he must use every means reasonably possible to distinguish his business from that of the other party, and his goods from those made by the other. Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Walter Baker & Co. v. Baker, 77 Fed. 181; Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; Walter Baker & Co. v. Baker, 87 Fed. 209; Chickering v. Chickering & Sons, 56 C. C. A. 475, 120 Fed. 69.

Therefore, where the name "Valentine" has for many years been associated with a certain preparation of meat juice or meat extract, a person of the same name will be restrained from carrying on the business of manufacturing and selling meat extracts under the name "Valentine" without clearly distinguishing his business from that of the other party, and from selling or offering for sale any such preparation without clearly distinguishing it from the goods of the other. Valentine Meat Juice Co. v. Valentine Extract Co. 83 L. T. N. S. 250.

And the fact that the boxes in which the preparation of the second comer are packed are entirely different from the package of the party first in the market is of no importance, where the name has for so many years been associated with the goods of the latter that it has come to have a secondary meaning as designating his goods, and it would be impossible for anyone to use the same name in connection with the same class of goods without passing off his goods as those of the other party. *Ibid*.

Nor does the fact that the two names are spelled differently constitute a defense, if they are *idem sonans*, as in case of the names "Stuart" and "Stewart" (Stuart v. F. G. Stewart Co. 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243) or "McLane" and "McLean" (McLean v. Fleming, 96 U. S. 258, 24 L. ed. 833).

Even though the packages in which the two articles are put up are in some respects

Gardner v. Stroever, 81 Cal. 150, 6 L. R. A. 90, 22 Pac. 483; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Hagen v. Beth*, 118 Cal. 330, 50 Pac. 425.

Van Dyke, J., delivered the opinion of the court:

This is an appeal from an order granting an injunction upon a verified complaint at the time of issuing the summons, and without notice to the defendant. The complaint alleges substantially the following facts, *viz.*: Plaintiffs have for more than ten years previous to the bringing of the action (August 5, 1902), under the name of "Morton's Special Delivery," conducted the business of transferring for hire the baggage and luggage of persons from their places of landing in San Francisco to their hotels or places of destination therein, and from their hotels and residences to the depots or wharves whence they were about to depart. In that business they employed a large number of solicitors, whose business it was and is to solicit custom from travelers. Each solicitor had for some time been caused by plaintiffs, while actually employed in his work, to wear upon his hat a badge upon which is printed in conspicuous letters the word "Morton." This badge indicated to the public that the solicitor was repre-

senting the Morton Special Delivery, which is well and favorably known, and that any baggage intrusted to any solicitor wearing such a badge would be handled by the persons doing business under that name. The defendant, within a few months prior to the bringing of the action, became engaged in the same character of business, under the name of "Morton Transfer Company." For the purpose of misleading and deceiving the public, as alleged, into the belief that he was a solicitor of plaintiffs, and that they will handle all baggage intrusted to him to transfer, he has and still uses in connection with his business a badge affixed to his hat, with the single word "Morton's" thereon. Such badge is of the same size, color, and general appearance as plaintiffs' badge, and the letters thereon are precisely similar in size, color, and general appearance as those of plaintiffs' badge; the only difference being the additional "s," with an apostrophe, to the name "Morton." During such time defendant has and still does represent to the public that he is acting for plaintiffs, and by the use of this artifice he deceives the public into the belief that he represents the plaintiffs, and thereby procures from them much of their baggage for the purpose of transfer. It is alleged, further, that plaintiffs' business has become well and favora-

quite dissimilar. *Stuart v. F. G. Stewart Co.*

Nor is it essential that there should be a deliberate purpose or intention to mislead. Courts in such cases do not require proof of any peculiarly iniquitous, perfidious dealing. If the representation as to what or whose the goods are is calculated to deceive the purchaser, equity will enjoin its continuance, although the deceitful representation was placed upon the goods carelessly, or from lack of appreciation of the meaning conveyed to the purchaser, or from an honest mistake as to the party's right to use it. *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; *Jameson v. Dublin Distillers' Co.* [1900] 1 Ir. Ch. 43.

If a person resorts to any artifice to deceive the public in connection with the use of his name, as by imitating the trademarks or labels of another person, such use of his name will, of course, be enjoined. *Holloway v. Holloway*, 13 Beav. 209; *Croft v. Day*, 7 Beav. 84; *McLean v. Fleming*, *supra*; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337, 67 N. E. 799; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Stonebraker v. Stonebraker*, 33 Md. 252; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 6 L. R. A. 823, 93 Am. St. Rep. 537, 7 So. 23; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; 1 L.R.A. (N.S.)

Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; *Rock Springs Distillery Co. v. Monarch*, 15 Ky. L. Rep. 866, 22 S. W. 1028.

For, as well stated by the court in *Croft v. Day*: "It has been very correctly said . . . that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form and say that no man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud."

And positive proof of fraudulent intent is not required if the simulation is clearly shown. *Drake Medicine Co. v. Glessner*, and *McLean v. Fleming*.

The courts, however, will not enjoin a person from any use whatever of his own name because it is already used as a trade name by another, but will simply forbid its use in such a way as will be likely to deceive the public.

Thus, in *Rock Springs Distillery Co. v. Monarch*, it was held that the fact that a person had used his name, which was the same as that of another party in the same business, on a brand so similar to that of the other party as to indicate an intent to deceive the public, did not justify an in-

bly known under the name of "Morton," and that as a result of the defendant's misrepresentations in the use of said badge they have been damaged in the sum of \$500, and, if such use and misrepresentations are continued, will suffer and sustain other damage, and that such loss or damage will be irreparable, and that they have no plain, speedy, or adequate remedy at law. All these allegations must, for the present purpose, be considered as confessed, the defendant having failed to answer. The injunction having been issued according to the provisions of § 527, Code of Civil Procedure, the defendant in the lower court might have moved to vacate or modify said injunction under the provisions of § 532, Code of Civil Procedure. He appears, however, to have failed to make any move in that direction, but, on the contrary, chose to take an appeal directly from the *ex parte* order granting the injunction, and to stand upon his contention that the order does not find sufficient support in the complaint on which it is based.

From the foregoing summary of the complaint, evidently this position of the appellant is untenable, as the complaint certainly states facts sufficient to entitle plaintiffs to an injunction. As in *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L. R. A. 182, 50 Am.

junction placing an absolute prohibition on his use of his name in that business, and that the injunction should be limited to restraining him from using his name as a part of his brand in such a way as to simulate the brand of the other party.

But, where it appeared that it would be impossible for a person trading under his own name of "Cash" to sell frillings without their being known as "Cash's Frillings," which was a name that was universally used to designate the goods of another party, it was held, in *Cash v. Cash*, 84 L. T. N. S. 349, 745, that he would be restrained from any use whatever of his name in connection with the sale of frillings, since to sell "Cash's Frillings" would be to represent that they were the goods of the other party. This seems to be an extreme case, but the court said the circumstances were such that it would hardly be possible for the second comer so to differentiate his goods from those of the other party as to avoid misleading the public.

Other cases illustrating the extent to which the use of one's name will be enjoined are *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 337; *Lever Bros. v. Smith*, 112 Fed. 998; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129, 52 N. E. 487; *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; *Jameson v. Dublin Distillers' Co.* [1900] 1 Ir. Ch. 43; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Walter Baker & Co. v. Sanders*, 1 L.R.A. (N.S.)

St. Rep. 57, 42 Pac. 142, and *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879, the basis of plaintiffs' action is that defendant is attempting, by fraudulent representations to the effect that defendant's business is plaintiffs' business, to appropriate the benefit of the good will of plaintiffs' established business. The principle applicable was stated in the *Weinstock Case*, as follows, *viz.*: "When one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive." This statement was approvingly quoted in the *Dodge Case*. The only appropriate and adequate remedy in such a case as this is the remedy of injunction; and this is so, regardless of the question of the insolvency of the person committing the fraud. If an injunction could not be granted as against a financially responsible person guilty of such fraud, the fraud upon the rival business and the public could be continued indefinitely, and the only right of the owner of the rival business would be in a multiplicity of actions for

26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889.

For examples of the use that may legitimately be made of one's own name in such cases, see *Burgess v. Burgess*, 3 De G. M. & G. 896; *Duryea v. National Starch Mfg. Co.* 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651; and *Rogers v. Wm. Rogers Mfg. Co.* 17 C. C. A. 575, 35 U. S. App. 848, 70 Fed. 1019.

The rule as to the right of a person to engage in business under his own name notwithstanding the fact that another of the same name has already established a similar business does not apply to the right of a corporation to use the name of a stockholder or director as a trade name, since the name of a corporation is an artificial thing.

And a person may lose the right to use his own name by a transfer of his business with the good will and trademarks. *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

Though it has been held that the words "Fish Bros. & Co." and the picture of a fish may be applied by brothers named Fish to vehicles manufactured by them, although such words and picture were previously used by them in a business which has now passed with its good will and trademarks to a corporation, provided their use is not such as to induce persons to buy their vehicles as and for those manufactured by the corporation. *Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish)* 82 Wis. 546, 16 L. R. A. 453, 33 Am. St. Rep. 72, 52 N. W. 595.

damages; whereas it might be, in many cases, practically impossible to ascertain the amount of damage done. The allegations in this complaint as to the nature of business here involved show beyond doubt that such would be the situation in this case. It is urged that, in so far as the injunction herein granted was mandatory, it was erroneously granted; the contention being that a mandatory injunction should not be granted pending trial, or until the rights of the parties had been definitely ascertained by the chancellor. We are, however, of the opinion that the injunction granted in this case was prohibitory only, and in no respect mandatory. The injunction complained of restrains the defendant, his agents and employees, from representing himself as the representative of plaintiffs, and from wearing on his hat, while engaged in the business of soliciting the transfer of baggage and luggage, a badge with the word "Morton's" thereon, or any badge similar thereto. This injunction does not restrain the defendant from carrying on his business in a legitimate manner and without the artifice referred to, by which it is sought to unjustly obtain some of the business of the plaintiffs. We are satisfied that the injunction was entirely justified by the allegations of the complaint, and went no further than was necessary to restrain the continuance of an artificial contrivance resorted to by defendant for the sole purpose of deceiving the public into the idea that in patronizing him they were patronizing plaintiffs, and of thus acquiring patronage intended to be given to plaintiffs. It is well settled that, while a person undoubtedly has the right to engage in business in his own name, he will not be allowed to resort to any artifice or contrivance in the use of that name for the purpose of deceiving the public as to the identity of his business or products, and that to prevent this result a certain manner of use of one's own name may, in a proper case, be prohibited. See *Dodge Stationery Co. v. Dodge*, *supra*, and other cases cited.

The order appealed from is affirmed.

We concur: Angellotti, J.; Shaw, J.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EVELYN DICKINSON
v.
CITY OF BOSTON.

(188 Mass. 595.)

1. Action for suffering—evidence—disease.

In an action to recover for the conscious
1 L.R.A. (N.S.)

suffering prior to death of one injured by another's negligence, evidence is admissible that he was suffering, and finally died, from an intercurrent disease.

2. Same—disease in family.

Refusal to admit evidence, in an action to recover for the conscious suffering prior to death of one injured by another's negligence, that members of the family had died of tuberculosis, for the purpose of raising the presumption that the injured person died of that disease, is not reversible error.

3. Declarations—notice of accident.

Serving a notice of accident on a city, as required by statute, is not a bringing of an action, within the meaning of a statute permitting the admission of evidence of declarations of an injured person made before action brought.

4. Municipal corporations—injury by street lamp.

A municipal corporation is liable for injuries caused by the negligent management by its agents of lamp posts erected for the lighting of its streets, where the duty of street lighting is not imposed by statute, but is undertaken under statutory authority, to lessen its liability to actions for unsafe highways.

5. Same—negligence of officer.

A superintendent of the lamp department of a city, whether appointed by the mayor or elected by the city council, is not a public officer, for whose negligence the city is not liable, where the maintenance of street lights is not required by statute, but is undertaken by the city for its own convenience.

(September 7, 1905.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which was prosecuted after plaintiff's death by her administrator, and resulted in a verdict in plaintiff's favor. Overruled.

The facts are stated in the opinion.

Mr. Samuel M. Child for defendant.

Messrs. Charles W. Bartlett, Elbridge R. Anderson, and Arthur T. Smith for plaintiff.

Braley, J., delivered the opinion of the court:

This is an action of tort to recover damages for injuries suffered by the plaintiff's intestate, caused by the fall of a defective lamp post owned by the defendant. Originally the deceased sought to sustain the action under Rev. Laws, chap. 51, § 18, for injuries received as a traveler upon the highway. But, if the lamp post which fell stood in a public way, at the time of the accident

she was on her own premises, and this statutory provision is inapplicable. Upon her death, the plaintiff, as administrator, being admitted to prosecute the suit, by an amendment duly allowed, declared in tort at common law for the alleged negligence of the defendant in not keeping and maintaining the lamp post in repair, and allowing it to become defective and unsafe. The plaintiff having obtained a verdict in the superior court, the defendant brings the case here on exceptions to the exclusion and admission of certain evidence, and to a refusal to rule that, upon all the evidence, the action could not be maintained.

No argument has been advanced at the bar, nor is found in the defendant's brief, that, if the action could be maintained, there

was no evidence for the jury of its negligence, or that the deceased was not in the exercise of due care. This leaves for our consideration such matters only as were argued, or appear in the briefs. Before taking up the principal question of liability, the correctness of the rulings relating to evidence may be considered. The cause of action was for the conscious suffering of the plaintiff's intestate from the time of the accident to her death, and evidence which had a tendency to prove that during this period she was suffering and finally died from an intercurrent disease was admissible. But the attempt of the defendant for this purpose to elicit on cross-examination from the mother of the deceased, who was a witness for the plaintiff, that others of

Case Note.—The distinction between public and private functions of a municipality, as affecting liability for the negligence of its agents, has been recognized in a large number of cases, the municipality being held liable if the negligence is with respect to its private or corporate functions or duties, while no liability attaches, in the absence of statutory provisions, if the negligence is with respect to its public or governmental duties. The rule is variously stated, and various reasons given therefor, in different cases.

Thus, in *Esberg-Gunst Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 75 Am. St. Rep. 651, 55 Pac. 961, the court states that there is a well-established distinction between the liability of a municipal corporation for the acts of its servants, agents, officers, or employees in the exercise of powers and duties granted to, or imposed upon, it as a mere agency of the state, and performed exclusively for public governmental purposes, and for acts done in the exercise of powers granted to it, or privileges conferred upon it, for its own profit, advantage, and emolument, although inuring incidentally to the public.

And in *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517, the court states that in so far as municipalities exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws, made to enforce the general policy of the state,—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless the action is given by statute; but that in so far as they exercise powers voluntarily assumed, and intended for the private advantage and benefit of the locality and its inhabitants, there seems to be no sufficient reason why they should be relieved from that liability to suit, and that measure of actual damages, to which an individual or private corporation exercising the same power for a purpose essentially private would be subject.

And in *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300, the court says: 1 L.R.A. (N.S.)

"Municipal corporations exist in a dual capacity, and their functions are twofold. In one, they exercise the right springing from sovereignty, and, while in the performance of the duties pertaining thereto, their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority, but are officers, agents, and servants of the state . . . and for their acts of omission and commission the municipalities themselves are not liable. In the other, they exercise a private, proprietary, or corporate right, arising from their existence as legal persons, and where the duty is one that rests upon the municipalities in respect of their special or local interests, and not as public agencies, and is absolute and perfect, not discretionary or judicial, in its nature, their officers and agents, in the performance of the function or duty, act in behalf of, or as the *alter ego* of, the municipalities in their corporate capacity, and not for the state or public at large, and for their acts the municipalities are held to accountability."

The distinction is also recognized in 2 Dill. Mun. Corp. 4th ed. § 974, where it is stated that if the municipal corporation appoints or elects the servants or agents for whose acts it is claimed to be liable, and can control them in the discharge of their duties, and continue or remove them, and hold them responsible for the manner in which they discharge their trust, and if such duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim *respondet superior* applies; but that if they are elected or appointed by the corporation, in obedience to statute, to perform a public

her children had died from pulmonary tuberculosis, and hence there was a presumption that her daughter also had died from this disease, well may have been deemed, in the discretion of the presiding judge, as too remote to be of any probative value, and its exclusion affords no just ground of exception. *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 665; *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323. Furthermore, whatever benefit might have been derived from an answer to the question later was obtained by the defendant when, from one of its medical witnesses, uncontroverted evidence of the presence of this disease in the family, and under such circumstances that, if infectious, the deceased might have contracted it, was

admitted. *Morrison v. Lawrence*, 186 Mass. 456, 72 N. E. 91.

Under an objection, but without an exception being taken at the time, though subsequently allowed as an exception of the defendant, a witness for the plaintiff, who had acted as counsel for her intestate, was permitted to give evidence of declarations she had made to him before the commencement of the action, whereby she fully narrated the circumstances under which the accident occurred. It now is urged that, as this conversation was held after a notice under Rev. Laws, chap. 51, § 20, had been served upon the city, it is not brought within the provisions of Stat. 1898, chap. 535, now Rev. Laws, chap. 175, § 66, because

service, not peculiarly local or corporate, and are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as agents or servants of the municipality, but as public, or state, officers, and the doctrine of *respondeat superior* is not applicable.

The doctrine also finds expression in a different form in some cases, such as *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Bowden v. Kansas City*, 69 Kan. 587, 66 L. R. A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, and *Kobs v. Minneapolis*, 22 Minn. 159, which draw a distinction between those duties which are legislative or judicial in their nature, and therefore discretionary, in which case there is no liability, and those duties which are absolute and perfect, or merely ministerial, for negligence in the performance of which the municipality is held liable. In regard to this distinction the statement is made in 2 Dill. Mun. Corp. 4th ed. § 966, that it is the almost, but not quite, uniform doctrine of the courts that municipal corporations proper are liable where the wrong resulting in an injury to others consists in a mere neglect or omission to perform an absolute and perfect, as distinguished from a legislative, discretionary, quasi judicial, or imperfect, corporate duty owing by the corporation to the plaintiff, or in the performance of which he is specially interested.

The court, however, in *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785, expresses itself as opposed to making any distinction between public and private functions because of the difficulty of carrying the doctrine into anything like uniform practice.

But the distinction spoken of is quite generally recognized, and the courts seldom disagree in stating the rule, although it is admitted that considerable difficulty is often experienced in determining the class to which a given case belongs, and conclusions reached do not always agree; and although many cases are decided by applying other principles, without any reference to such distinction.

Some of these duties or functions are very generally recognized as public, for negligence (L.R.A. (N.S.)

gence in the performance of which there is no liability. One of these is as to police officers,—liability being denied in such cases as reckless shooting by a policeman (*Whitfield v. Paris*, 84 Tex. 431, 15 L. R. A. 783, note, 31 Am. St. Rep. 69, 19 S. W. 566); for an assault in making an unlawful arrest (*Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614); and injuries inflicted while attempting to enforce an ordinance forbidding the running at large of unmuzzled dogs (*Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810).

Municipal liability has generally been denied also for the same reason for the negligent acts of the fire department; as, in permitting apparatus to get out of repair, causing injury to an employee (*Peterson v. Wilmington*, 130 N. C. 76, 56 L. R. A. 959, 40 S. E. 853); an injury to one in the street while members of the department were going to a fire (*Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263); the frightening of a horse by steam escaping from a fire engine (*Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177); or the destruction of property by fire, due to permitting the water pipes and hydrants to become clogged or out of repair (*Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788).

But in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, a city which voluntarily maintained a system of waterworks for general purposes and the extinguishment of fire, for its own advantage and profit, was held liable for the destruction of property by fire, due to insufficiency of water supply, on the ground that the duty was not a public, but a corporate, one.

The power or duty to provide for the public health is also held to be public in its nature, so that the liability of a municipal corporation for negligence has been denied in such cases as the death of an employee from smallpox, contracted in tearing down a smallpox hospital (*Nicholson v. Detroit*, 129 Mich. 246, 56 L. R. A. 601, 88 N. W. 695); for sickness or death from permitting a drainage ditch to become obstructed and filled with filth and offal (*Williams v. Greenville*, 130 N. C. 93, 57 L. R. A. 207, 89

serving such a notice is the bringing of an action within the meaning of the statute, after which such declarations are declared inadmissible. The presumption, however, is plain that it was the legislative purpose that this language should have its ordinary meaning as used in our laws, and the words "commencement of the action" refer to the date when proceedings are instituted by a writ or other legal process issuing from the clerk's office. *Ford v. Phillips*, 1 Pick. 202; *Gardner v. Webber*, 17 Pick. 407, 411; *Com. v. Casey*, 12 Allen, 214, 217. While a preliminary finding of the good faith of the declarant by the court is required before such declarations can be received, this judicial action is to be inferred from the ad-

mission of the evidence itself, where the exceptions fail to state that the inquiry was not made. *Dixon v. New England R. Co.* 179 Mass. 242, 246, 60 N. E. 581. These declarations, therefore, were within the statute, and properly admitted in evidence. *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802.

By an ordinance duly enacted the city had established a lamp department, that included the lamps and other property used in its system of street lighting, the management of which was intrusted to an officer, therein designated as a "superintendent of lamps." The defendant now insists that he was a public officer, for whose negligence it was not responsible. It relies, in support of

Am. St. Rep. 860, 40 S. E. 977); and for injury by falling into a vault on private premises, left open after removing its contents (*Bryant v. St. Paul*, 33 Minn. 289, 53 *Am. Rep.* 31, 23 N. W. 220).

On the other hand, the maintenance by a city of its own waterworks, from which it derives revenue and profit, is generally held to be of a private or corporate nature, so that it has been held liable in such cases as an injury to goods stored in a cellar, due to the bursting of a water main (*Esberg-Gunst Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 75 *Am. St. Rep.* 651, 55 *Pac.* 961); and an injury due to the bursting of a dam, unskillfully constructed (*Bailey v. New York*, 3 Hill, 531, 38 *Am. Dec.* 669). But, as has been said before, liability has generally been denied in case of loss by fire from failure to furnish a sufficient water supply.

The use of public streets has been held quite generally to come within the police power, so that liability has been denied in such cases as injury by firing of a cannon by private individuals (*Arms v. Knoxville*, 32 Ill. App. 604; *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 *Am. Rep.* 771; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L. R. A. 789, 46 *Am. St. Rep.* 760, 54 N. W. 1044); and injury due to coasting, permitted by the public authorities (*Wilmington v. Vandegrift*, 1 *Marv.* (Del.) 5, 25 L. R. A. 538, 65 *Am. St. Rep.* 256, 29 *Atl.* 1047; *Dudley v. Flemingsburg*, 115 Ky. 6, 60 L. R. A. 575, 103 *Am. St. Rep.* 253, 72 S. W. 327).

But in *Taylor v. Cumberland*, 64 Md. 68, 54 *Am. Rep.* 759, 20 *Atl.* 1027, the court, without referring to the distinction between public and private duties, held that a municipal corporation is under an obligation to exercise for the public good the powers conferred on it by its charter to prevent such nuisances as coasting, and that its duty in that regard was not discharged by merely passing an ordinance forbidding it.

And in *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, 36 *Am. St. Rep.* 664, 34 N. E. 727, a city was held liable for injuries during a display of fireworks by private individuals, on the ground that it permitted a nuisance.

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In applying the doctrine to the question of liability for injuries due to the condition of the streets, the conflict between the authorities becomes very pronounced.

Thus, in *Hill v. Boston*, 122 Mass. 344, 23 *Am. Rep.* 332, the court, Gray, Ch. J., writing the opinion, after a very thorough and exhaustive discussion of the authorities, both English and American, on the question of liability for injury due to defects in highways, denies the liability of a city for injuries to a pupil in a public school, caused by a defective stairway, on the ground that the neglect was with regard to a public duty.

The city's liability was also denied for the same reason for an injury due to a defective cross walk, in *Detroit v. Blackeby*, 21 Mich. 84, 4 *Am. Rep.* 450; and for injuries due to plaintiff's horse falling into a hole in a drain across one of the streets, in *Young v. Charleston*, 20 S. C. 116, 47 *Am. Rep.* 827.

But *Galveston v. Posnainsky*, 62 Tex. 118, 50 *Am. Rep.* 517, holds a city liable for injuries by falling into a drain along an unguarded sidewalk, on the ground that its duties in regard thereto were ministerial.

The liability of a municipal corporation proper for injuries due to defects in the streets is sustained by the majority of the cases, and in reaching such conclusion the courts have relied upon the existence of a right of action expressly given by statute, the existence of a statutory duty resting on the municipality as such, either directly expressed, or to be implied from a proper construction of the statute; the fact that the municipal corporation has sole care and control of its streets, or upon the application of some other principle of a similar nature, rather than upon the distinction between public and private functions.

This distinction has been recognized in many other kinds of cases, but from the illustrations given it will be seen that there is practical unanimity of opinion as to the application of the doctrine to some powers and duties, and that there has been great difficulty and much conflict of opinion in making the application as to others.

this position, upon Stat. 1825, chap. 3, p. 313, permitting the city to set up and maintain lamps in its streets, so far as might be convenient and necessary for the purpose of lighting them, "and to make all necessary contracts, rules, orders, and regulations respecting said lamps." Under the Prov. Stat. 1773-74, chap. 12, 5 Prov. Laws (state ed.), 301, confirmed by Stat. 1796, chap. 69, enacted when Boston was a town, and Stat. 1825, chap. 3, p. 313, passed after it became a city, the defendant was authorized, but not required, to maintain lamps to light its streets, and to enact proper ordinances providing for the punishment of those "breaking or otherwise damaging the same." No general statutory duty is imposed upon cities and towns, requiring them to light their streets for any purpose. See Pub. Stat. 1882, chap. 203, § 76. But, when they are lighted at the expense of the municipality, authority to tax for such an expenditure must be given by statute. *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592, 594. And it has been said that the probable reason for the passage of these special laws was the limitation on the taxing power of the defendant; as without them neither the town nor the city could have established and maintained lawfully a system of artificial lighting of its streets, to be paid for out of the public revenue. *Spaulding v. Peabody*, 153 Mass. 129, 131, 132, 10 L. R. A. 397, 26 N. E. 421.

In suits for damages caused by defects in streets which at night may become dangerous to travelers because they are dark and unlighted, it uniformly has been held that, as a city or town is under no statutory requirement to light them, an omission to do so does not constitute negligence. *Sparhawk v. Salem*, 1 Allen, 30, 32, 79 Am. Dec. 700; *Randall v. Eastern R. Co.* 106 Mass. 276, 8 Am. Rep. 327; *Lyon v. Cambridge*, 136 Mass. 419; *Spillane v. Fitchburg*, 177 Mass. 87, 88, 83 Am. St. Rep. 262, 58 N. E. 176. But if, under no obligation imposed by statute, the defendant undertook this service for the general convenience of its citizens and travelers within its borders, it also by so doing derived an incidental benefit by the protection thus afforded of decreasing the probability of actions against it for defective public ways, under Rev. Laws, chap. 51, §§ 1, 18. An unlighted public way, indeed, may be dangerous when used at night, though not thereby rendered defective. If, however, it is out of repair, and this condition has been undiscovered, or, if discovered, not remedied, the probability that travelers using it would be less likely to be injured when lighted than if unlighted is apparent and appreciable. It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken the enterprise for its private benefit, and not acting in the performance of any public duty, it is liable for negligence in the management of its corporate property, when used for such purpose. *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Bigelow v. Randolph*, 14 Gray, 541, 543; *Hawks v. Charlemont*, 107 Mass. 414; *Sullivan v. Holyoke*, 135 Mass. 273; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Doherty v. Braintree*, 148 Mass. 495, 20 N. E. 106; *Coan v. Marlborough*, 164 Mass. 206, 208, 41 N. E. 238; *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454; *Butman v. Newton*, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401.

By the ordinance the superintendent of lamps, among other duties, was required, at the expense of the city, to keep and maintain "all lamp posts" in good repair. It was through his negligence that the lamp post that fell was allowed to fall into decay. That the city could act as well by ordinance in the creation and appointment of agents charged with duties to be performed in its behalf as by a direct vote of the city council is settled. *Jensen v. Waltham*, 166 Mass. 344, 346, 44 N. E. 330; *Butman v. Newton*, *supra*. But, as we have said, the defendant was under no municipal duty to establish and maintain street lights, which were classified by its ordinance as a lamp department. It follows that the superintendent of this department, whether elected by the city council or appointed by the mayor, does not belong to that class of public officers, of which highway surveyors afford a familiar illustration, for whose official acts cities and towns are not held liable. For he is not charged with the performance of duties prescribed by any statute, where he would act independently, but he acts, if at all, under the ordinance as a municipal agent of the defendant. *Walcott v. Swampscott*, 1 Allen, 101; *Hawks v. Charlemont*, *supra*; *Sullivan v. Holyoke*, *supra*; *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, *supra*; *Butman v. Newton*, *supra*. Being thus under the immediate direction and control of the city, it had full authority to direct the manner in which his department should be conducted. If the defendant lighted its streets as a matter of convenience and safety for those having occasion to use them at night, without being required by law to undertake the performance of such a duty, the superintendent of lamps for this purpose became its servant, for whose negligent-

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conduct in their maintenance it was responsible.

A majority of the court is of the opinion that the order must be:

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EUSEBE DESAUTELS

v.

FELIX J. CLOUTIER et al.

(.... Mass.)

Injury by fellow servant—absence of instructions.

Failure to warn a servant as to the danger of throwing an ice pick over a partition into a room where others are working without giving adequate notice, upon giving him a direction to do so, is not negligence on the part of the master which will render him liable for personal injuries caused by absence of such notice, since the servant had such knowledge, and the order must be interpreted as a direction to perform the service in a proper way.

(October 19, 1905.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Hampden County, made during the trial of an action brought to recover damages for personal injuries for which defendants were alleged to be responsible, which resulted in a verdict in their favor. Overruled.

The facts are stated in the opinion.

Mr. T. B. O'Donnell, for plaintiff:

The order to throw the pick was a negligent and reckless order.

Corrigan v. Union Sugar Refinery, 90 Mass. 577, 96 Am. Dec. 685; *Hickey v. Merchants & M. Transp. Co.* 152 Mass. 39, 24 N. E. 860.

A master is bound to use ordinary and reasonable care to prevent injury to a servant in the course of his employment.

20 Am. & Eng. Enc. Law, p. 54.

If the defendants failed to use due care they may be held responsible, although the negligence of a fellow servant with the plaintiff contributed to the accident.

Myers v. Hudson Iron Co. 150 Mass. 137, 15 Am. St. Rep. 176, 22 N. E. 631; *Griffin v. Boston & A. R. Co.* 148 Mass. 145, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166.

Defendants are responsible for giving negligent orders to a fellow servant which result in an injury to the plaintiff.

Elmer v. Locke, 135 Mass. 576; *Atchison T. & S. F. R. Co. v. Vincent*, 56 Kan. 344, 43 Pac. 251; *Foster v. Missouri P. R. Co.* 115 Mo. 165, 21 S. W. 916; *Myhre v. Tromanhauser*, 64 Minn. 541, 67 N. W. 660.

Messrs. Brooks & Hamilton, for defendants:

Plaintiff's injury resulted, not from any negligence of the defendants, but from the negligence of a fellow servant, in the execution of a proper order.

Gouin v. Wampanoag Mills, 172 Mass. 222, 51 N. E. 1078.

Lathrop, J., delivered the opinion of the court:

This is an action of tort at common law for personal injuries received by the plaintiff while in the employ of the defendants. At the trial in the superior court, at the close of the plaintiff's evidence, the judge

Case Note.—The Massachusetts cases cited in the opinion of the court to the effect that an order or direction to an employee to do a certain act is not to be interpreted as an order to do it without due regard to the safety of his fellow servants are in effect supported by the cases which hold that the failure of an employee, in performing the work which he is directed to do, to give a fellow servant warning when doing an act which may endanger him, is not attributable to the master. Besides various other instances in which this rule has been applied, it has been so held in respect to the failure to warn coservants that a blast is to be fired. *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519; *Gallagher v. McMullin*, 25 App. Div. 571, 49 N. Y. Supp. 734; *Ward v. Naughton*, 74 App. Div. 71, 77 N. Y. Supp. 344; *contra*, *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764. Also as to the failure of a hatch tender to give warning that a bail is about to be thrown down. *Ocean S. S. Co. v. Cheeney*, 86 Ga. 278, 12 S. E. 351. And as to failure to warn that blocks are to be

thrown down where workmen are engaged from a height. *Donnelly v. San Francisco Bridge Co.* 117 Cal. 417, 49 Pac. 559.

As to the effect of a specific order from a superintendent to a workman to "throw down cotton," in the execution of which another workman was injured, the court, in *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078, says: "The order can only be interpreted as directing Pat to throw down cotton in a proper way, and in a proper place, and not as telling him to throw it down upon the plaintiff when he was standing underneath."

As declared by the Massachusetts court in *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152, 6 L. R. A. 733, 21 Am. St. Rep. 438, 23 N. E. 829: "An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed thoroughly to understand."

This seems to be as pertinent and as sound when applied to the duty to tell a servant to warn his fellow servants as it is when applied to telling him of his own peril.

ruled that the action could not be maintained, and directed a verdict for the defendants. The case is before us on the plaintiff's exceptions.

The defendants were the proprietors of an ice business, and had an ice house, divided by partitions into compartments or rooms, each about 50 by 75 feet in extent. The partitions, according to the plaintiff's testimony, were about 27 feet in height, and extended to within 5 feet of the roof. At the time of the accident the plaintiff was working with others in room 2, and was injured by being struck in the foot by an ice pick, which was thrown over the partition from room 1 by a fellow servant named McFadden. The surface of the ice in both rooms was at the time within about 12 feet of the top of the partition, and there was a ladder to each opening in the building, which was used by the workmen as the surface of the ice was raised. McFadden testified that as he was going up the ladder leading to room 1, and when he was 5 feet from the ground, one of the defendants "told him to take the pick and throw it over in the other room;" that he "took the pick and got on top of the ice, and threw the pick, and called out to the men below to look out;" that "he hollered, 'Look out!' before he threw the pick over, and then he threw the pick." He was then asked: "How long after you hollered, 'Look out below!' that you threw the pick?" He answered: "When I threw the pick I hollered."

This evidence indicates very strongly that the warning and the act of throwing were separated by only a slight interval of time, if they were not simultaneous. This, too, is shown by the testimony of the plaintiff, who testified through an interpreter. He was asked, "How long was it after you heard somebody call out to look out was it before you got hurt?" The answer was, "He only had time to get his head up." The plaintiff had previously testified that at the time he was hurt he had just put a cake of ice in its place; that he was stooping down, and, as he straightened up, the pick fell on his foot. There can be no doubt that the evidence shows an act of negligence on the part of McFadden in not ascertaining where the men were who were working in the room, and in throwing the pick over immediately after once shouting, "Look out!" But, as McFadden was a fellow servant of the plaintiff, the defendants cannot be held liable for McFadden's act. It is sought, therefore, to hold the defendants on the ground that the order given was an act of negligence, and that McFadden should have been warned of the danger of throwing the pick over without giving adequate notice. But this McFadden knew as well as

anyone. The order can be interpreted only as an order to throw over the pick in a proper way and in a proper place, and not as telling him to throw it over, regardless of the safety of those in the other room. This view of the meaning of the order was taken in a somewhat similar case. *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078. See, also, *Gorman v. Woodbury*, 173 Mass. 180, 53 N. E. 373.

Exceptions overruled.

ILLINOIS SUPREME COURT.

CHICAGO UNION TRACTION COMPANY,
Appt.,
v.

ADOLPH SAWUSCH.

(218 Ill. 130.)

1. Fellow servants—barn man and street-car conductor.

A barn man of a street car company, who is charged with the duty of substituting a perfect car for one which has become disabled during a run, represents the company so far as the selection of the car and its fittings is concerned, and is not a fellow servant of conductors on the road.

2. Injury to servant—assumption of risk.

A street-car conductor does not assume the risk of injury from the failure of a barn man, charged with the duty of substituting a perfect car for one which has be-

Case Note.—Negligence of a servant whose duty it is to send out safe cars for use by other servants has been considered in many cases, though the above case is one of but few that have raised the question with respect to a street car. There is no obvious difference, however, between such duty in case of street cars and the case of cars used on ordinary railroads. Though the question as to what constitutes a proper car for street-railway use may be different from that relating to a car on an ordinary railroad, the duty manifestly must be, in either case, to furnish a car that is proper and suitable for the use to be made of it.

Liability of the master for negligence of servants in sending out cars which are defective, in consequence of which other servants are injured, has been sustained in a goodly number of cases, among which are *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; *Goodrich v. New York C. & H. R. R. Co.* 116 N. Y. 398, 5 L. R. A. 750, 15 Am. St. Rep. 410, 22 N. E. 397; *Troxler v. Southern R. Co.* 124 N. C. 189, 44 L. R. A. 313, 70 Am. St. Rep. 580, 32 S. E. 550; *Pennsylvania R. Co. v. LaRue*, 27 C. C. A. 363, 65 U. S. App. 20, 81 Fed. 148. Similarly, it has been repeatedly held—and this is almost the same in effect as the doctrine just stated—that employees whose duty it is to inspect cars are

come disabled, to furnish a controller handle which fits the motor, so that the car is partially uncontrollable.

3. Same—imperfect appliances.

Negligence of a street car company in delivering to a crew a car without any, or with a defective, controller handle, will render it liable for injuries thereby caused to an employee on the road.

4. Same—concurrent negligence of master and fellow servant.

A master is not absolved from liability for injury to an employee which would not have occurred without his negligence, by the fact that the negligence of a fellow servant of the injured person contributed to the accident.

(October 24, 1905.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. W. W. Gurley, with Messrs. John A. Rose and Albert M. Cross, for appellant.

Messrs. Pinckney, Tatge, & Abbott and Thomas A. Leach, for appellee:

The rule of nonliability on the part of the master for the negligence of a fellow servant has no application in this case, where the negligence in question was the master's neglect of duty to provide a proper reverse lever or power handle.

Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 458, 43 Am. St. Rep. 259, 39 N. E. 324; Hess v. Rosenthal, 160 Ill. 621, 43 N. E. 743; Chicago & A. R. Co. v. Maroney, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953; John S. Metcalf Co. v. Nystedt, 203

Ill. 333, 67 N. E. 764; Cooley, Torts, pp. 560-563; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208, 71 N. E. 1074.

The duty of furnishing safe appliances carries with it the duty of inspection, which cannot be delegated so as to relieve the master of liability.

Lake Shore & M. S. R. Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Chicago & E. I. R. Co. v. Kneirim, *supra*.

When an injury to a servant would not have happened but for the master's negligence, the fact that the negligence of a fellow servant contributed to the injury does not release the master from liability.

Chicago & N. W. R. Co. v. Gillison, 173 Ill. 264, 50 N. E. 657; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L. R. A. 216, 32 N. E. 285; Cooley, Torts, 560.

Boggs, J., delivered the opinion of the court:

In an action on the case by the appellee against the appellant company, judgment was entered in the superior court of Cook county in favor of the appellee in the sum of \$12,000, which, on appeal, was affirmed by the appellate court for the first district in the sum of \$10,000, a remittitur of \$2,000 having been entered; and a further appeal has brought the record into this court. Two grounds for reversal are urged: First, that the trial court erred in refusing to direct a peremptory verdict, as requested by the appellant company; and, second, that the court erred in refusing to give instruction No. 1 asked by the appellant company.

The contention of the appellant company as to the facts proved by the testimony is stated by its counsel as follows: "The

not fellow servants of the trainmen or other employees exposed to danger from defects in the cars. Among the numerous cases on this point are Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; Eaton v. New York C. & H. R. R. Co. 163, N. Y. 391, 79 Am. St. Rep. 600, 57 N. E. 609; Coontz v. Missouri P. R. Co. 121 Mo. 652, 26 S. W. 661; International & G. N. R. Co. v. Kernan, 78 Tex. 294, 9 L. R. A. 703, 22 Am. St. Rep. 52, 14 S. W. 668; Tierney v. Minneapolis & St. L. R. Co. 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; Mixer v. Imperial Coal Co. 152 Pa. 395, 25 Atl. 587.

Application of the same rule in respect to furnishing defective street cars has been made in some cases prior to that of CHICAGO UNION TRACTION CO. v. SAWUSCH.

In McNamara v. Brooklyn City R. Co. 11 Misc. 667, 32 N. Y. Supp. 913, where a conductor on a trolley car was injured because of alleged defects in the car brakes, which 1 L.R.A.(N.S.)

caused a collision, the court said that the duty of the company "unquestionably was to furnish adequate brakes for its cars, and to keep them in proper order; and it cannot discharge itself from the consequences of a failure to perform that duty by directing its servants or agents to do it, and then, when the duty is left unperformed, shield itself from liability on the ground that the injuries complained of were due to the negligence of a fellow servant."

In Leigh v. Omaha Street R. Co. 36 Neb. 131, 54 N. W. 134, where the driver of a horse car was kicked by one of the animals drawing the car, which the owner knew was likely to kick on being struck, the court said: "It is the duty of such driver to stand on the front platform, close to the horses. In effect, a defective, and under some circumstances dangerous, appliance in the propelling power of the car was used. The fact that it was an animal instead of a steam engine can make no difference."

evidence in this case is practically harmonious, and shows the following undisputed facts: The accident occurred July 3, 1901, about 11 o'clock at night, on Van Buren street between State street and Plymouth place. The defendant has double street car track in that part of Van Buren street, together with a switch track connecting the two main tracks. There are two lines of cars running on that street,—the Van Buren street cars, which run east and west on Van Buren street from State street to Kedzie avenue, and the Twelfth street cars, which run east and west on Van Buren street from State street to Fifth avenue and then turn off into another street. Both these lines are operated by means of an overhead trolley. At the time of the accident the plaintiff was a conductor running on the Van Buren street line, and had been running on that line for about five years. The cars are trolley cars, capable of running in either direction and with a fender at each end, the fender at the rear of the car being usually fastened up and the one in the front of the car extended while the car is running. Of course, when the car changes from one direction to the other it is necessary to put down one fender and raise the other. At the time of the accident the plaintiff's car, which was east-bound, had nearly reached the terminus of its run, and was about to switch over into the other track on its return trip. It was standing still at the time, on the east end of the southerly track, the motorman being still at the east end of the car. The plaintiff reversed the seats in the car preparatory to the return trip, and then got off and went to the rear of the car in order to let down the fender at that end, which had been fastened up while the car was going east. This, he says, was his duty. When he reached that point he found that a Twelfth street car, which had also just come in from the west, was so close to his car that he could not lower the fender. He therefore asked the motorman of the Twelfth street car, with whom he was acquainted, having met him at that point nearly every evening, to move his car back. The motorman promised to do this, but in attempting to turn the handle so as to reverse the power he unintentionally made the car go forward instead of backward, with the result that the plaintiff's leg was caught between the two cars.

"The cause of the unexpected motion of the Twelfth street car was this: On the defendant's lines there are in use trolley cars having two different sizes of motors, and these different motors have different kinds of handles. These handles are removable, and whenever the cars are in the barns the handles are taken off and put in a place

by themselves, ready to be used again when occasion requires. The motor on the Twelfth street car in question was a small motor, and the handle which the motorman was using was one adapted to the large motor. With such a handle it was possible apparently to make the car go forward and also to stop it, but if the attempt was made to reverse the car the handle was liable to slip, so as to cause the car to go forward instead of backward: and that is what happened on this occasion. The cause of the motorman's having the wrong handle on this occasion is thus explained: He had been running another car that day, but something went wrong with his car and his conductor telephoned to the car barns for another car. The other car was sent out to him in charge of a man employed in the barns, and when the two cars met at a point about a mile from the barns, the barn man took the disabled car on to the barns and the motorman proceeded on his way back with the new car. The car which he had been operating had a large motor while the car in which he now found himself had a small motor, and it is clear that in transferring from the one car to the other he carried his motor handle with him, instead of leaving it in the car and taking the motor handle which had been used in the other car. This matter is sworn to directly by one witness, the conductor on this car in question, who said they 'changed the handle,' and it clearly appears by necessary inference from the evidence in the record. Thus Anderson, the barn man, swore that when he took the car in question out of the barns that night he had a motor handle that fitted the motor in that car. He turned that car over to this motorman, and yet it clearly appears that at the time of the accident the motorman on the Twelfth street car had a handle which did not fit the motor on his car. The only possible explanation of this phenomenon is that, in the hurry of changing cars, the motorman kept and transferred the motor handle which he had been before using, instead of leaving the motor handle on the car which it fitted. Both Anderson (the barn man) and Hunt (the motorman) say that they do not remember whether they changed handles at the time when they changed cars or not. The motorman did not discover that he had the wrong handle until the accident happened. The motor itself, the handles, car, and other apparatus were all right, in good repair."

The contention that Hunt, the motorman, and the appellee were fellow servants may be conceded. Anderson, the barn man, was clearly not a fellow servant of the appellee. He had no duty to perform which had any

connection with the duties of the appellee. The car which the motorman, Hunt, had been operating proved to be out of repair, and, in order to enable Hunt to perform the work of the master, the latter undertook to send him another car. Anderson, the barn man, was chosen by the master to select the car to be sent to Hunt and to take it out on the line of the road and there deliver it to Hunt. Anderson was therefore, while engaged for the master in supplying to Hunt a car, performing a duty which devolved on the master to perform. It was the duty of the appellant company to furnish the cars to be operated by its servants. The law charged upon it the positive obligation to furnish reasonably safe cars and with no necessary part omitted therefrom, and holds it responsible for any failure to discharge that obligation, and makes it liable for the failure of any servant it may employ to discharge that obligation. Any servant so employed is engaged in the performance of a duty or obligation of the appellant company, and is acting as the representative and agent of the appellant company, and for any want of proper caution on the part of any such agent or representative the appellant company is liable as for its own personal negligence. The neglect to properly perform that duty by such a representative or agent of the master is not a peril which other servants of the master assume. *Chicago & A. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 306, 48 N. E. 953.

We think it clearly deducible from the proof, either that Anderson, the barn man and the representative of the appellant company, delivered to Hunt the car which he (Anderson) brought from the barn with the improper handle thereon which was on that car when appellee was injured, or that Anderson delivered that car to Hunt without any handle on it. Anderson returned the defective car to the barn, and Hunt ran the car which came to him from the barn on his trip on appellant's tracks on the street, and both of the cars must have had motor handles after the change was made. If the handle remained on each car when the cars were changed, then Anderson, the representative of the appellant company, delivered to Hunt a car supplied with an improper handle, and this negligence was that of the appellant company, and was the cause of the injury to the appellee. If, when the cars were changed, each motorman carried with him the handle from the car he was operating, then Anderson delivered to Hunt a car without any handle, which was a negligent act on the part of the appellant company and the proximate cause of the injury to appellee. We think it very clear that each motorman, when the cars were

changed, carried away with him the handle he was using, and hence that each man got a car without a handle. If Hunt carried the handle which was on the defective car to the car which Anderson delivered to him and Anderson had not taken the handle therefrom, Hunt would have had two handles and the car which he delivered to Anderson would have been without any handle, and Anderson could not have run it back to the barn, as he did. Anderson, however, ran that car which he got from Hunt, back to the car barn, and it follows either that Hunt did not carry the handle from that car and Anderson used the handle he found upon it, or that Anderson carried the handle from the car he had brought from the barn and used that handle, and consequently delivered the other car to Hunt unprovided with any handle.

These conclusions do not result from mere conjecture or speculation as to what may have occurred, but are logically and reasonably to be deduced from the existence of facts that are established by the proofs. It may be that it is fairly to be deduced, also, from the evidence that Hunt, the motorman, if he had exercised due care, would have discovered that the car which was delivered to him by Anderson, the barn man, was operated by a different and smaller motor requiring a different and smaller handle than the car he had been operating, and the injury received by the appellee may have been, in part, chargeable to this lack of due care on the part of Hunt, a fellow servant. But if the negligence of Anderson, who was the representative of the appellant company and whose negligence was its negligence, contributed to the injury, and the injury would not have occurred but for the lack of care of Anderson, the appellant company would be liable. *Chicago & N. W. R. Co. v. Gillison*, 173 Ill. 264, 64 Am. St. Rep. 117, 50 N. E. 657; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037. The trial court did not, therefore, err in refusing to direct a verdict as a matter of law.

By instruction No. 1, asked by the appellant company and refused, the court was requested to direct the jury that the motorman, Hunt, and the appellee, were fellow servants, and that the appellee could not recover under the first count of the declaration, even if the jury should believe that Hunt was guilty of negligence in the manner in which he operated the car at the time and place when and where the appellee was injured. The first count in the declaration charged the "defendant, by its said servants, so carelessly, negligently, and improperly drove and managed the said motor or trolley car, that by and through such carelessness, negligence, and improper driv-

ing of said motor or trolley car said car then and there ran and struck with great force and violence upon and against the plaintiff." No instructions were asked in behalf of the appellee. Twenty-four instructions were asked in behalf of the appellant company. In these instructions the relation of fellow servants, what constituted the relation, and when it existed, were fully made known to the jury in language selected by counsel for the appellant company, and the question whether that relation existed between the motorman, Hunt, and the appellee, was fully and fairly submitted to the jury, to be determined from the testimony under concededly correct instructions of the court; and the jury were expressly instructed in instruction No. 5, that if they believed, from the evidence, "under the instructions of the court, that the plaintiff and the servant or servants in control of and operating such car, at the time, and place in question, were fellow servants as defined in these instructions, then the plaintiff cannot recover under the first count of his declaration." This instruction, under the conceded facts of the case, secured to the appellant company all benefit that could have resulted from instruction No. 1 had it been given.

The verdict is entirely consistent with the view that the jury concluded that Hunt and the appellee were fellow servants, and followed the direction of the court given in instruction No. 5, but found, from the evidence, that the appellant company furnished to such fellow servant an improper, unsafe, and defective motor or trolley car, and that the injury was occasioned by such failure of the appellant company to discharge its duty as master, as charged in the second count of the declaration.

We think there is no error in the record reversible in character.

The judgment is affirmed.

Petition for rehearing denied December 6, 1905.

ILLINOIS SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.,

v.

ANDERSON HAMLER.

(215 Ill. 525.)

1. Sleeping-car porter—contract releasing claim for negligent injuries.

A contract by one employed as porter on a sleeping car to release railroad companies, which may haul such car, from liability for

injuries which may result to him from their negligence, is valid.

2. Same—consideration.

Continued employment as a porter on a sleeping car is a sufficient consideration for the signing of a release of liability for personal injuries caused through the negligence of the railroad company hauling the car.

3. Same—not servant of railroad company.

A porter hired, paid, and subject to the orders of a sleeping car company is not the servant of the railroad company which hauls the car in which he works, within the rule that a contract between master and servant for release of liability for negligent injuries is void.

4. Same—absence of contract between railroad and car company.

That no express contract between a railroad and sleeping car company is shown, does not prevent the railroad company from taking the benefit of a provision in a contract between the sleeping car company and its employees releasing railroad companies over whose tracks the cars are drawn from liability for negligent injuries to such employees.

5. Negligence—degrees—release from liability for.

No distinction between the degrees of negligence of which a railroad company is guilty can be founded on speculation, so as to avoid the effect of a contract releasing it from liability for negligent injuries in case the negligence is found to be gross.

6. Gross negligence—release from liability for.

Injuries caused by gross negligence are included in a release, by a sleeping-car porter, of the railroad company hauling the car on which he is employed, from liability for negligent injury to him.

(Magruder, J., dissents.)

(June 23, 1905.)

APPEAL by defendant from a judgment of the Branch Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. T. Rankin and Benjamin S. Cable for appellant.

Mr. Ben M. Smith, with Messrs. George E. Dickson and Castle, Williams, & Smith, for appellee:

The contract was without consideration, and therefore void.

Purdy v. Rome, W. & O. R. Co. 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255.

A master cannot, by a contract with a servant, in consideration of the employment, exempt himself from liability to the servant

for injuries sustained through his negligence.

Eckman v. Chicago, B. & Q. R. Co. 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; 14 Am. & Eng. Enc. Law, p. 910; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705.

The injury was caused by the gross negligence of the appellant without any negligence on the part of the appellee.

Archibald, New Crim. Proc. 9.

Every act of gross carelessness, even in the performance of what is lawful, whereby death ensues, is indictable either as murder or manslaughter.

United States v. Freeman, 4 Mason, 505, Fed. Cas. No. 15,162; *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643; *Lee v. State*, 1 Coldw. 62; *White v. State*, 84 Ala. 421, 4 So. 598; *People ex rel. Mc-*

Mahon v. Westchester County, 1 Park. Crim. Rep. 659; *State v. Brown*, Houst. Crim. Rep. 539; *Reg. v. Lowe*, 4 Cox, C. C. 449; *State v. O'Brien*, 32 N. J. L. 169; *Com. v. Metropolitan R. Co.* 107 Mass. 236; *Belk v. People*, 125 Ill. 584, 17 N. E. 744.

Gross negligence is a different degree of negligence from ordinary negligence.

Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 8 L. R. A. 508, 23 Am. St. Rep. 587, 24 N. E. 417; *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Wabash R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Eckman v. Chicago, B. & Q. R. Co.* *supra*; *Illinois C. R. Co. v. Beebe*, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253, 50 N. E. 1019; *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Illinois C. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398;

Case Note.—The trend of the courts away from the old distinction between degrees of negligence clearly appears from the opinion of the court in *CHICAGO, R. I. & P. R. CO. v. HAMLER*. As to the attempt to maintain such a distinction, notwithstanding the general rule, when the question arises as to the effect of a contract stipulation for liability, the decision follows also the trend of other authorities.

In addition to the cases cited in the opinion of the court on this point, particularly those of *Kelly v. Malott*, 67 C. C. A. 548, 135 Fed. 74, and the leading case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 62, it has been generally held in similar cases where a contract stipulated against liability, whether it expressly included negligence, or was in general terms which the court held to cover negligence, that the stipulation extended to gross negligence.

In the language of *Quain, J.*, in *McCawley v. Furness R. Co.* L. R. 6 Q. B. 57, which was a case of stipulation in a drover's pass that he should travel at his own risk, it was held that "negligence, even gross, is the very thing which the contract stipulates that the defendants shall not be liable for."

The language of the *Lockwood* Case, denying the distinction between degrees of negligence, is cited with approval in *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* 60 N. J. L. 246, 44 L. R. A. 213, 37 Atl. 609, in upholding the validity of the policy of insurance of a common carrier against liability for losses occasioned by its negligence.

In *Perkins v. New York C. R. Co.* 24 N. Y. 207, 82 Am. Dec. 289, and *Wells v. New York C. R. Co.* 24 N. Y. 181, an exemption of a carrier, in a pass, was held to include negligence, even if it were culpable and gross.

The same was held in *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261.

1 L. R. A. (N.S.)

An apparent exception is found in *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 575, 25 L. R. A. 81, 49 Am. St. Rep. 901, 59 N. W. 947, but this decision was rendered under a provision of the Code of the state which excepts "gross negligence," as well as fraud or wilful wrong, from the stipulations that a common carrier may make to exempt itself from liability. Under that statute, it was necessarily held that such a stipulation, as affecting negligence, could not extend to gross negligence.

Also, in the case of *Hart v. Western U. Tele. Co.* 66 Cal. 579, 50 Am. Rep. 119, 6 Pac. 645, the court, in reversing a judgment against the telegraph company, said that, as the message was unreported, and there was a stipulation that no recovery for mistake or failure to deliver such a message should be had beyond the amount received for sending it, the recovery must be thus limited, unless the plaintiff proved wilful misconduct or gross negligence of the defendant. The statutes of the state, however, provided that such company must use "great care and diligence;" and one of the judges, who dissented on the ground that the alleged error of the instructions in assuming the fact of gross negligence was not prejudicial, said: "Construed as an ordinary phrase, the term 'gross negligence,' as used by the court in its instructions to the jury, may, therefore, be considered as the equivalent of that want of great care and diligence exacted by the Code."

A good proportion of the cases most often cited as authorities for a conclusion contrary to that of the court in the above reported Illinois case are earlier cases from the same state, which have been overruled by the change of doctrine in Illinois, by which the theory of comparative negligence, and the classification of negligence into degrees, have been abolished in that state.

Chicago, B. & Q. R. Co. v. Mehlsack, 44 Ill. App. 124; Chicago & N. W. R. Co. v. Calumet Stock Farm, 96 Ill. App. 337; Belt R. Co. v. Banicki, 102 Ill. App. 642; Illinois C. R. Co. v. Morrison, 19 Ill. 136; Illinois C. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Arnold v. Illinois C. R. Co. 83 Ill. 273, 25 Am. Rep. 383; Chicago, B. & M. R. Co. v. Hawk, 36 Ill. App. 327, 42 Ill. App. 322; Illinois C. R. Co. v. Cozby, 69 Ill. App. 256; Illinois C. R. Co. v. Beebe, 69 Ill. App. 363; United States Exp. Co. v. Council, 84 Ill. App. 491.

On petition for rehearing.

Gross negligence was proved.

Illinois C. R. Co. v. Phillips, 49 Ill. 234; 55 Ill. 194; Illinois C. R. Co. v. Houck, 72 Ill. 285; Toledo, W. & W. R. Co. v. Moore, 77 Ill. 217; Illinois C. R. Co. v. Butler, 69 Ill. App. 128; Hart v. Washington Park Club, 157 Ill. 9, 29 L. R. A. 492, 48 Am. St. Rep. 298, 41 N. E. 620; Atchison v. Dullam, 16 Ill. App. 42; Metropolitan West Side Elev. R. Co. v. McDonough, 87 Ill. App. 31; Chicago & N. W. R. Co. v. Calumet Stock Farm, *supra*.

The question of negligence is one of fact, and not of law.

Wabash R. Co. v. Brown, *supra*; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

Cartwright, Ch. J., delivered the opinion of the court:

On January 18, 1902, Anderson Hamler, the appellee, was a porter in the employ of the Pullman company in a sleeping car attached to a passenger train of appellant running in a westerly direction in the state of Iowa. As the train passed through a station called Victor the engine exploded. The engineer and fireman were killed, and the Pullman sleeping car in which appellee was at work was thrown on its side, and he was injured. He brought this suit in the circuit court of Cook county to recover damages for his injuries, and alleged in each count of his declaration that he was employed by the Pullman company as a porter; that his duties were the care of the sleeping car, the making up and taking down of berths therein, and providing for the necessities and comforts of passengers; and that he was, with all due care and diligence, performing his duties as such porter when the car was thrown from the track. In the first count he charged negligent, careless, and wrongful management and operation of the boiler which exploded and threw the car from the track; in the second count he alleged that the engine was negligently, carelessly, and wrongfully equipped with a defective boiler; and the third count contained a general charge of the negligent operation

of the train, causing the car to be thrown from the track. There was a plea of the general issue, and upon a trial there was a verdict of guilty, and damages were assessed at \$15,000. On a motion for a new trial plaintiff remitted \$7,500, and judgment was entered for \$7,500. Appellant appealed from the judgment to the appellate court for the first district, where the cause was assigned to the branch of that court. One of the judges of the branch court presided at the trial in the circuit court, and took no part in the consideration of the appeal, and, the other judges disagreeing, the judgment was affirmed by operation of law. One of the judges was disqualified, and the judgment became final as to controverted questions of fact by operation of law, and not by consideration and judgment of the court.

On the trial the defendant offered in evidence a contract of employment with the Pullman company, dated January 2, 1902, signed by the plaintiff, the execution of which was admitted by him, and which fixed the terms and conditions upon which he accepted the employment and entered into the service of said company. Among other things, the contract recited that plaintiff was aware that the Pullman company secured the operation of its cars upon lines of railroad by means of contracts wherein said company agreed to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said Pullman company, and he thereby released the corporations or persons over whose lines of railroad the cars of said Pullman company might be operated from all claims for liability on account of any personal injury to him while traveling over such lines in said employment or service. This contract was the basis of the defense to the suit, and the defendant tendered to the court an instruction to be given to the jury that the defendant was not a common carrier of the sleeping cars of the Pullman company; that it could not be compelled to haul such sleeping cars, but might or might not haul the same, as it desired; that, if it undertook to haul such cars in its trains, it might do so, and in so doing might make such contract or demand such conditions as would protect it from liability for injury to the porter or other employees of the Pullman company on the said cars through negligence; and that, if the plaintiff voluntarily entered into the agreement releasing the railroad company from all liability for any injury he might receive while acting as a Pullman porter, he could not recover, and the verdict should be that the defendant was not guilty. The court refused to give the instruction.

The principle involved and the rights of

the parties under such a contract as this was considered and decided in *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332, which was an action brought by an employee of the American Express Company for personal injuries received while engaged in the service of that company in an express car. The defense was a contract made by the plaintiff with the express company to obtain employment, by which he released from any liability to him any corporation operating any railroad over which the express cars should run. It was decided that such a contract is valid, and not void as against public policy, and that the direction of the court to find the defendant not guilty was justified by the contract, which was a complete defense. There is no difference whatever, in principle, between the case of a porter on a car of the Pullman company and a messenger in an express car. It is no part of the contract or obligation of a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays the Pullman company for the services performed by it, and not the railroad company; and, if one desires such services as are rendered by the Pullman company and its porter, he must contract with that company for them. In its business as a common carrier of passengers a railroad company is bound to carry all who apply, and to treat all alike, and its duties and obligations to them are imposed by law. The obligations of a common carrier arise from the public nature of the employment, and, being imposed by law, it would be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. A railroad company, in its business as a common carrier, undertakes to use the care and diligence required by law in the transportation of passengers, and will not be permitted to absolve itself from its duties by a stipulation in the contract of carriage by which a passenger is to take the risk of its negligence; but, if the service is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit. There can be no doubt that the defendant is not bound to haul sleeping cars tendered to it by the Pullman company, with its conductors, porters, or other employees. The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier; but the Pullman company furnishes special facilities and services to passengers, and the defendant is not a common carrier of Pullman cars and employees performing duties therein. The defendant might undertake to receive and haul the cars of the Pullman company, but

in doing so had a right to impose such terms as it might elect. This has been the opinion of the courts in all cases involving such contracts as the one here in question, which have been enforced in cases of express cars, circus trains, and Pullman cars, which the carrier was not bound to receive and haul as a common carrier. *Bates v. Old Colony R. Co.* 47 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; *Robertson v. Old Colony R. Co.* 156 Mass. 526, 32 Am. St. Rep. 482, 31 N. E. 650; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 281; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Peterson v. Chicago & N. W. R. Co.* 119 Wis. 197, 100 Am. St. Rep. 879, 96 N. W. 532; *Donovan v. Pennsylvania Co.* 61 L. R. A. 140, 57 C. C. A. 362, 120 Fed. 215; *New York C. & H. R. R. Co. v. Diefendaffer*, 62 C. C. A. 1, 125 Fed. 893; *McDermion v. Southern P. Co.* 122 Fed. 669. In the last two of these cases the validity of the contract with the Pullman company was involved. In the case of *Blank v. Illinois C. R. Co.* *supra*, appellant relied upon the decision of Judge Taft in *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. 561, but that decision was reversed by the Supreme Court of the United States in 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385, where it was held that Voight could not avoid his agreement on the ground that it was against public policy. The court, affirming the doctrine that a common carrier of passengers cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, said: "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare." Upon an extensive review of the authorities, it was decided that the contract was not against public policy, but was valid, and constituted a defense to the action.

It is urged, however, that the contract in this case was without consideration, and was therefore void. Upon the cross-examination of the plaintiff he was presented with the contract, and admitted that he signed it. It bore date at the time of his employment by

the Pullman company, but after it was introduced in evidence by the defendant he was called in rebuttal, and testified that it was executed by him about seven months after he was employed by the Pullman company, and that he did not read it. It is on the ground that the contract was executed after the employment began that counsel urge it was without consideration. There was evidence that the contract was signed before employment was given to the plaintiff; but, whatever the fact may be, the employment was at certain daily wages, payable monthly, and for no particular time. The contract bore date at the commencement of the service, and recited on its face that it was entered into in consideration of the employment. If it was signed as he claimed, and the employment continued, it would be, in any event, effective as to any occurrence after its execution. It does not seem to be claimed that plaintiff was not bound by the contract because he did not choose to read it. He testified that he was able to read and write, and there was no evidence of fraud or misrepresentation, or that he was in any manner prevented from reading the contract. Under such circumstances the fact that he did not read it does not affect its validity.

It is contended that plaintiff was a servant of the defendant, and that the contract was also void as a contract between master and servant. The declaration averred that the plaintiff was in the employ of the Pullman company, and, as a question of fact, the uncontradicted evidence was that the Pullman company owned the car and had charge of its operation; that it employed the men who ran its cars, paid the porters; and that the defendant paid a compensation to the Pullman company for running the Pullman cars over its road. The master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular, and therefore was not its servant. Under this head it is also urged that no contract was proved between the defendant and the Pullman company. Plaintiff's contract recited that the Pullman company secured the operation of its cars on lines of railroad by means of contracts, and it released from liability any corporation over whose lines the cars should run. In *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214, 61 N. E. 678, in which a contract identical with this one was under consideration, the supreme court of Indiana held that the contract, referring generally to the transportation companies over whose lines the Pullman company should run its cars, comprehended the appellee in that case; that the contract was *prima facie* for its benefit, and 1 L.R.A. (N.S.)

that it would be presumed to have accepted its provisions, and might claim rights under it as one in whose interest it was executed.

Finally, it is contended that a contract of this character only exempts from liability for ordinary negligence, and is no defense in an action for an injury caused by gross negligence. It is contended that, if the degree of negligence is high, and the negligence great, the agreement is of no effect; and the trial court adopted that view in giving instructions to the jury. In the first instruction the court defined gross negligence as the want of slight diligence and care, and in other instructions told the jury that, if the plaintiff was not guilty of negligence, and the defendant was guilty of gross negligence, they should find for the plaintiff, and that, if the contract in evidence was signed by the plaintiff, and he was not guilty of negligence, and the defendant was guilty of gross negligence causing the injury, the contract was not a good defense, and they should find for the plaintiff. The cause of the explosion was not definitely proved, but there was evidence that tended to show that the water was low in the boiler. The engineer and fireman were both killed, and it can never be known whether they were misled on account of the water gauge or other appliances not working properly. There was no evidence tending in the remotest degree to prove that there was any wilful or intentional failure on the part of either of them to perform any duty respecting the boiler or the management of it. Their own safety was involved, and there can be no presumption that they lost their lives through a wilful or intentional disregard of duty.

We are of the opinion that no distinction as to the rights of the parties can be founded upon speculation as to different degrees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded that the defendant was guilty of gross negligence. Formerly this court, in expounding the doctrine of comparative negligence, classified negligence into three degrees, as slight, ordinary, and gross; but that doctrine was long ago abolished, and, while negligence may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question, and no liability has been based on any distinction in degrees unless the negligence was wilful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512. Even when gross it is but the omission of a duty. *Jacksonville S. E. R. Co. v. Southworth*,

135 Ill. 250, 25 N. E. 1093. The many refinements concerning the degrees of such omissions of duty grew out of the application of the rule of comparative negligence, and were devalued of all importance by the decision that to justify a recovery the person injured must be in the exercise of ordinary care, and the injury must have resulted from a want of ordinary care on the part of the defendant. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456. The rule since that time has been that, if a plaintiff has exercised ordinary care, and the defendant has failed to exercise due care,—i. e., the care demanded under the circumstances,—the rights of the parties are thereby fixed and determined, and there is an end of controversy. If those conditions exist, there is actionable or culpable negligence, which will justify a recovery of damages resulting therefrom; and it makes no difference in the liability or the damages by what name the negligence is designated. Where an injury results from a failure to exercise ordinary care, and not from a wilful or intentional failure to perform a duty, the question of degree is of no importance. Speculations on that subject lead to no practical result, as shown by the various cases, among which is *Lake Shore & M. S. R. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905, where it was said that slight negligence is not necessarily incompatible with due and ordinary care; and, inasmuch as there is no negligence unless there is a failure to exercise due care, which is the care required by law under the circumstances of a case, the remark was equivalent to holding that slight negligence was not negligence at all.

Where the doctrine of comparative negligence is not applied, the authorities make no distinction in rights, duties, or liabilities based on degrees of negligence. Judge Cooley, in his work on Torts, p. 630, says: "Some writers classify negligence as gross negligence, ordinary negligence, and slight negligence. But this classification only indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown." Judge Thompson classifies negligence as of two kinds,—negligence, which consists of carelessness and inattention; and wilful negligence, consisting of wilful and intentional failure or neglect to perform a duty; and he repudiates any further classification. He says (1 Thompson on Negligence, § 18): "Lord Holt, Ch. J., in a celebrated case divided negligence into three degrees,—slight, ordinary, and gross. In this he is supposed to have made an attempt to

follow the Roman law; but later investigators have pointed out that *culpa levissima*, or slight negligence, was unknown to the Roman law, but was one of the refinements of the Middle Ages. I confess myself careless, ignorant, and indifferent upon this whole subject of the degrees of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. . . . No effort can extract from the current American decisions the conclusion that there are three degrees of culpable negligence,—slight, ordinary, and gross. On the one hand, it has been held that slight negligence may be compatible with ordinary care, and therefore not actionable at all. On the other hand, it has been laid down that there is no distinction between gross negligence and the want of ordinary care. . . .

If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown." The author of the chapter on Negligence in the American and English Encyclopedia of Law, 2d ed., vol. 21, p. 459, says: "While not infrequent references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best-considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands; and hence it is more accurate to call it simply negligence. Some decisions even go further, and declare that the classification of negligence into degrees is a matter of pure speculation, and of no practical consequence; that it is useless, and tends to confusion; and that in fact it is unsafe to base any legal decision on distinctions in the degrees of negligence." One of the reasons given by the courts for disregarding supposed distinctions in degrees of negligence is the inability to give the terms "slight," "ordinary," and "gross" any definite meaning, and the impracticability of applying any rule based on the supposed distinction. It is clear that negligence cannot be divided into slight, ordinary, and gross by definite lines, so that a jury may understand the limits of each, and assign each case to its own department. In *Hinton v. Dibbin*, 2 Q. B. 847, Lord Denman said: "Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might, perhaps, have been reasonably expected that

something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

In *The New World v. King*, 16 How. 469, 14 L. ed. 1019, it was said: "The theory that there are three degrees of negligence described by the terms 'slight,' 'ordinary,' and 'gross' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. . . . Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. . . . It may be added that some of the ablest commentators on the Roman law and on the Civil Code of France have wholly repudiated this theory of three degrees of diligence as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties."

In *Perkins v. New York C. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281, the court of appeals said: "The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the utter impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly, before cases are made to turn, by the verdicts of juries, upon any such distinction, the judges should be able to define with some precision what they mean by gross negligence, slight negligence, and ordinary negligence. It will be seen, on examining the many cases reported where the question has arisen, that this has been found utterly impracticable by the judges when called upon to instruct juries on the question, and also when called on to declare the law more carefully in bank. . . . What is negligent in a given case may easily be affirmed by a jury, but in what degree the negligence consists in any scale of classification of degrees of negligence is not so easily determined, will ordinarily be a matter of pure speculation, and of no practical consequence."

In *Wilson v. Brett*, 11 Mees. & W. 113, it was held that there is no legal difference between negligence and gross negligence; that it is the same thing, with the addition of a vituperative epithet; and that the question in any case is whether there was culpable negligence.

In *Grill v. General Iron Screw Collier Co.* 1 L.R.A. (N.S.)

L. R. 1 C. P. 600, it was complained that the lord chief justice misdirected the jury because he made no distinction between gross and ordinary negligence. In deciding the case *Willes, J.*, said: "I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett* that gross negligence is ordinary negligence with a vituperative epithet,—a view held by the exchequer chamber. *Beal v. South Devon R. Co.* 3 Hurlst. & C. 337. Confusion has arisen from regarding negligence as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of the defendant to use."

In the case of *Beal v. South Devon R. Co.* *supra*, above referred to, the failure to exercise reasonable care, skill, and diligence was called gross negligence, although it would be called ordinary negligence under most definitions where there is any division into degrees.

It will be found that the words "slight," "ordinary," and "gross," as applied to negligence, are not used in the decisions with the same meaning, or any definite and well-understood meaning. Illustrations are numerous, but a few will suffice for the present purpose. The words "gross negligence" are often used as the antithesis of "slight care;" but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by the law. The absurdity of such a standard for determining supposed degrees of negligence is manifest. It has been noted that slight negligence is not regarded as inconsistent with due care, and, if due care is exercised, there is no actionable negligence, and therefore, in a legal sense, no negligence at all. In *Bloor v. Lafield*, 69 Wis. 273, 34 N. W. 115, it was held that a slight want of ordinary care on the part of the plaintiff, contributing proximately to cause the injury, would defeat his action, while only slight negligence on his part contributing thereto would not. The supreme court of Wisconsin also holds that no mere degree of carelessness or inattention constitutes gross negligence (*Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808), and that the term "gross negligence" signifies wilfulness, involving intent, actual or constructive, to cause injury; and if one is guilty of wilful misconduct causing injury to another the former's fault is denominated gross negligence. *Rideout v. Winnebago Traction Co.* 123 Wis. 297, 69 L. R. A. 601, 101 N. W. 672. In *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262, the court drew a distinction between negligence charged to be reckless and a wilful and wan-

ton injury; and in *Stringer v. Alabama Mineral R. Co.* 99 Ala. 397, 13 So. 75, it was said: "The words 'gross,' 'reckless,' when applied to 'negligence' *per se*, have no legal significance which import other than simple negligence or a want of due care." The court recognized but two grades of negligence,—one being simple negligence, or the want of due care, and the other such reckless or wanton disregard of probable consequences as to be equivalent to an intentional injury; and expressed doubt whether the latter could be strictly and technically called negligence,—certainly a well-founded doubt. In *McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, 11 S. E. 316, it was held that in torts there is no degree of negligence which can be described by the word "gross" alone. In *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374, the court, after citing and quoting from the English decisions holding that there is no intelligible distinction between ordinary and gross negligence, said: "'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of the care that was necessary under the circumstances." In *Smith v. New York C. R. Co.* 24 N. Y. 222, it was said: "Attempts have been made to fix a liability upon the distinction between gross negligence and negligence merely; but courts have been compelled to abandon the attempt, and to say that negligence does not change its character and become anything but negligence by the application of any epithet to it."

The United States circuit court of appeals for the seventh circuit considered the same question involved in this case in *Kelly v. Malott*, 67 C. C. A. 548, 135 Fed. 74. The suit was for damages on account of the death of a messenger of the Adams Express Company, and the declaration charged that he was killed in a collision that occurred through the gross negligence of the defendant. A contract similar to the one in this case was pleaded, and the question was whether the injection of the word "gross" in the declaration made out a case despite the plea. The court said: "It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. 'Negligence' is merely a word of denial. 'Care' is the positive word. It is familiar and sound doctrine that there are degrees of care. But 'care' cannot properly be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the facts of the situation, and is proportionate to the danger reasonably to be apprehended. Whatever the required degree

of care, the failure to measure up to it is the ground of complaint. But failure is failure. The cause of action flows from the failure to exercise the full degree of care that was due. The injuries are what they are. The innocent sufferer is entitled to full compensation on account of the defendant's failure to bestow the fullness of care demanded by the situation. He is to receive no more, no less, than full compensation, because, though the defendant's lack may be a variable, any lack supplies a cause of action; and his injuries, which measure the value of the cause of action, are a constant. The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconscious perhaps, to justify exemplary damages where only compensatory should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment there must be an actual or constructive intent to inflict the injury. Negligence and wilfulness are as unmixable as oil and water. 'Wilful negligence' is as self-contradictory as 'guilty innocence.' The substantive remains the same substantive, whatever the adjective. In *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, the Supreme Court said: "In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply "negligence." And this seems to be the tendency of modern authorities. . . . In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it." See also *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 492, 23 L. ed. 374, 375; *Purple v. Union P. R. Co.* 57 L. R. A. 700, 51 C. C. A. 564, 114 Fed. 123."

Whether the use of the word "wilful" negligence is proper and consistent or not, there can be no doubt that it is not equivalent to gross negligence, and the question whether exemplary damages shall be awarded does not justify any classification into degrees, since negligence, however gross, will not authorize such damages. A tort must be aggravated by an evil intent to enable a party to recover exemplary damages. *Milwaukee & St. P. R. Co. v. Arms*, *supra*. The only question in any case is whether there is actionable negligence, and, if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degree of such negligence. The instructions that the contract was not a good defense in case the jury found the de-

fendant guilty of gross negligence were incorrect, and should not have been given.

At the close of all the evidence there was a motion on the part of the defendant to direct a verdict of not guilty. The court denied the motion, and refused to give the instruction. Under the authority of *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332, that instruction should have been given.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court.

Magruder, J., dissents.

Opinion reaffirmed after rehearing.

KANSAS SUPREME COURT.

ATCHISON & EASTERN BRIDGE COMPANY, Plff. in Err.,
v.

LENA M. MILLER, Admr., etc., of William I. Miller, Deceased.

(....Kan....)

1. Fellow servants.

All employees of the same master, engaged in the same general business, and

Headnotes by BURCH, J.

Case Note.—The departmental theory, or consociation theory, of the relation between servants, which, as shown by Labatt on Master and Servant, § 506, p. 1401, obtains in a minority of the states, and which has been subject to much discussion and great diversity of views, is recognized by the above case, if at all, only to a limited and narrow extent. Two of the concurring judges decline to indorse the general doctrines declared in the opinion, and the facts of the case did not present a very complete separation of the work into departments. Though the employees involved in the accident were under different foremen, they were under a single superintendent.

But, without regard to the general theories of departmental work, it may be said that, under the authority of cases most nearly similar on the facts, the injured machinist employed in repairing, and, when necessary, operating, stationary engines used in hoisting and pile driving, which were located upon barges and upon a bridge in course of reconstruction that rested upon false work, and the member of the pile-driving crew by whose negligence a pile, while suspended, was allowed to fall and strike the machinist, may be regarded as fellow servants. Thus it has been held in the following cases that the employees were fellow servants: A laborer employed in building a bridge and an engineer operating hoisting machinery, both being under one foreman's orders. *Ryan v. McCully*, 123 Mo. 1 L.R.A. (N.S.)

whose efforts tend to promote the same general purpose, and accomplish the same general end, are fellow servants.

2. Same—separate departments.

The assignment of servants of the same master to separate departments of the same general enterprise does not affect their relation as fellow servants, unless such departments are so far disconnected that each one may be regarded as a separate undertaking.

3. Same—opportunity of acquaintance.

It is not essential to the fellow-servant relation between employees of the same master that they should have an opportunity to become acquainted with each other, or to observe each other's conduct, or to take precautions against each other's negligence, or to influence each other in the formation of habits of foresight and care.

4. Same—assumption of risk.

Fellow servants assume the risk of injury from each other in their common conduct of the master's work.

5. Master's duty in selection of servants.

The master, however, contracts to exercise reasonable care in the selection of his servants, and to furnish them all with a reasonably safe place in which to work, and reasonably safe materials, tools, and appliances with which to work; and he is liable for injuries resulting from breaches of these duties, no matter what the ordinary duties

636, 27 S. W. 533. Men in charge of elevators or hoists and workmen whom they carry. *Bradbury v. Kingston Coal Co.* 157 Pa. 231, 27 Atl. 400; *McAndrews v. Burns*, 39 N. J. L. 117; *Stringham v. Hilton* (*Stringham v. Stewart*) 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870. Winchmen on a ship and workmen handling the goods. *The Peninsular*, 79 Fed. 972. A scaffold builder and a rigger employed on a steamboat in port. *Pickett v. Atlas S. S. Co.* 12 Daly, 441. A workman receiving lumber in a building and an engineer in charge of an engine hoisting it. *Sheehan v. Prosser*, 55 Mo. App. 569. A bricklayer in a sewer and workmen who excavate and sheathe the trench. *Curley v. Hoff*, 62 N. J. L. 758, 42 Atl. 731. A brick mason and a carpenter on the same structure. *Keith v. Walker Iron & Coal Co.* 81 Ga. 49, 12 Am. St. Rep. 296, 7 S. E. 166. A carpenter who makes a scaffold for the construction of a ship, and workmen who use it. *Beesley v. F. W. Wheeler & Co.* 103 Mich. 196, 27 L. R. A. 266, 61 N. W. 658.

These cases may not be conclusive authority for the decision in *ATCHISON & E. BRIDGE Co. v. MILLER*, but they show that the tendency of the courts has been to regard as fellow servants those of different trades or kinds of work when engaged in building the same structure, or when one is operating some hoisting machinery or elevator and the other is injured by his negligence in working it.

or the rank or grade or department of the servant to whom their performance has been delegated.

6. Fellow servants—machinist and member of crew.

A member of a pile-driving crew, engaged in driving piling for the erection of false work essential to the reconstruction of a bridge, is a fellow servant with a machinist employed by the same master to repair stationary engines located in the midst of the work upon barges, upon the bridge, and upon the false work, and used for hoisting material and driving piling in the progress of the general enterprise of building the false work.

(March 11, 1905.)

ERROR to the District Court for Atchison County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. W. W. Guthrie and W. F. Guthrie, for plaintiff in error:

The fellow-servant rule proceeds on the theory that the ordinary risks of the employment, of which the negligence of co-servants is one, are taken into consideration by both parties in agreeing upon the terms of a contract of employment, and in fixing the compensation; and that, therefore, every person who enters the service of another must be assumed to have taken upon himself all the ordinary risks of the employment, including the negligence of competent co-servants.

12 Am. & Eng. Enc. Law, 2d ed. pp. 893, 902.

The master's liability to one servant for the negligence of another in no wise depends upon the comparative rank of the negligent servant.

The different-department limitation upon the rule of nonliability is contrary to the weight of authority.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339; Brodeur v. Valley Falls Co. 16 R. I. 448, 17 Atl. 54.

The master owes to every servant whom he employs certain direct and positive duties, well understood and easily determined.

These are positive obligations of the master to the servant, which it is his duty to perform, and, if he delegates the performance of this duty to another, it still remains his duty, and the failure upon the part of one to whom he delegates it is still his failure.

Kansas P. R. Co. v. Little, 19 Kan. 271; Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 644, 31 Kan. 197, 1 Pac. 644; Hannibal & St. J. R. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; 1 L.R.A. (N.S.)

Missouri P. R. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Atchison, T. & S. F. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Prybilski v. Northwestern Coal R. Co. 98 Wis. 413, 74 N. W. 117; Pfeiffer v. Dialogue, 64 N. J. L. 707, 46 Atl. 772; Houston & T. C. R. Co. v. Sueas, 14 Tex. Civ. App. 384, 37 S. W. 378; Illinois C. R. Co. v. Bishop, 76 Miss. 758, 25 So. 867; Byrnes v. Brooklyn Heights R. Co. 36 App. Div. 355, 55 N. Y. Supp. 269; Gilmore v. Mittineague Paper Co. 169 Mass. 471, 48 N. E. 623; Mann v. O'Sullivan, 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375; McCarty v. Rood Hotel Co. 144 Mo. 397, 46 S. W. 172; Curley v. Hoff, 62 N. J. L. 758, 42 Atl. 731; Hastings v. Montana Union R. Co. 18 Mont. 493, 46 Pac. 264; Louisville & N. R. Co. v. Stuber, 54 L. R. A. 696, 48 C. C. A. 149, 108 Fed. 934.

Messrs. Z. E. Jackson and Jackson & Jackson, for defendant in error:

Whether two servants are fellow servants within the rule depends on whether they are under the orders and control of the same person.

Rourke v. White Moss Colliery Co. L. R. 1 C. P. Div. 556.

To bring employees within the fellow-servant rule the risk of injury from the negligence of the one must be so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages.

Morgan v. Vale of Neath R. Co. L. R. 1 Q. B. 149.

The reasons in Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, for the rule of nonliability are: (1) That such injuries must be presumed to have been within the contemplation of the parties when they made their contract; and (2) that public policy requires the enforcement of such a rule, upon the theory that, by enforcing it, each servant is made closely observant of the acts of his fellow servant, and that the scrutiny of one another naturally tends to efficiency and care.

Union P. R. Co. v. Erickson, 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347.

The first reason has been completely set aside, and Chicago & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, fully answers the second reason.

Persons are in the same common work and fellow servants when engaged in such duties as bring them to work at the same place, at the same time, under such circumstances as make them co-operate with each other, or are, by their usual duties, brought into habitual consociation, from which it may be supposed that they have the power

of influencing each other for their mutual protection and the avoidance of injury from negligence. It is a question of fact in each case as to whether the risk of injury from the want of care of the negligent employee was assumed by the injured employee in accepting service, and, as incident to such rule, it is a question of law for the court when there is no doubt about the facts.

Missouri P. R. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632; St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; Atchison, T. & S. F. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104; Walker v. Gillett, 59 Kan. 214, 52 Pac. 442; Donnelly v. Cudahy Packing Co. 68 Kan. 653, 75 Pac. 1017; Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 Pac. 856; Good-Eye Min. Co. v. Robinson, 67 Kan. 510, 73 Pac. 102; Kansas P. R. Co. v. Little, 19 Kan. 267; Dow v. Kansas P. R. Co. 8 Kan. 642; Kansas P. R. Co. v. Salmon, 14 Kan. 512; McTaggart v. Eastman's Co. 28 Misc. 127, 58 N. Y. Supp. 1118; Spillane v. Eastman's Co. 32 Misc. 235, 65 N. Y. Supp. 668; Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co. 68 App. Div. 441, 73 N. Y. Supp. 842; Gallagher v. McMullin, 25 App. Div. 571, 49 N. Y. Supp. 734; Shannon v. Consolidated Tiger & Poorman Min. Co. 24 Wash. 119, 64 Pac. 169; Mullan v. Philadelphia & S. Mail S. S. Co. 78 Pa. 25, 21 Am. Rep. 2; Uren v. Golden Tunnel Min. Co. 24 Wash. 261, 64 Pac. 174; Dixon v. Chicago & A. R. Co. 109 Mo. 413, 18 L. R. A. 792, 19 S. W. 412; Parker v. Hannibal & St. J. R. Co. 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119; Relyea v. Kansas City, Ft. S. & G. R. Co. 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480; Hobson v. New Mexico & A. R. Co. 2 Ariz. 171, 11 Pac. 545; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Chicago & A. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023; Russell v. Hudson River R. Co. 17 N. Y. 134; Consolidated Coal Co. v. Gruber, 188 Ill. 584, 59 N. E. 254; Duffy v. Kivilin, 195 Ill. 630, 63 N. E. 503; Sullivan v. Missouri P. R. Co. 97 Mo. 113, 10 S. W. 852; American Cotton Co. v. Smith, 29 Tex. Civ. App. 425, 69 S. W. 443; Louisville & N. R. Co. v. Edmund, 23 Ky. L. Rep. 1049, 64 S. W. 727; Wilson v. Banner Lumber Co. 108 La. 590, 32 So. 400; Fifield v. Northern R. Co. 42 N. H. 225; Bain v. Athens Foundry & Mach. Works, 75 Ga. 718; Madden v. Chesapeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 895; Daniels v. Union P. R. Co. 6 Utah, 357, 23 Pac. 762; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365; Edmonson v. Kentucky C. R. Co. 105 Ky. 479, 49 S. W. 201, 448; Norfolk & W. R. Co. 1 L.R.A. (N.S.)

v. Nuckols, 91 Va. 193, 21 S. E. 342; Baird v. Pettit, 70 Pa. 477; Jenkins v. Mammoth Min. Co. 24 Utah, 513, 68 Pac. 845; Roux v. Blodgett & D. Lumber Co. 94 Mich. 607, 54 N. W. 492; Pool v. Chicago, M. & St. P. R. Co. 53 Wis. 657, 11 N. W. 15; Sims v. American Steel Barge Co. 56 Minn. 68, 45 Am. St. Rep. 451, 57 N. W. 322; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; Garrahy v. Kansas City, St. J. & C. B. R. Co. 25 Fed. 258; Howard v. Delaware & H. Canal Co. 6 L. R. A. 75, 40 Fed. 195; Pike v. Chicago & A. R. Co. 41 Fed. 95; Evans v. Carbon Hill Coal Co. 47 Fed. 437; Northern P. R. Co. v. Cavanaugh, 2 C. C. A. 358, 10 U. S. App. 197, 51 Fed. 517; St. Louis & S. F. R. Co. v. Furry, 52 C. C. A. 518, 114 Fed. 898; Cincinnati, H. & D. R. Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11; Gulf, C. & S. F. R. Co. v. Warner, 89 Tex. 475, 35 S. W. 364; Union P. R. Co. v. Erickson, 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347; Gulf, C. & S. F. R. Co. v. Wood (Tex. Civ. App.) 63 S. W. 164; Peoria, D. & E. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951.

As to whether the injured person and negligent person are coemployees, or as to whether there is consociation of the employees, is primarily a question of fact for the jury.

Chicago & A. R. Co. v. Swan, 176 Ill. 424, 52 N. E. 916; Chicago & N. W. R. Co. v. Snyder, 128 Ill. 655, 21 N. E. 520; Donnelly v. Cudahy Packing Co. 68 Kan. 653, 75 Pac. 1017; Shannon v. Consolidated Tiger & Poorman Min. Co. 24 Wash. 119, 64 Pac. 173; Parker v. Hannibal & St. J. R. Co. 109 Mo. 362, 18 L. R. A. 802, 19 S. W. 1119; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Chicago & A. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023; Gila Valley, G. & N. R. Co. v. Lyon (Ariz.) 71 Pac. 957; Baird v. Pettit, 70 Pa. 477; Roux v. Blodgett & D. Lumber Co. 94 Mich. 607, 54 N. W. 492.

The burden of proof that the injury occurred through the fault of a fellow servant is on defendant.

Consolidated Kansas City Smelting & Ref. Co. v. Osborne, 66 Kan. 393, 71 Pac. 838; Gulf, C. & S. F. R. Co. v. Wood (Tex. Civ. App.) 63 S. W. 164; Chenall v. Palmer Brick Co. 117 Ga. 106, 43 S. E. 443.

When the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, would not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.

McCray v. Galveston, H. & S. A. R. Co.

89 Tex. 171, 34 S. W. 95; *Houser v. Cumberland & P. R. Co.* 80 Md. 148, 27 L. R. A. 154, 45 Am. St. Rep. 332, 30 Atl. 906; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989; *Jackson v. Galveston, H. & S. A. R. Co.* 90 Tex. 372, 38 S. W. 745; *Gulf, C. & S. F. R. Co. v. Marchand*, 24 Tex. Civ. App. 47, 57 S. W. 860; *Kansas P. R. Co. v. Salmon*, 11 Kan. 91; *Atchison, T. & S. F. R. Co. v. Kingscott*, 65 Kan. 131, 69 Pac. 184; *Missouri P. R. Co. v. Holley*, 30 Kan. 474, 1 Pac. 130, 554.

On petition for rehearing.

The rights of master and servant should be considered and determined in the light of existing conditions and relations, and not decided or settled by the mere adoption of precedents established sixty years ago.

Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to assume.

2 Bl. Com. 443; 1 Parsons, Contr. p. 4; 2 Kent, Com. 449; 3 Am. & Eng. Enc. Law, p. 860.

When a promise is implied, it is because the party intended it should be, or because justice plainly requires it in consideration of some benefit received.

Kansas P. R. Co. v. Little, 19 Kan. 267; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442; *Seeds v. American Bridge Co.* 68 Kan. 522, 75 Pac. 480; *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856; *Atchison, T. & S. F. R. Co. v. Bancord*, 66 Kan. 88, 71 Pac. 253.

In each case where the question of "fellow servant" was involved, the court determined the point by ascertaining the liability assumed in the employment, and decided as to such question in language which clearly applied to, or expressly recognized, the "different department" and "consociation" principle, and that the term "common employment" as used, referred to the community of employment in which the injured and negligent servants were engaged, and not the entire range or scope of the business of the master.

Tightmeyer v. Mongold, 20 Kan. 90.

Right reason and common justice would not imply a contract that the servant assumed the risk of injury from a coservant, and it would not be just or expedient to hold that the employee under such circumstances assumed a liability or risk which was not, or could not have been, known to him at the time he accepted employment, or while engaged in the performance thereof. Every reason suggests, as a foundation of the implied contract, that the assumption of liability L.R.A. (N.S.)

ity shall be presumed only where the employee has, or can acquire, some knowledge of the risks and perils assumed.

The decision in this case is inconsistent with the rule heretofore adopted in this state.

Dow v. Kansas P. R. Co. 8 Kan. 642; *Kansas P. R. Co. v. Salmon*, 14 Kan. 512.

Burch, J., delivered the opinion of the court:

At the time the injury complained of in this litigation was inflicted, the Atchison & Eastern Bridge Company was engaged in the erection of false work essential to the reconstruction of the bridge across the Missouri river at the city of Atchison. The false work served as a substructure of the old bridge during the dismantling process, of the new bridge as piece by piece it replaced the old one, and of a temporary bridge for highway purposes alongside the bridge proper, over which railway traffic was not interrupted. Many men were employed in many kinds of service. A single superintendent managed the entire work, various branches of which were in charge of foremen who directed the operations of separate squads and gangs. Material was assembled and distributed by skiffs and barges on the river, and by cars on the bridge tracks. Many kinds of tools and much machinery were used and transported from place to place. Piles were driven and braced and capped, and a multitude of subsidiary acts performed, all to the ultimate end that the false work might be brought to completion. Stationary engines were used to hoist material and to drive the piling. These engines were located in the midst of the work, upon the barges, upon the bridge, and upon the false work. The plaintiff's intestate, Miller, was employed as a machinist by the bridge company to repair them, and, in addition, to operate them when necessary. On the first day of his service, while he was engaged in repairing an engine situated on the bridge, and only 3 feet from its north edge, a pile-driver barge moored below him, and the crew undertook to drive a pile. It met with an obstruction which rendered it necessary to raise it and resharpen the point. While it was suspended for that purpose, its top towering 30 feet above the floor of the bridge, it fell, and Miller was knocked under the wheels of a passing train, where he received injuries from which he died. His administratrix recovered a judgment against the bridge company, to reverse which this proceeding in error was instituted.

On the trial it sufficiently appeared that the injury was caused by the negligence of a member of the pile-driving crew in fastening the chain used to lift and hold the pile

in suspension. The jury, however, returned special findings of fact which raise the question whether the member of the pile-driving crew charged with the duty of adjusting the chain was not a fellow servant of Miller in the general enterprise of constructing the false work. Such findings, arranged as well as they may be to develop the subject, are as follows:

"(81) State whether or not the defendant, at the time the pile fell, was engaged in the undertaking of constructing false work to support the iron-work of the bridge during the progress of reconstruction? A. Yes.

"(82) State whether or not, in constructing such false work, stationary engines were used for the purpose of raising and lowering timbers and on stationary and barge pile driver? A. Yes.

"(83) State whether or not Miller was employed to do any necessary work done on the stationary engines used by the defendant, which required attention from a machinist? A. Yes."

"(85½) If you answer question No. 83 in the affirmative, state what, if anything, in addition to work as a machinist, Miller was employed to do. A. Run an engine."

"(106) State whether or not, in the course of practice on that work, men in one crew were interchanged with men in others, in the judgment of the superintendent? A. Yes."

"(84) State whether or not the work which Miller took service to perform would require him to work in and around the places where other men engaged in putting up the false work were at work? A. Yes.

"(85) State whether or not the work which Miller took service to perform required him to work in and about places where negligence on the part of other employees engaged in putting in the false work might result in injury to him? A. Yes."

"(24) Was the line of service in which said William I. Miller was employed that of a machinist, to repair and keep in order the hoisting engines and machinery used by the defendant company in the prosecution of its work? A. Yes."

"(25) Was the duty and work in which the barge crew was employed at the time of the injury to said Miller that of operating the machinery upon the barge, and hoisting and driving in the bed of the Missouri river? A. Yes."

"(14) At the time said William I. Miller, deceased, received the injuries from which he died, was he engaged, as a machinist, in repairing a hoisting engine upon the floor of defendant's bridge? A. Yes."

"(1) Did a pile fall in the direction of and toward William I. Miller, deceased, at 1 L.R.A. (N.S.)

the time he received the injury from which he died? A. Yes."

"(15) If you answer question 1 'Yes,' or in the affirmative, then was such pile being raised about ten (10) feet north and east from where said Miller was then at work? A. Yes.

"(16) If you answer question 1 'Yes,' or in the affirmative, then was such pile being raised from a barge or boat floating on the river? A. Yes.

"(17) If you answer question 16 'Yes,' or in the affirmative, then was such barge or boat about 20 feet lower elevation than the floor of the defendant's bridge? A. Yes.

"(18) If you answer question 16 'Yes,' or in the affirmative, then was such pile raised until the top was about 30 feet higher than the floor of defendant's bridge? A. Yes."

"(39) State whether or not the engine upon which Miller was working was located about three (3) feet from the north side of the bridge? A. Yes."

"(79) State whether or not Miller was working at the time on the engine within ten (10) or fifteen (15) feet of the pile driver? A. Yes."

"(80) State whether or not Miller, at the time the pile fell, was working where he could see the operations upon the pile driver? A. Yes."

These facts are sufficient to enable the court to draw the proper conclusion of law as to the relation of the deceased and the chairman of the pile-driver crew.

Each party to the suit sought the legal opinion of the jury upon certain phases of the controversy. To the plaintiff the jury responded as follows:

"Were said William I. Miller, deceased, at the time he received the injury from which he died, and the barge or boat crew employed in raising the pile, engaged in different lines of work or employment? A. Yes.

"Were the work and duties of said William I. Miller such as to bring him into habitual association with said barge crew, so that he might exercise an influence upon said barge crew promotive of proper care and caution, and the line of employment of said barge crew such that they might exercise an influence upon said Miller promotive of proper care and caution? A. No.

"At the time said Miller received the injuries from which he died, was he working in a different line of duty and service from that in which the barge crew was at work and employed? A. Yes."

To the defendant it answered thus:

"State whether or not all of the employees engaged in constructing false work to support the iron-work of the bridge during process of reconstruction, or in aiding them in such work, were engaged in the common en-

terprise of constructing such false work. A. Yes."

This court can say whether the repair of engines is a different kind of service from pile driving, and whether, from the nature of their duties, and the situations of the machinist and the chainman, they might, in their work, exercise an influence upon each other promotive of care and caution, and whether they were both engaged in a common enterprise, as well as the jury; and the questions and answers last presented are reproduced here chiefly for the purpose of elucidating the theories of counsel respecting the rules of law applicable to the case. From these questions and answers it is apparent the plaintiff relies upon the so-called departmental and consociation limitations of the fellow-servant rule acknowledged in certain jurisdictions, while the position of the defendant is that identity of department and consociation of duties are not tests of the master's liability, but that, if the injured and the injuring servants work under the control of a common master in a general employment directed to a common end, the master is not liable, provided, of course, the neglected duty be not one which the master himself must perform.

There is much force in the defendant's argument that the master is not liable in this case even under the consociation theory of the relation between the servants. Miller's duties called him into the most intimate association with the other men. The conduct of each was at all times likely to affect the others. If his tools should fly from his hand, or a separated part of the machinery he was repairing should escape him, they might strike a member of the barge crew. If a pile were unskilfully handled, it might strike him. Trucking crews passing and repassing with tools, machinery, and materials might injure him, and carelessness in his conduct might injure them. When he was injured he was within 10 or 15 feet of the barge crew, and in plain view of the pile, which hung almost over him, and his duties constantly exposed him to such perils. The nature of his employment was such that he might have been repairing or even running the engine used for hoisting the pile which fell at the time it fell. He was almost as intimately related to the chainman as the engineer upon the barge. In states where the consociation doctrine prevails, it is held that the length of time the different servants may have been at work is not material, and that all of them need not be engaged to do work precisely identical in kind. "It is true, they might have been fellow servants in the strictest sense, and yet they might not have been associated an hour before the happening of the injury. What is meant is, if the 1 L.R.A. (N.S.)

parties continue to be engaged in a common service, they will be habitually associated, so that they may exercise any influence over each other promotive of common safety." *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369, 375, 12 N. E. 225, 227. "The fact that an employee was only temporarily engaged at a particular task, and that he had no acquaintance with his collaborators does not operate to bar the application of the doctrine of fellow servants." *Klees v. Chicago & E. I. R. Co.* 68 Ill. App. 244. "It is an error to suppose that a force of men cannot be engaged in a common service unless all are continuously working at the same time, and engaged in doing precisely the same kind of work. It is sufficient if all are actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end or purpose, sought to be accomplished by the united efforts of all. The skill of a carpenter, blacksmith, or other mechanic might be very useful in removing a wreck, and, when thus working together in such a service, though each one in his own particular way, they are all, within the meaning of the rule, engaged in a common employment." *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 211, 53 Am. Rep. 616. If this be true, all the conditions of the consociation doctrine are fairly satisfied in this case, since the findings of fact disclose a very necessary dependence of the machinist and the pile drivers upon each other's care and vigilance or mutual safety, and abundant opportunity for the operation of reciprocal influences conducive to their common welfare. It is not the purpose of the court, however, to rest its decision upon this ground, if another and more fundamental one be discoverable. If the decisions of this court show that it has, in the main, consistently adhered to a logically defensible theory respecting the liability of a master for an injury to one of his servants caused by the negligence of another, those decisions, and the theory upon which they proceed, ought to be followed, unless great injustice would result from doing so. To discover the true position of the court upon this subject, an examination of its leading and best-considered cases is necessary.

In the early case of *Dow v. Kansas P. R. Co.* 8 Kan. 642, it was held that a conductor and a brakeman of the same railway train are fellow servants. The court was greatly impressed with the duty of railroad companies to make their service safe to the traveling public, and, believing that the watchfulness over each other of officers and agents charged with the running of trains would tend to promote the general welfare, it apparently undertook to encourage such conduct by preventing a recovery against the

master in case one of those servants should injure another. In the opinion it is said: "The paramount object of nearly all the rules of law concerning the operation of railroads is security to the person and lives of human beings, and particularly security to the persons of passengers being transported on the trains from one portion of the country to another; and, in order to insure this security, the railroad companies are held to the strictest accountability with regard to passengers. They must use the utmost care and skill within the scope of human foresight or human knowledge practicable. They are liable to passengers for the slightest negligence on the part of their agents or servants. But this is not all. A rule must be adopted that will insure the most skilful and trustworthy agents and servants. . . . But it is also the policy of the law to make it to the interest of every servant or agent of the railroad company to see that every other servant or agent of the company is competent and trustworthy. This may be done by making it to the interest of every employee of the railway company to inform the company of every act of any other employee showing a want of skill, care, or competency. The employees of the railway company have the best opportunities of knowing the competency and trustworthiness of the other employees of such company, and, if they do not think the other employees are competent or careful, let them either inform the company, so that the incompetent or negligent employees may be discharged, or themselves quit the service of the company. Who can know better whether a conductor of a railroad train is competent and trustworthy than the brakeman on the same train? . . . As to passengers, and generally as to any person not in the employ of the company, the negligence of any agent or servant of the company is the negligence of the company. As to such persons even the negligence of the brakeman is the negligence of the company. But as between coemployees no one is peculiarly the representative of the company more than another, except, perhaps the higher officers whose duty it is to employ and discharge the other employees, and therefore as between coemployees the negligence of none but the higher officers aforesaid is the negligence of the company. If such higher officers are not careful and diligent in employing and discharging or retaining the other employees, then the company is responsible to the other employees for the negligence of such employees as have been employed or retained without proper care." From these extracts it is plain, however, that the court was not attempting to establish a general foundation for the law

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of coservice. Finding a peculiar state of facts to which the reasoning of the opinion would apply, it drew a limited conclusion, without discussing the bearing of the argument upon broader subjects. It was sufficient to make the interest of the public the controlling consideration in determining who should be liable for the negligent infliction of injuries upon each other by persons charged with the running of trains. As far as it went, the opinion was an affirmation of the views of Chief Justice Shaw in the epoch-making case of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 58, 59, 38 Am. Dec. 339. In that case it is said: "If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised: being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited, a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers. . . . The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story, *Bailments*, §§ 590 *et seq.* We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the

ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer." This interest of a portion of the public in a particular employment, however, cannot furnish a sound basis from which to determine the liability of masters generally. In multitudes of cases employees may not be able to exert any appreciable influence upon each other, and yet the risk of injury from a coservant be one clearly within the comprehension of the parties when the relation of master and servant was formed. In the *Farwell Case* the effect of the consociation of employees, and their separation into departments, upon the liability of the master, was reasoned out as follows: "It was strongly pressed in the argument that, although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise. How near or how distant must they be to be in the same or different departments? In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage at the same time, at many hundred feet distant from each other and beyond the reach of sight and voice, and yet acting together. Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence

of anyone but himself: and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract." Commenting upon this argument, the supreme court of Rhode Island, in an opinion of much force and clearness, said: "The reasons here set forth are a strong answer to the position taken in the Illinois cases. They show an obvious impracticability in trying to gauge the liability of an employer, in a complex business, by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments, and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place, and not at another. Without a personal supervision of all his help in all their work, he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For if the test of liability be that of the separate and independent duties of the servants, they may nevertheless be so near each other as to be able to exert a mutual influence to caution, or, if it be that of association, they may still be in the same department, but unable, from their duties or position, to exert such influence. But, aside from these considerations, we do not think the rule is correct in principle. The principle upon which the determination of *Farwell v. Boston & W. R. Corp.*, proceeded is the same that has been generally followed in England and in this country, namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow servants. When one works with others, he knows that his safety depends on the exer-

cise of care by those around him, as their safety depends, also, upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him. For his own negligence the master must answer, but for that of others, which is a risk incident to every employment, he has not agreed to be responsible, but, on the contrary, the servant has impliedly agreed to assume it upon himself." *Brodeur v. Valley Falls Co.* 16 R. I. 448, 451. 17 Atl. 54, 55. In the *Dow Case* it will be observed that the distinction between superior and inferior servants is made to lie in the nature of the duty to be performed, and not in mere rank or grade. The simple fact that an officer or agent hires or discharges men does not in itself make the master liable for his conduct generally, but the negligence of such an officer or agent as a representative of the master in hiring or retaining incompetent employees entails responsibility if injury results.

In the case of *Kansas P. R. Co. v. Salmon*, 14 Kan. 512, the limit of the master's liability to his employees was quite clearly perceived and stated. It was said, in effect, that upon officers and agents who may employ, retain, or discharge men rests the duty of exercising reasonable care and diligence in furnishing a sufficient number of competent employees for the work to be done. Those who have the power to furnish implements, machinery, or materials to other employees must furnish them in sufficient number and amount, and of proper kind, to accomplish the work. These officers, agents, and employees discharge duties of a higher kind than those who merely do the work, and, to that extent, are regarded as higher or superior. Their employment in respect to such matters is not common with that of other employees. Having thus distinguished the duties which the master must perform, the court says: "A railway company is not responsible to one employee for the negligence of another employee, where they are both engaged in the same common employment. . . . The grade of the employee within the particular employment does not generally make much difference. If the employee performs the duties of one of the higher officers, agents, or servants, of which we have already spoken, the company is generally responsible for his negligence, whatever may be his grade. But if he is engaged in the same common employment with other employees, the company is generally not responsible for his negligence to the other em-

ployees, although he may be in fact the foreman for that particular work."

In the case of *Kansas P. R. Co. v. Little*, 19 Kan. 267, a superintendent had entire charge of the work of building a culvert. It was his duty to inspect machinery and see that it was in good order. A derrick became defective, to the knowledge of the superintendent, who failed to repair it, in consequence of which it fell and injured a workman. In the opinion it is said: "Owens, however, had the power to inspect said materials, tools, and implements, and if not sufficient, or if they became insufficient, to apply to his superior officers for others. The jury found specially that 'it was the duty of Owens to inspect the derrick and see that it continued in good order.' Said derrick was sufficient and in good order when Owens received it. But afterward, by use, it became insufficient. . . . That Owens was negligent in using said derrick after he knew that it had become insufficient and unsafe, we suppose no one will question; but whether this negligence was the negligence of the railroad company may be questioned, and is questioned. We think it was. Owens was the only representative that the railroad company had upon that work. He was really the superintendent of the railroad company for that particular work. As to the laborers on the work, he was the railroad company itself. If he had been merely a foreman working under a common employer, a common master, a common principal, along with the other employees, then we suppose, under the authorities, he would have been only a fellow servant with the others, and the company would not have been responsible for his negligence towards the others. But he was not merely a foreman working with the others under a common employer. As to the others he was the employer himself. He was their master, their principal." Further in the opinion it is stated, by way of showing the complete authority of the superintendent, that he hired and discharged men; but the basis of the decision is the master's failure to furnish to his employees safe instrumentalities with which to work.

In the case of *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632, 644, the true rule was stated by Mr. Justice Valentine in the following luminous way: "In all cases at common law a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law,

the servant assumes all the risks and hazards incident to, or attendant upon, the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and coemployees. And at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master,—a vice principal,—and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or coemployee of such servant, where the fellow servant or coemployee does not sustain this representative relation to the master; nor is he liable for the failure of still other servants to perform certain acts, where the performance of such acts does not come within the proper line of their duties." This language has been quoted as authoritative by a large number of the state courts of this country and by the Supreme Court of the United States. It was written upon the theory that the negligence of coservants is not a breach or the master's duty, but a breach of the duty of servants toward each other; that the risk of injury from the negligence of fellow employees is one of the ordinary risks of any employment which are assumed when the contract of service is made; and that whatever in this respect the servant could reasonably foresee entered into the terms of his compensation.

In the case of *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, it was held that a section foreman or section boss whose duty consisted in keeping a railway track in a safe condition for the operation of trains was not a coemployee or fellow servant with the engineer of a locomotive drawing a train. In the opinion something of the confusion, even then deeply confounded, exhibited by the authorities upon the law of coservice, is reflected. In portions of the opinion the results of consociation and departmental separation are given weight, but the test of the liability of the master is finally placed upon the character of the duty to be performed, and not upon the assignment of servants to different lines of employment, or their opportunity to become acquainted with or to influence each other. The conclusion of the court is thus 1 L.R.A. (N.S.)

expressed: "Therefore, where a railroad company delegates, directly or indirectly, to a section boss or section foreman, the duty of keeping a certain section of the railroad in proper condition and repair, and to warn trainmen in case of danger, and the section boss fails to perform his duty in these respects, and a trainman is injured by reason of such negligence, the railroad company is responsible."

In the case of *Missouri P. R. Co. v. Peregoy*, 36 Kan. 424, 14 Pac. 7, the opinion was written by a commissioner. Language is used recognizing the so-called superior control limitation of the common-law fellow-servant rule, and a quotation from *Kansas P. R. Co. v. Salmon* is inserted in a manner indicating a misapprehension of the meaning of that case. But stable ground for the decision is reached in the second paragraph of the syllabus, which reads as follows:

"Where such foreman directed an unskilled apprentice to do work that requires a skilled mechanic to perform, and directed him to call to his assistance other employees also ignorant of said work, and said work was dangerous, and such danger was known to the foreman, and was unknown to such employees, and no notice was given to them of the danger, and the foreman failed to give them instructions which, if given and followed, would have prevented the accident, and one was killed while at said work, the employer is liable in an action for damages."

Under all the authorities, such a risk is not one ordinarily incident to an employment. But to hold a company liable merely because the person injured was working under a foreman would undermine the authority of all the preceding Kansas decisions, some of which contain statements directly to the contrary. The necessary conclusion following a consideration of them is that, unless the duty neglected be one which the master is bound to perform, he cannot be liable, no matter what servant may be careless. He cannot be "represented" except in respect to his duty to furnish a safe place, careful employees, and the like. Having discharged this duty, his responsibility ends, and distinctions of rank and grade as between the injured and injuring servant are of no consequence whatever.

In the year 1898 the opinion in the case of *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442, was promulgated. It held that a train conductor is not a fellow servant with a brakeman acting under his orders. The only Kansas case cited in support of the opinion is that of *Atchison, T. & S. F. R. Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104, which has no application, because the neglected duty there under consideration was one of inspection,

which the master was bound to perform, and the decision was expressly placed upon that ground. The Dow Case, 8 Kan. 642, which decided the same question in exactly the opposite way, and which had stood as law in this state for twenty-seven years, was not given even a passing reference. The doctrine in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, was adopted in full. From the decision in the Ross Case four justices dissented. When the Walker Case was decided, the Ross Case already had been questioned and branded as "extreme" by this court in the Weaver Case, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408. The Supreme Court of the United States had already receded from its doctrine, and the next year its authority was expressly repudiated in the case of *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, the headnotes of which are as follows:

"The negligence of a conductor of a freight train is the negligence of a fellow servant of a brakeman on the same train, who was killed by an accident occurring through that negligence.

"The negligence of such conductor is not the negligence of the vice or substituted principal or representative of the railroad company running the train, and for which that corporation is responsible.

"The general rule of law is that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

"An employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking. It is not necessary that the servants should be engaged in the same operation or particular work. It is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. And, accordingly, in the present case, upon the facts stated, the conductor and the injured brakeman are to be considered fellow servants, within the rule."

If the discredited Ross Case and the Walker Case are to stand as authorities in this state, instead of the Conroy Case and the Dow Case, they must stand as arbitrary exceptions in the law of co-service, and not because they are justifiable upon any of the basic principles of that subject. Whether just cause exists for such a radical innovation cannot be determined in this case. It 1 L.R.A. (N.S.)

is the present purpose of the court to find and state and adhere to a logical doctrine if that can be done.

Since qualifications of the fellow-servant rule on account of department, rank, grade, control, and consociation are all substantially similar, and all contradict the same fundamental propositions in the same way, the reasoning by which the Supreme Court of the United States overthrew the Ross Case applies to the case at bar, and extracts from its opinions upon the subject are pertinent here.

In the case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, Mr. Justice Brewer said: "If the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross Case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are, in and of themselves, separate and distinct. Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department. These two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master. . . . The truth is, the various employees of one of these large corporations are not graded like steps in a staircase; those on each step being as to those on the step below.

in the relation of masters, and not of fellow servants, and only those on the same steps fellow servants, because not subject to any control by one over the other. *Prima facie* all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master, to further his interests in the one enterprise. Each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. . . . The danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other. If he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employee, it includes all coworkers to the same end, whether in control or not. . . . Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge."

In the case of *Northern P. R. Co. v. Hambley*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, Mr. Justice Brown said: "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the

same identical service—as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship—are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."

In the case of *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269, the court quoted approvingly the following language from the decision in the *O'Brien v. American Dredging Co.* 53 N. J. L. 297, 21 Atl. 324: "Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow servants."

In the case of *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, the headnote reads: "H. was foreman of an extra gang of laborers for plaintiff in error on its road, and, as such, had charge of and superintending the gang in putting in ties and assisting in keeping in repair three sections of the road. He had power to hire and discharge the hands (thirteen in number) in the gang, and had exclusive charge of their direction and management in all matters connected with

their employment. The defendant in error was one of that gang, hired by H., and subject, as a laborer, while on duty with the gang, to his authority. While on such duty the defendant in error suffered serious injury through the alleged negligence of H., acting as foreman in the course of his employment, and sued the railroad company to recover damages for those injuries. Held, that H. was not such a superintendent of a separate department, nor in control of such a distinct branch of the work of the company, as would be necessary to render it liable to a coemployee for his neglect, but that he was a fellow workman, in fact, as well as in law, whose negligence entailed no such liability on the company as was sought to be enforced in this action." In delivering the opinion of the court, Mr. Justice Peckham said: "In the Baugh Case it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over, and a superior position to that occupied by, the servant who was injured by his negligence. The rule is that in order to form an exception to the general law of nonliability, the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case. When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employees under them, vice principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent. . . . This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a coemployee for his neglect. He was in fact, as well as in law, a fellow workman."

These decisions are in accord with the overwhelming weight of authority both in England and in this country. 4 Thompson on 1 L.R.A. (N.S.)

Negligence, chap. 125, in which the consociation doctrine is described as "local and peculiar;" 12 Am. & Eng. Enc. Law, 2d ed. pp. 975, 976; 2 Labatt, Mast. & S. chap. 27. The later text appears as a note to the report of the case of *Sofield v. Guggenheim Smelting Co.*, in 50 L. R. A. 417.

The views of various state courts upon the subject are illustrated by the following quotations:

"The rule of law that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow servant is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures and engines in carrying on the master's work. A railroad corporation is not liable to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad." *Holden v. Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343.

"A carpenter who is injured while repairing an elevator shaft, and the operator of the elevator, both of whom were employed by the owner of the building, are fellow servants, employed in the same general business; and the master is not responsible for an injury resulting to the carpenter from the negligence of the operator of the elevator. Fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that the others, in the exercise of ordinary sagacity, ought to foresee, when accepting their employment, that his negligence would probably expose them to injury; and, danger from the negligence of another employee being fairly apparent, all other employees assume the risk incident to that danger." *Mann v. O'Sullivan*, 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375.

"The negligence of the foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him because it was not blocked, is the negligence of a fel-

low servant, although the foreman had authority to employ and discharge plaintiff, and the plaintiff was under his superintendence and control in doing the work in the performance of which he was injured. Whether a negligent servant is the fellow servant of an employee who is injured by the carelessness of the former depends not upon the relative ranks of the two servants, but upon the character of the work, the negligence with respect to which resulted in the injury. The negligent performance or omission to perform a duty which the master owes to his employees is at common law the negligence of the master, whatever the grade of the servant who is in that respect careless. The negligence of a servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant, as contradistinguished from the duties of the master to his employees." *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L. R. A. 97, 26 Am. St. Rep. 621, 48 N. W. 222.

"A founder in a blast furnace for the manufacture of pig iron, who has a separate department,—the inside work of the furnace,—and who has nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, is held to be a fellow servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and to assume the risk that said cars might be handled negligently by said engineer." *Adams v. Iron Cliffs Co.* 78 Mich. 272, 18 Am. St. Rep. 441, 44 N. W. 270.

"When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business, and, being subject to the control of the same master, they are fellow servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be. 3 Wood, Railway Law, 1494 *et seq.* And when the relation of fellow servants is established, there can be no recovery from the common master or employer by one of them for an injury occasioned to him through the negligence or misconduct of his coemployee. In order to render the master liable in such case, it would be necessary to show that the negligent servant was incompetent, and that he was selected without reasonable care and prudence, or that he was continued in the

employment after notice to the master of his unfitness, or that the master had failed to furnish adequate means and materials for the work. Such is the law of this state, and such is the law as it has generally prevailed in America and England for many years." *McMaster v. Illinois C. R. Co.* 65 Miss. 264, 268, 7 Am. St. Rep. 653, 4 So. 59.

The earlier Kansas decisions are all in harmony with these cases, and in perfect consonance with them are the latest utterances of the court upon that subject:

"Whenever coemployees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed. . . . Plaintiff and the operator of the elevator were engaged in one common pursuit,—that of curing and packing meat. Each worked in a different line of employment, but was engaged in the same general business, and so closely related that the negligence of one was liable to inflict injury to the other. Therefore he must be held to have assumed the risk of the negligence of his coemployee who ran the elevator." *Donnelly v. Cudahy Packing Co.* 68 Kan. 653, 75 Pac. 1017.

"But whenever a negligent act violates any duty which the master himself owes to the servant—as, for example, the duty to make the service and the place in which it is performed reasonably safe—that fact controls, irrespective of the rank or grade of service between employees, and notwithstanding the circumstance that they are engaged in a common employment, directed to a common end." *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856, 857.

In the light of these authorities, it must be concluded that the servant, in the contract of employment, assumes all the ordinary risks of the employment. In the exercise of ordinary sagacity, he must foresee that the negligence of those with whom he works may result in injury to him. Danger from that source is one of the ordinary incidents of the service, and, so far as it fairly may be anticipated, it is assumed. In the conduct of his business the master may utilize the economic principle of the division of labor, systematize and classify his work, and regiment his forces, without affecting his liability. Organization is not only essential to the successful management of all complex operations, but is demanded as a means of securing the safety of employees themselves, and the

servant must anticipate its bearing upon his welfare. If the process proceed so far that different departments become, in effect, distinct enterprises, each one may be treated as a separate undertaking. The danger of injury from employees so completely disconnected is so remote that it fairly may be said to be excluded from the contemplation of the parties when the contract is made. But this cannot be true in respect to those employees who are engaged in the same general business, and whose efforts tend to promote the same general purpose and accomplish the same general end. Each one of such servants must know that his relations with the others may endanger his safety. They are all coservants, and each one takes the risk of breaches of duty on the part of the others likely to do him harm. This is true whether or not he may be able to become acquainted with all his fellows; whether or not he may be able to observe their conduct; whether or not he may be able to take precautions against their carelessness; whether or not he may be able to influence them in the formation of habits of foresight and care. The master does not contract to furnish him these opportunities. The master merely contracts to exercise reasonable care in the selection of his associates, and to furnish them all a reasonably safe place in which to work, and reasonably safe materials, tools, and appliances with which to work. The fact that the servant is assigned to a department does not augment or qualify any of these duties, nor does such fact make the negligence of an injuring servant belonging to another department, but who is not charged with the performance of any of these duties, the negligence of the master; and, before the master can become liable to an injured servant, the master must be negligent. All attempts to apply any other rule meet with unsurmountable difficulties. The admission of Justice Thomas in the case of *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 403, 18 L. R. A. 802, 19 S. W. 1119, is deeply significant: "When the principle announced in the earlier cases—that all servants employed and paid by the common master to perform common service were fellow servants—was abandoned, the courts were left apparently with no sound principle by which they could be guided and controlled in concrete cases." The following observations of Judge Dillon in 24 Am. Law Rev., at page 189, contain an admonition which all courts dealing with the fellow-servant doctrine of the law should heed: "Any attempt to refine, based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagina-

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tion of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to 'find no end, in wandering mazes lost.'"

In this case there can be no doubt that the machinist was engaged with the members of the pile-driving crew in the common employment of erecting the bridge company's false work, and was a fellow servant with them; that the danger to which he was exposed was one which was incidental to the work, and that the negligence of the chainman in securing the chain upon the pile was not the negligence of the master. Therefore the judgment of the District Court is reversed, with direction to enter judgment for the defendant on the findings of fact.

All the Justices concur.

Greene, J., concurring:

I concur in the decision reversing this case, but do not indorse the law of fellow servants, as stated and applied in some of the decisions quoted in the opinion.

C. A. Smith, J., concurring:

I concur in the decision of this case, but cannot concur in some of the statements of the general doctrine as to the law of fellow servants. I think some of them too broad. Nor would I have it understood that this court goes to the extent of some of the cases cited, with apparent approval, as authority for this decision.

Petition for rehearing overruled.

MINNESOTA SUPREME COURT.

MICHAEL H. JEMMING, Appt.,

v.

GREAT NORTHERN RAILWAY COMPANY, Resp't.

(.... Minn.)

1. Steam shovel—operation of railway—fellow servants.

A crew of nine men, consisting of an engineer, a craneman, a fireman, two jackmen.

Headnotes by ELLIOTT, J.

Case Note.—The statutes of Iowa, Kansas, and Minnesota, abrogating the doctrine of common employment with respect to railway servants engaged in the operation of the road or subjected to its hazards, are substantially alike. Although these statutes are couched in general language applicable to all railroad employees, they have been construed by the state courts as applying only to servants engaged in the actual operation of the road. This construction has been made for the purpose of saving the acts from the imputation of being re-

and four pitmen, were engaged in operating a steam shovel in a gravel pit. The outfit consisted of a shovel, an engine house which contained the engine which operated the shovel, an old engine tender which contained the coal and water, and a caboosse. It was all located upon a short track which was made up of sections 6 feet long. As the work progressed, and it became necessary to move the shovel forward, a section of track was taken up from the rear, and placed in front of the shovel. The track was in no way connected with any other track. About 16 feet from the shovel outfit there was a temporary track upon which stood ballast cars, and this track was about 80 rods from the main railroad track, with which it connected at a point about 1 mile distant. The engineer employed and discharged the men, and generally controlled

the crew. He personally had charge of the work of moving the crane, and controlled the speed and course of the bucket attached thereto. Plaintiff, one of the pitmen, was injured by the negligent manner in which the engineer caused the bucket to swing from the ballast car into the pit. Held:

(a) That the plaintiff and his fellow servants were not at the time of the accident engaged in operating a railway.

(b) That the danger to which the plaintiff was subjected was not one of the hazards peculiar to the operation of a railroad, and therefore was not within § 2701, Gen. Stat. 1894.

(c) That the engineer was a fellow servant of the plaintiff, who was a pitman, and whose work it was, with the assistance of others, to take the 6-foot section of track from the rear of the outfit, carry it forward

pugnant to the Constitution as class legislation. The courts have experienced considerable difficulty in determining whether or not, upon the facts of a particular case, it falls within the statute as thus construed.

In *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156, the court, after an examination of the adjudicated cases, came to the conclusion that the only construction which will furnish a definite or logical rule is to hold that the statute only applies to those employees who are exposed to the peculiar hazards connected with the use and operation of the road, and whose injuries are the result of such dangers.

In *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52, it was held that the manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating the road.

A great many of the cases in which the courts of these states have applied the statute come so clearly within its provisions that a reference to them will throw no light upon the question involved in the case of *JEMMING v. GREAT NORTHERN R. Co.* above reported, and they will not be referred to here.

In *Handelun v. Burlington, C. R. & N. R. Co.* 72 Iowa, 709, 32 N. W. 4, it was held that an employee whose duty it was to assist in loading and unloading gravel cars, and to ride to and fro on the gravel train, was entitled to recover. And the same holding was had in *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406, where an employee who was engaged exclusively in shoveling gravel from a train was injured by its sudden starting.

But the right of a section hand injured while loading timber on a car, to recover, was denied in *Smith v. Burlington, C. R. & N. R. Co.* 59 Iowa, 73, 12 N. W. 763; and the right of a member of a construction gang to recover, where his duties required him to ride upon and work about cars and tracks, but whose injury was caused by a heavy stone thrown by a coemployee, was denied in *Matson v. Chicago, R. I. & P. R. Co.* 68 Iowa, 22, 25 N. W. 511.

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The right of an employee in a railway coal house, who was injured through the negligence of a coemployee while coal was being loaded on a car, to recover, was denied in *Luce v. Chicago, St. P. M. & O. R. Co.* 67 Iowa, 75, 24 N. W. 600.

A section hand injured while loading railroad iron upon a flat car, by a rail falling upon his arm, does not come within the protection of the statute. *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 9, 49 N. W. 302.

A case which comes very close to the border line in *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52, where it was held that a laborer engaged in shoveling earth on flat cars, and sometimes going with the train and unloading the earth, and who was injured while undermining the bank which was being excavated, came within the provisions of the statute. In this case the court said that, although the injuries did not arise from the hazards of railroading, they could not be separated from the general employment of the plaintiff, which subjected him to the perils and hazards of the business of railroading.

The *Deppe Case* was distinguished in *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124, where it was held that a car repairer is not entitled to recover for injuries, although he was at times required to travel upon trains in going to his work, but was not required to engage in his employment at points where there were moving trains. The distinction was based on the ground that in the *Deppe Case* the plaintiff was one of a crew necessary on a construction train, and consequently his duties were peculiar to the operation of a railroad.

An employee handling a derrick used in coaling an engine cannot recover. *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 96, 78 N. W. 800.

An employee was permitted to recover, who was employed on a ditching machine on a railroad, which was operated by the movement along the track of the train of which the machine formed a part, and who was injured by being struck by the crank of a windlass used to lower the scoop. *Nelson v. Chicago, M. & St. P. R. Co.* 73 Iowa, 576,

and fasten in position in front of the steam shovel.

2. Pleading—specific acts of negligence—proof.

The rule that, where the complaint in an action to recover damages for personal injuries alleges specific acts of negligence, the proof will be confined to the matters thus alleged, applied.

(November 24, 1905.)

APPEAL by plaintiff from an order of the District Court for Wright County denying a motion for a new trial after the direction of a verdict in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **F. E. Latham** and **James C. Tarbox**, for appellant:

The duty of the master to his servant involves the furnishing of a safe place in which to work, suitable tools and machinery with which to do the work, and the establishment of proper rules for the carrying on of the work in a safe manner.

2 Labatt, Mast. & S. § 574; Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 503; Doing v. New York, O. & W. R. Co. 151 N. Y. 579, 45 N. E. 1028; Hannibal & St. J. R. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; Pool v. Southern P. Co. 20 Utah, 210, 58 Pac. 326; Louisville, E. & St. L. Consol. R. Co. v. Hanning, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; Luebke

35 N. W. 611. The difference between this ditching machine and the steam shovel in **JEMMING v. GREAT NORTHERN R. Co.** is that the ditching machine was actually operated on a railroad track.

An employee engaged in filling tenders with coal from cars upon an adjoining track, who is injured by the negligence of a fellow workman in pushing into the coal car a plank after the work has been completed and the engine is about to start, is entitled to recover. **Akeson v. Chicago, B. & Q. R. Co.** 106 Iowa, 54, 75 N. W. 676.

So is a person who is employed to travel on a train to remove snow and ice from the track at various points, although the train is not in motion at the time. **Smith v. Humeston & S. R. Co.** 78 Iowa, 583, 43 N. W. 545.

An employee comes within the statute, who, while working in a ditch along the track, was struck by a piece of coal from the tender of a passing engine. **Croll v. Atchison, T. & S. F. R. Co.** 57 Kan. 548, 46 Pac. 972.

But a servant injured by the falling of loose coal dislodged from an engine tender which is standing still, by another servant standing on the tender, cannot recover. **Weisel v. Eastern R. Co.** 79 Minn. 245, 82 N. W. 576. 1 L.R.A. (N.S.)

v. Chicago, M. & St. P. R. Co. 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; **Redington v. New York, O. & W. R. Co.** 84 Hun. 231, 32 N. Y. Supp. 535; **Smith v. Baker**, 65 L. T. N. S. 467; **Vogt v. Honstain**, 81 Minn. 174, 83 N. W. 533.

The master must give notice and warning of dangers which are liable to arise in the course of the work.

Shearm. & Redf. Neg. 5th ed. § 203; **Chicago & A. R. Co. v. Kerr**, 148 Ill. 605, 35 N. E. 1117; **Donahoe v. Old Colony R. Co.** 153 Mass. 356, 26 N. E. 868; **Stephenson v. Ravenscroft**, 25 Neb. 678, 41 N. W. 652; **Carlson v. Northwestern Teleph. Exch. Co.** 63 Minn. 428, 65 N. W. 914; **Borgerson v. Cook Stone Co.** 91 Minn. 91, 97 N. W. 734; **Peter-son v. American Grass Twine Co.** 90 Minn. 343, 96 N. W. 913; **Gray v. Commutator Co.** 85 Minn. 463, 89 N. W. 322; **Abel v. Butler-Ryan Co.** 66 Minn. 16, 68 N. W. 205; **Hill v. Winston**, 73 Minn. 80, 75 N. W. 1030; **Holman v. Kempe**, 70 Minn. 422, 73 N. W. 186; **Stahl v. Duluth**, 71 Minn. 341, 74 N. W. 143; **Chicago v. Cronin**, 91 Ill. App. 466; **Walsh v. Chicago**, 94 Ill. App. 314; **Daley v. Brown**, 167 N. Y. 381, 60 N. E. 752; **Choate v. Ontario Rolling Mill Co.** 27 Ont. App. Rep. 155; **Bushby v. New York, L. E. & W. R. Co.** 107 N. Y. 374, 1 Am. St. Rep. 844, 14 N. E. 407; **Felice v. New York C. & H. R. Co.** 14 App. Div. 345, 43 N. Y. Supp. 922; **Northwestern Fuel Co. v. Danielson**, 6 C. C. 636, 12 U. S. App. 688, 57 Fed. 915; **Comers v. Washburn-Crosby Co.** 91 Minn. 105, 97 N. W. 733; **Richmond Granite Co.**

Neither can an employee whose sole duty it is to place coal on a platform for delivery to engine tenders. **Stroble v. Chicago, M. & St. P. R. Co.** 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 63.

A stone mason employed in setting curbing around a depot is not subjected to a peril peculiar to the operation of a railroad, so as to be entitled to recover, where he is injured by the fall of a curb stone left un-securely standing by an employee. **Missouri, K. & T. R. Co. v. Medaris**, 60 Kan. 151, 55 Pac. 875.

An employee injured by a bolt driven through the bottom of a car, which he was assisting in repairing, cannot recover. **Holtz v. Great Northern R. Co.** 69 Minn. 524, 72 N. W. 805.

Neither can a boiler maker's assistant injured by the negligence of a coservant in letting the smokestack of a locomotive fall. **Lavallee v. St. Paul, M. & M. R. Co.** 40 Minn. 249, 41 N. W. 974.

But a person employed in a railway car shop, who, while on a ladder leaning against one of the cars of a train, is injured by the negligence of those in charge of the train, in moving it without notice, can recover. **Pierce v. Central Iowa R. Co.** 73 Iowa, 140, 34 N. W. 783.

v. Bailey, 92 Va. 554, 24 S. E. 232; Hess v. Adamant Mfg. Co. 66 Minn. 79, 68 N. W. 774; Perras v. A. Booth & Co. 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Barrett v. Rear-don (Minn.) 104 N. W. 309.

This was an accident due to the peculiar hazards attending the operation of engines and trains, and, therefore, is within the fellow-servant law of Minnesota.

Schneider v. Chicago, B. & N. R. Co. 42 Minn. 68, 43 N. W. 783; Schus v. Powers-Simpson Co. 85 Minn. 447, 69 L. R. A. 887, 99 N. W. 68; Kline v. Minnesota Iron Co. 93 Minn. 63, 100 N. W. 681; Mace v. H. A. Boedker & Co. (Iowa) 104 N. W. 475; Blomquist v. Great Northern R. Co. 65 Minn. 69, 67 N. W. 804; Anderson v. Great Northern R. Co. 74 Minn. 432, 77 N. W. 240; Kreuzer v. Great Northern R. Co. 83 Minn. 385, 86 N. W. 413; Lindgren v. Minneapolis & St. L. R. Co. 86 Minn. 152, 90 N. W. 381.

Messrs. Rome G. Brown and Charles S. Albert, for respondent:

The work in which Jemming was engaged at the time he was injured did not expose him to the dangers and hazards peculiar to the operation of railroads.

Weisel v. Eastern R. Co. 79 Minn. 245, 82 N. W. 576; Bender v. Great Northern R. Co. 89 Minn. 163, 94 N. W. 546; Reddington v. Chicago, M. & St. P. R. Co. 108 Iowa, 96, 78 N. W. 800; Luce v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 75, 24 N. W. 600; Akeson v. Chicago, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676; Nelson v. Chicago, M. & St. P. R. Co. 73 Iowa, 576, 35 N. W. 611; Thompson v. Chicago, M. & St. P. R. Co. 18 Fed. 239; Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262; Holtz v. Great Northern R. Co. 69 Minn. 525, 72 N. W. 805; Pearson v. Chicago, M. & St. P. R. Co. 47 Minn. 9, 49 N. W. 302; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156.

If the injury is occasioned by reason of the negligence of a servant in his failure to perform his portion of the work which is the object of their common employment,—that is, if the act is one which pertains to the duty of an operative,—the defendant is not liable.

Perras v. A. Booth & Co. 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Wood v. New Bedford Coal Co. 121 Mass. 252; Reddington v. Chicago, M. & St. P. R. Co. *supra*; Buckley v. Gould & C. Silver Min. Co. 8 Sawy. 394, 14 Fed. 833; O'Neil v. Great Northern R. Co. 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086; Holtz v. Great Northern R. Co. 69 Minn. 525, 72 N. W. 805; Lindvall v. Woods, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; Brown v. Winona & St. P. R. Co. 27 Minn. 162, 38 Am. Rep. 285, 6 N. W. 484; Brown v. Minneapolis & St. L. R. Co. 1 L.R.A. (N.S.)

31 Minn. 553, 18 N. W. 834; Ell v. Northern P. R. Co. 1 N. D. 336, 12 L. R. A. 97, 26 Am. St. Rep. 621, 48 N. W. 222.

Elliott, J., delivered the opinion of the court:

The plaintiff was injured while in the employ of the defendant railway company, and brought this action to recover damages on the ground of the alleged negligence of the defendant. At the close of the plaintiff's case, the court directed a verdict in favor of the defendant, and, from an order denying a motion for a new trial, the plaintiff appeals to this court.

The facts are comparatively simple and easily understood. The plaintiff was employed by the defendant railroad company as a pitman with one of the steam-shovel crews engaged in shoveling gravel from a gravel pit in New London. He commenced work on the 12th of September, 1904, and was employed continuously from that date until the 10th of October, when he was injured. The steam-shovel outfit with which the plaintiff was working consisted of the shovel, an engine house, which contained the engine operating the shovel, an old engine tender, containing the coal and water for the use of the engine, and a sort of caboose. It was a steam shovel such as is ordinarily used for similar work in places in no way connected with the railway business. The shovel was located upon sections of track about 6 feet long, which were not connected in any way with any other track. About 16 feet from the shovel outfit, there was a temporary track, upon which stood ballast cars, and this track was about 80 rods away from the main railway track, with which it connected about 1 mile from the place where the steam shovel was located. The shovel worked into the bank immediately in front and on the left-hand side. In its operation the dirt was removed from the place immediately in front before commencing on the left-hand side. When enough had been removed from the front to make the necessary room, a section of the movable track was taken up from the rear of the outfit, carried forward by the pitmen, and placed in front of the shovel. The crew consisted of a fireman, engineer, crane-man, two jackmen, and four pitmen, of which the plaintiff was one. It was the duty of the pitmen to level off the place for a section of the track, and then pick up the ties and rails constituting the section, carry them around in front of the shovel, and put them in place. These rails were 6 feet long, and were fastened together by two bridal bars or pieces of iron, which could be moved forward and backward on the rail. The same section was used over and over again,

as fast as the steam shovel moved ahead. The shovel was moved by the engine, which was used to do the digging. The movements of the shovel were controlled by the engineer and the craneman. The engineer would swing the crane around, raise and lower it, and when the dipper was filled would raise it up, and swing it over the ballast car. He governed the speed and the height and course of the dipper. He hired and discharged the men constituting the crew, and was in general charge of the operation of the shovel. The craneman attended to the raising and lowering of the dipper while they were dipping. As usually operated, when the men were in the pit, the shovel was swung around from the ballast car over and across the track, then lowered at something like a right angle with its first course, then brought back towards the machinery, and pushed forward into the bank until the dipper was filled; after which it was raised up over the track, and back again to the car, where it was emptied. On the day when the plaintiff was injured the shovel was being operated somewhat faster than usual. The plaintiff was in the pit, engaged in fixing the bridial bars, when the engineer brought the dipper down in an unusual course, "kind of cornerwise" from where it started, over the place where he was working, so that it would have struck him had he remained in that place. In trying to escape he fell on the track, and the dipper in its forward course towards the dirt struck him, and caused the injuries complained of. At the time of the accident both the ballast car and the steam shovel outfit were stationary, the machinery and crane mechanism only being in motion.

1. The appellant contends that the defendant was guilty of negligence in not framing such general rules and regulations as a prudent man would under the circumstances consider necessary and reasonable for the elimination of possible dangers and the protection of the employees. There is nothing in the record to show whether or not such rules were made in this instance. But the appellant is not in a position to predicate negligence upon the failure to make such rules, even if it appeared that none were made and promulgated. The allegation of the complaint is that, "while plaintiff was so working, and while he was exercising ordinary care and caution, and without fault or negligence on the part of plaintiff in any manner whatever, defendant wrongfully, negligently, and carelessly caused the heavy iron scoop or bucket for digging up and elevating the gravel, with the heavy arm or lever by which it was operated, to descend in a sudden and unexpected manner upon the plaintiff." The court will not consider

acts of negligence not charged in the complaint. *Connelly v. Minneapolis E. R. Co.* 38 Minn. 80, 35 N. W. 582; *Morrow v. St. Paul City R. Co.* 65 Minn. 382, 67 N. W. 1002. In the *Connelly* Case the court used language which is equally applicable to the case at bar. "The appellant in his brief relies to some extent upon the duty of the defendant to make and promulgate general rules for the conduct of its employees so far as might be necessary for the protection of coemployees. The case does not involve any such consideration. The complaint does not allege any neglect of duty on the part of the defendant in that respect, nor otherwise than in the movement of these cars on this particular occasion; nor was such a question litigated." For applications of this principle, see *Chicago City R. Co. v. Bruley*, 215 Ill. 464, 74 N. E. 441; *Hudgins v. Coca Cola Bottling Co.* 122 Ga. 695, 50 S. E. 974.

This leaves but two questions for consideration: (a) Did the work that the plaintiff was engaged in involve hazards or dangers peculiar to the operation of railroads? And (b) if it did not, was the engineer of the steam-shovel outfit a vice principal or a fellow servant?

2. Laws 1887, chap. 13, p. 69 (Gen. Stat. 1894, § 2701), was enacted for the purpose of abolishing, under certain conditions, the common-law rule which exempts employers from responsibility for damages resulting from personal injuries occasioned by the negligence of a fellow servant.

(a) If the language of the statute had been given a literal construction, it would have applied to all the employees of railroad companies under all circumstances, whether the injury complained of was received in the course of the employment or otherwise. When the statute first came before the court in *Lavallee v. St. Paul. M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974, it was recognized that such a reading would render the act unconstitutional as class legislation. It was, however, to be presumed that the legislature did not intend the statute to be construed in such a manner as to destroy its validity. It was therefore held to be intended for the benefit only of such employees as were engaged in the extremely hazardous business of operating railroads. Thus limited, the act was constitutional. As said by Chief Justice Gilfillan: "The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty—sometimes impossibility—of escaping from them with any amount of care when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that

he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are a sufficient reason for applying a rule of liability on the part of the employer to the employee so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer." See *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Labbatt, Mast. & S.* §§ 643 et seq. This case was followed in *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156, where, after full and careful reconsideration, the statute was held to apply only to the employees of railway corporations exposed to the peculiar hazards connected with the use and operation of railroads. After noting the unsatisfactory efforts which had been made to apply other theories, Mr. Justice Mitchell said: "Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers." The rule, as thus established, that the statute includes only the class of servants exposed to injury by the dangers peculiar to the use and operation of railroads, has never since been departed from by this court. *Pearson v. Chicago, M. & St. P. R. Co.* 47 Minn. 9, 49 N. W. 302; *Weisel v. Eastern R. Co.* 79 Minn. 245, 82 N. W. 576; *Holtz v. Great Northern R. Co.* 69 Minn. 524, 72 N. W. 805; *O'Niel v. Great Northern R. Co.* 80 Minn. 27, 51 L. R. A. 532, 82 N. W. 1086; *Kline v. Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681. And see *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676.

The statute is held not to apply to street railways, although included within its general language, for the reason that their employees are not exposed to the hazards and dangers incident to the operation of ordinary railroads. *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099. In the *Lavallee Case* the plaintiff at the time of his injury was employed as a boiler maker in the defendant's shops, and clearly did not come within the statute. In the *Johnson Case* plaintiff was one of a crew of men who were engaged in repairing a bridge on de-

fendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened. The plaintiff was at work between the stationary part of the bridge and the draw, when the wind blew the draw shut, and injured him. It was held that the injury was not caused by a hazard incident to the operation of a railroad, and there could be no recovery. In the *Pearson Case* a crew of sectionmen were engaged in loading railroad iron from the ground upon a flat car, when some of the crew negligently let one of the rails fall upon plaintiff's arm. The risk was not in any way different from that to which anyone is subjected who, with others, engage in loading or unloading ponderous articles. It was held that there could be no recovery. In *Njus v. Chicago, M. & St. P. R. Co.* 47 Minn. 92, 49 N. W. 527, the plaintiff was engaged in removing iron bars from a car to the ground, and it was held that he was within the statute as construed by the supreme court of Iowa, in which state the accident occurred. In the *Weisel Case* the plaintiff was one of the crew of a steam shovel working in a gravel pit, which was being operated in a manner very similar to the one in the case at bar. For the purpose of supplying water to the shovel, a locomotive was brought into the pit near the shovel, and a hose attached to the locomotive was carried to the boiler of the steam shovel. The water under steam pressure was thus forced from the locomotive to the shovel. The locomotive with the tender loaded with coal came into the pit, and remained stationary. The plaintiff picked up the hose, and handed it to another member of the crew, who was standing on the loose coal upon the tender. In handling the hose the man on the coal dislodged a piece of coal, which fell upon the plaintiff, and injured him. The risk to which the plaintiff was subjected was held not to be a railroad hazard, as the danger of the coal falling was no other, different, or greater in any respect than would exist in the case of a stationary coal bin in no way connected with a railroad. In the *Holtz Case* the plaintiff, with three other employees of the railroad company, was engaged in repairing a car in the repair shed. While under the car, engaged in putting plates and nuts on the bolts as they were driven through by another employee, one of the bolts, being longer than the others, came in contact with plaintiff's head, and severely injured him. It was held not a railroad hazard. In the *O'Niel Case* the plaintiff, a section hand, was injured by coming in contact with a projecting bolt while engaged in removing a part of a railway bridge. The risk was

not peculiar to railroading, but was incidental to the repair of a bridge.

The same construction has been placed upon the Iowa statute, which is like that of Minnesota. In *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 96, 78 N. W. 800, Reversing 75 N. W. 679, on rehearing, the plaintiff was employed to aid in coaling the defendant's engine. The engine and train were standing still alongside the coal shed. While so employed in hoisting coal for the purpose of filling a car, a coemployee so negligently moved a crane they were using in the work that it struck the plaintiff's arm and broke it. The danger arising from the use of the crane does not appear to have been greater or less by reason of the fact that it was used in loading a railroad car; nor does it appear that the plaintiff, while engaged in his duties, was exposed to any dangers from the operation of the road. The case comes within *Malone v. Burlington, C. R. & N. R. Co.* 61 Iowa, 326, 47 Am. Rep. 813, 16 N. W. 203, 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756, and *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124. In our opinion the evidence shows no liability. See also *Nelson v. Chicago, M. & St. P. R. Co.* 73 Iowa, 576, 35 N. W. 611. In *Smith v. St. Paul & D. R. Co.* 44 Minn. 17, 46 N. W. 149, it was held not a necessary condition to the applicability of the statute that the employment of the servant injured and of the servant whose negligence caused the injury should be of the same kind. Both the servants whose conduct was in question were engaged in actual railroad operations.

There is another line of cases which illustrates the application of the statute. In *Nichols v. Chicago, M. & St. P. R. Co.* 60 Minn. 319, 62 N. W. 386, the plaintiff was employed as a wiper in a roundhouse, and was called by the foreman to aid in straightening a wire cable used to pull a plow in unloading gravel from flat cars in repairing the road. One end of the cable was attached to a switch stand, and the other to a locomotive, which pulled until the wire became taut. One of the employees pushed the cable off the end of the switch stand, and it swung around, and broke the plaintiff's leg. The hazard was held peculiar to the railroad business; the court saying: "The test is not whether the conditions are in any respect parallel to those to be found in some other kind of business, or whether the appliances are in, any respect similar to those used in some other kind of business. If there is any element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. There certainly are such elements and conditions in 1 L.R.A. (N.S.)

this case." In *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260, it appeared that the plaintiff was a "wiper," whose duty it was to assist in taking engines in and out of the roundhouse, and to the coal shed for coal. He was injured while assisting in coaling an engine by it being negligently moved by his coservant, and it was held that the hazard was one peculiar to the operation of railroads. In *Leier v. Minnesota Belt-Line R. & Transfer Co.* 63 Minn. 203, 65 N. W. 269, the plaintiff was injured while attempting to step from a platform to the top of a passing car, under the orders of a conductor. Very naturally it was held that he was injured by reason of exposure to a railroad hazard. In *Blomquist v. Great Northern R. Co.* 65 Minn. 69, 67 N. W. 804, the plaintiff, a section man, was employed in repairing the defendant's main track. The work had to be done with great and extraordinary haste, in order to avoid danger to trains that were or might be approaching. While engaged with other section men in carrying a heavy iron rail, the plaintiff was injured by a fellow workman negligently releasing his hold on the rail and letting it fall. It was admitted that this was a close or "border" case, but it could be fairly said that the plaintiff's employment involved an element of danger peculiar to the railroad business, and intimately connected with, and growing out of, the operation of the road, to wit, "that he was engaged in repairing the track upon which trains were operated, and that, in view of that fact, the work had to be done with great and unusual haste, in order to avoid danger to trains that were or might be approaching." The *Blomquist Case* was followed in *Anderson v. Great Northern R. Co.* 74 Minn. 432, 77 N. W. 240. The plaintiff was engaged with others in repairing a portion of defendant's roadbed, and was injured by the negligence of a fellow servant in releasing a jack which held up a portion of the track, which then fell upon the plaintiff's foot. For the purpose of bringing the case within the principle of the *Blomquist Case*, it was alleged in the complaint that the work was being executed in great haste, so as to complete the work and replace the track before the arrival of any trains. This allegation was put in issue by the answer, and as the issues were presented, it was, under the evidence, a question for the jury whether or not the work in which the plaintiff was engaged at the time of his injury was being executed under such conditions and circumstances as to expose the plaintiff to the peculiar hazards incident to the use and operation of railroads, and whether he was injured as the result of such dangers. The same principle was applied in *Kreuzer v.*

Great Northern R. Co. 83 Minn. 385, 86 N. W. 413, where the plaintiff was injured, while at work clearing a wrecked train from the defendant's tracks, by the falling of the roof of a disabled car, caused by the negligence of a fellow servant. The wreck was an extensive one, and the tracks were covered with the disabled cars. The crew was called out in the middle of the night, and from all the circumstances it was apparent that the work was urgent, and that great haste was necessary in order to clear the track for the passage of expected trains. As in the Anderson Case, it was clearly a question for the jury to say whether the work was being done under such circumstances as to expose the plaintiff to the hazards peculiar to operating a railroad. In *Lindgren v. Minneapolis & St. L. R. Co.* 86 Minn. 152, 90 N. W. 381, the plaintiff, a section man, was injured through the negligence of a fellow servant while engaged in removing a hand car from the railroad tracks to make way for an approaching freight train; and it was held, following *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L. R. A. 271, 47 N. W. 1068, that the case was within the statute, as removing the car from the track was a part of the operation of the car. See also *Benson v. Chicago, St. P. M. & O. R. Co.* 75 Minn. 163, 74 Am. St. Rep. 444, 77 N. W. 798.

(b) The appellant also contends that the crew which was operating the steam shovel was operating a railroad, within the meaning of the statute as construed by the decisions of this court. We do not think that the steam shovel with its tender and sections of movable track can be thus dignified. In *Schneider v. Chicago, B. & N. R. Co.* 42 Minn. 68, 43 N. W. 783, the plaintiff was injured by being thrown from the pilot of an engine which was being operated upon a temporary construction track. It was not questioned but that the defendant was operating a railroad, but it was claimed that the proviso of § 2701 applied, as the road was not open to public use. See also *Moran v. Eastern R. Co.* 48 Minn. 46, 50 N. W. 930, and *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122. The road under construction in *Schus v. Powers-Simpson Co.* 85 Minn. 447, 69 L. R. A. 887, 89 N. W. 68, was an extensive logging railroad, and it was contended unsuccessfully that the statute did not apply to it, because it was not organized as a railroad corporation, and was not engaged as a common carrier of passengers and freight, but confined its railroad business exclusively to its own affairs. The *Schus* Case was followed in *Kline v. Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681, where it appeared 1 L.R.A. (N.S.)

that the defendant was operating a narrow gauge railroad, about 2 or 3 miles long, with a full equipment of cars and engines. The only question involved was whether the statute applied to a private railway.

Under the construction thus given, the statute, and as applied in the cases to which attention has been called, it is very clear that the danger to which the plaintiff in this case was subjected was not one of the hazards peculiar to the operation of a railway. It was such as is incidental to the management of all machinery, and the accident would have been as liable to occur had the steam shovel been operated by parties not in the employ of a railway company, in excavating for a canal, or for the foundation of a building. It was a hazard connected with the operation of a steam shovel, and the mere fact that the shovel belonged to a railway company, and was being operated by its employees, did not change its nature.

3. As the case does not come within the purview of § 2701, Gen. Stat. 1894, it is necessary to ascertain whether the plaintiff and the engineer, through whose negligence plaintiff was injured, were fellow servants. The claim that the engineer was a vice principal cannot be sustained. It is true that he was in charge of the crane, had power to hire and discharge men, and was in a position of authority over the men. But it can no longer be contended in this jurisdiction that mere superiority of rank creates the relation of vice principal. It is the established law of this state that it is not the rank of the employee nor his authority over other employees, but the nature of the duty or service that he performs, which determines whether he is a vice principal or a fellow servant. *Labatt, Mast. & S.* §§ 514 et seq.; *Cooley, Torts*, 2d ed. 640; 2 *Jaggard, Torts*, p. 1037; *Dillon's* article in 24 Am. L. Rev. 190. The law imposes upon the master certain absolute duties, and imperatively requires that he either perform them personally, or through some representative. If he chooses to delegate such duties to one of his employees, the delegate thus becomes his personal representative, and the master is responsible for the manner in which the duties are performed. As to this absolute duty, the obligation of the representative, whatever his rank as compared with other employees, stands in the place of the master; as to all other matters, he is a fellow servant of the other employees. He thus occupies a dual relation. To the extent to which the master's absolute duties are delegated to him he is a vice principal; where engaged with others in the common employment of

the master he is a fellow servant. *Lindvall v. Woods*, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Perras v. A. Booth & Co.* 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; *Brown v. Minneapolis & St. L. R. Co.* 31 Minn. 553, 18 N. W. 834; *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L. R. A. 97, 26 Am. St. Rep. 621, 48 N. W. 222; *Wood v. New Bedford Coal Co.* 121 Mass. 252.

In this case it was the absolute duty of the railway company to use proper care to furnish its employees with a reasonably safe place to do the work of the master, and proper machinery and appliances with which to work; and, if the company had delegated the performance of this duty to the engineer, he would have been a vice principal in relation to such duties. But it is not charged that there was any failure in the discharge of such duties, as the negligence alleged is merely the improper handling of a part of the machinery in a particular instance. The swinging of a crane through the same course every time it is operated is the mere act of a workman, and not one of the absolute duties which the law imposes upon the master. It was the individual duty of the man who was placed in the position of engineer to do his work so as to avoid injury to his fellow workmen. If he failed to do this, and injury resulted thereby to another coemployee, it was the unfortunate result of the casual negligence of the fellow servant, and there can be no recovery of damages from the master.

For the purpose of this case, it must be presumed that the machinery was proper, and was being operated in a proper place. The negligence, therefore, was in the improper use by one servant of a proper instrumentality, for which the master is not liable to the servant. It was the duty of the engineer to control the operation and movements of the crane. It was the duty of the plaintiff to aid in moving and placing the track. One was as much an individual duty as the other. No orders were given, as far as the record shows, by the engineer to the plaintiff. Each was employed to do his differential share of the labor of the common employment for the accomplishment of the ultimate object of such employment.

The facts bring this case squarely within the rule as stated in *Borgerson v. Cook Stone Co.* 91 Minn. 91, 97 N. W. 734; "As to those who are engaged with others in a common employment or in the details of the work, the performance of such duties, though different in kind, requires them to be regarded as fellow servants."

The court, therefore, properly directed a verdict, and the order denying the motion for new trial is affirmed.

L.R.A. (N.S.)

NEW YORK COURT OF APPEALS.

MORTIMER FALK et al., Respts.,
v.

AMERICAN WEST INDIES TRADING
COMPANY, Appt.

(180 N. Y. 445.)

1. Trademark—assignment.

A trademark adopted to designate a brand of cigars of a particular manufacturer is not assignable separate from the good will of the business to which it was attached.

2. Same—infringement—suit by assignee.

A judgment for infringement in favor of a transferee of a trademark is not sustained by the evidence where there is nothing to show the transfer to him of anything but the naked trademark.

3. Appeal—presumption as to findings.

The court of appeals will not presume that any fact was found not embraced within the scope of the pleadings, the findings, as they appear in the record, and the proofs upon which the decision was made, for the purpose of upholding a judgment, although it was a short decision, unanimously affirmed.

4. Same—conclusion as to judgment—exception.

A general exception to a conclusion of law that plaintiff is entitled to judgment raises a question of law with respect to the right to maintain the action.

(Cullen, Ch. J., and Bartlett and Werner, JJ., dissent.)

(February 21, 1905.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in plaintiffs' favor in an action brought to enjoin infringement of a trademark and to recover damages therefor. Reversed.

The facts are stated in the opinion.

Mr. Isaac M. Aron, with Messrs. Briesen & Knauth, for appellant:

The assignment was null and void, and

Subject Note—Sale of a trademark.

I. Introduction, 705.

II. Ownership, 705.

III. Transferability.

a. Generally, 707.

b. Sales in gross, 708.

c. Of marks denoting place or product of manufacture, 710.

d. Of marks denoting personal skill, 711.

e. Of names as trademarks, 711.

f. Under special statutes, 714.

IV. Method of transfer.

a. By sale of business or article with which mark is used, 715.

b. Judicial sales, 717.

did not transfer any rights to the plaintiffs, because a trademark is not a piece of property which passes by assignment separate from the business of the owner of the mark, or of the article which it may serve to distinguish.

Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 468; Leather Cloth Co. v. American Leather Cloth Co. 11 H. L. Cas. 523; Williams v. Farrand, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446; Dixon Crucible Co. v. Guggenheim, 2 Brewst. (Pa.) 321; Witthaus v. Braun, 44 Md. 303, 22 Am. Rep. 44; Skinner v. Oakes, 10 Mo. App. 45; Weener v. Brayton, 152 Mass. 101, 8 L. R. A. 640, 25 N. E. 46; The Fair v. Jose Morales & Co. 82

Ill. App. 499; Messer v. The Fadettes, 168 Mass. 140, 37 L. R. A. 721, 60 Am. St. Rep. 371, 46 N. E. 407; Weston v. Ketcham, 51 How. Pr. 455; Cotton v. Gillard, 44 L. J. Ch. N. S. 90; Wood v. Lambert, L. R. 32 Ch. Div. 247; Paul, Trademarks, ¶ 117; Robertson v. Quiddington, 28 Beav. 529; Royal Baking Powder Co. v. Raymond, 70 Fed. 376; Atlantic Mill. Co. v. Robinson, 20 Fed. 217; Partridge v. Menck, 2 Barb. Ch. 101; Chadwick v. Covell, 151 Mass. 190, 6 L. R. A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068.

By assigning the mark which they had made valuable to indicate their manufacture, the assignors committed a constructive fraud upon the public.

Manhattan Medicine Co. v. Wood, 108 U.

V. Rights resulting from or affected by transfer.

a. Of vendor, 718.

b. Of vendee.

1. Exclusive, 719.

2. Injunction, 720.

3. Purchase of stock containing trademark, 721.

c. Of partners, 722.

d. As affected by fraud.

1. Generally, 723.

2. Notice of change of ownership, 725.

3. Immaterial inaccuracies, 726.

VI. Fraudulent sales, 727.

VII. Proof of sale, 727.

I. Introduction.

A large part of the trademark cases reported were brought into court, not by the original owners of the mark, but by purchasers, seeking relief against piracy. In many of these the right to sell the trademark is recognized, no question whatever being made of it; but it is only intended to take into this note cases in which the question of sale was actually up, in some form, or in which rights directly relating to or affected by the change of ownership were decided. A few others are included for illustrative purposes merely.

The distinction between trademarks and names, as defined in the cases, is not always easy to make out. This note, of course, does not cover sales of trade names, but a number of cases are referred to involving sales of names used like trademarks on goods or articles sent out to the trade. Indeed, many of such names are spoken of indifferently by the courts as trade names or trademarks. Hotel names are also treated of as quasi trademarks by the courts. Where cases dealing with the sale of names have been introduced, therefore, it is because they are actually called trademarks in the reports, or are so like trademarks that they might as well be considered as such.

II. Ownership.

It was once thought that a trademark

could not be owned, and that one trader might copy the mark of another, if he liked, without fear of being stopped by an injunction. But as it is now so well settled that a trademark is property, which, with some exceptions, may pass from hand to hand, like the thing it signifies, it will only be necessary to refer to a few of the authorities on the nature of the rights to these business symbols, although bearing on the question whether they may be sold.

Lord Hardwicke, in 1742, said that every trader had some particular mark or stamp: that he did not know of any instance of granting an injunction to restrain one trader from using a mark of another, and that he thought it would be of mischievous consequence to do it. Blanchard v. Hill, 2 Atk. 484.

Courts of equity, however, were soon ready to help dealers save their marks from piracy, but extended their aid solely on the ground of the fraud, and not for the protection of a property right. In Perry v. Truefitt, 6 Beav. 66, it was held that the ground for relief against infringement of a trademark was fraud, and not property in the mark. The master of the rolls said it did not seem to him that a man could acquire a property merely in a name or mark.

In Croft v. Day, 7 Beav. 84, it was also held that the right to the protection of a trademark rested upon fraud, and did not depend upon the exclusive right which one might be supposed to have in a particular name.

In another early case it was said that there was no property in a trademark, but that a person might acquire such a right in respect to it as to say that nobody else should use it. Collins Co. v. Brown, 3 Jur. N. S. 929, 3 Kay & J. 423. To the same effect is Collins Co. v. Cowen, 3 Kay & J. 428; M'Andrew v. Bassett, 10 Jur. N. S. 492.

So, in an early American case it was held that an assignee of a trademark could prevent rivals from imitating it, not because he had any property in it, but for the reason that the mark was a sign or representation importing, and so understood and

S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; Macmahon Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 468.

The error complained of is a plain error, apparent upon a perusal of the decision.

Walsh v. Washington Marine Ins. Co. 32 N. Y. 440; Pratt v. Foote, 9 N. Y. 463; Hemmingway v. Poucher, 98 N. Y. 281; Jerome v. Queen City Cycle Co. 163 N. Y. 351, 57 N. E. 485; Lake v. Art'sans' Bank, 3 Abb. App. Dec. 10.

The question whether the conclusion of law is supported by the facts found, and also whether any material finding of fact is without evidence to support it, is a question of law, open for review in this court.

Gannon v. McGuire, 160 N. Y. 476, 73

Am. St. Rep. 694, 55 N. E. 7; Shotwell v. Dixon, 163 N. Y. 43, 57 N. E. 178; National Harrow Co. v. E. Bement & Sons, 163 N. Y. 505, 57 N. E. 764.

This court is not concluded by findings of fact in the absence of evidence tending to sustain them, although none of the findings have been reversed by the general term.

Beck v. Sheldon, 48 N. Y. 365; Meacham v. Burke, 54 N. Y. 217; Putnam v. Hubbell, 42 N. Y. 106; Root v. Great Western R. Co. 45 N. Y. 527; Fellows v. Northrup, 39 N. Y. 117; Draper v. Stouvenel, 38 N. Y. 219; Aldridge v. Aldridge, 120 N. Y. 614, 24 N. E. 1022.

The user of a mark which involves an untruth will not be protected in a court of equity.

Hazard v. Caswell, 93 N. Y. 268, 45 Am.

acted upon by the public, that the article to which it was attached was the manufacture or production which was generally known in the market under that designation. Walton v. Crowley, 3 Blatchf. 440, Fed. Cas. No. 17,133.

In *Leather Cloth Co. v. American Leather Cloth Co.* 1 Hem. & M. 271, Vice Chancellor Wood took the position that there was no property in a trademark, approving *Perry v. Truefitt*, 6 Beav. 66. The judgment was reversed in 10 Jur. N. S. 81. In regard to the nature of a trademark as property, the Lord Chancellor observed that it was correct to say there was no exclusive ownership of the symbols which constituted a trademark, apart from the use or application of them. But the word "trademark" was the designation of those marks or symbols when applied to a vendible commodity, and that the exclusive right to make such use or application was rightfully called property. The true principle, therefore, he said, would seem to be that the jurisdiction of the court in the protection given to trademarks rested upon property, and that the court interfered by injunction because that was the only mode by which property of this description could be effectually protected. The earlier English cases on the point were overruled by this decision.

In *Millington v. Fox*, 3 Myl. & C. 338, it was held that an injunction would lie for the infringement of a trademark, although no fraud was shown.

And it was said in *Singer Mach. Mfg. Co. v. Wilson*, L. R. 3 App. Cas. 376, that it had been settled since the decision in the case of *Millington v. Fox*, *supra*, that the right to the protection of a trademark did not rest upon the ground of fraud.

It is now settled that the jurisdiction of the court as to trademarks is not confined to cases of fraud, but extends to property. *Wheeler v. Johnston*, Ir. L. R. 3 Eq. 284.

And in *Hall v. Barrows*, 9 Jur. N. S. 483, it was held that the jurisdiction of equity in the protection of trademarks rested upon property, and not fraud.
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In *Skinner v. Oakes*, 10 Mo. App. 45, the court, in discussing this subject, said: "The early English cases . . . in protecting trademarks proceed on the idea of fraud, and not on the idea of property. . . . But upon whatever idea the courts proceeded, as soon as their decisions established in a particular individual a right, exclusive as against the world, to use a particular label . . . whereby trade was attracted to him, that right at once became a thing of value, and hence property in a sense more strict than that in which many other incorporeal rights, such as the elective franchise or the right of presentation to a vacant benefice, have been regarded as property."

The law of trademarks is of recent origin, and may be comprehended in the proposition that a dealer has a property in his trademark. The ownership is allowed to him, that he may have the exclusive benefit of the reputation which his skill has given to articles made by him, and that no other person may be able to sell to the public, as his, that which is not his. *Clark v. Clark*, 25 Barb. 76.

The right to a trademark is derived from its appropriation and continual user, and becomes the property of those who first employ it and give it a name and reputation. *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707, Affirming 50 Hun. 230, 2 N. Y. Supp. 783.

There is no doubt that property in trademarks has been recognized for a long time by the profession and by the courts; but it has only been within a comparatively short time that its importance has come to be fully understood. *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408.

The ownership of a trademark has, in general, been considered as a right of property, and equity will protect that right from infringement; proof of fraud is not required. *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415.

In *Winsor v. Clyde*, 9 Phila. 513, it was said that property in the devices of trade and business had become as well established as property in any other matter or thing; that

Rep. 198; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820; *Alaska Packers' Assn. v. Alaska Improv. Co.* 60 Fed. 103; *American Cereal Co. v. Eli Pettijohn Cereal Co.* 72 Fed. 903.

Messrs. Wise & Lichtenstein, for respondents:

The plaintiffs' trademark of "El Falcon" was infringed by the use by defendant of the title "El Falco."

Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Sanders v. Jacob*, 20 Mo. App. 96; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. 823; *Electro-Silicon Co. v. Trask*, 59 How. Pr. 189; *Actien-Gesell-*

schaft v. Somborn, 14 Blatchf. 380, Fed. Cas. No. 496; *Schweitzer v. Atkins*, 37 L. J. Ch. N. S. 847; *Burnett v. Phalon*, 3 Keyes, 594; *Royal Baking Powder Co. v. McQuade, Price & S. Trademark Cases*, 401; *Enoch Morgan's Sons v. Edler, Cox, Manual of Trademark Cases*, 2d ed. p. 480; *Cambrick v. Morson*, L. J. Notes of Cases of 1877, p. 71; *Condit v. Glaccum*, 2 N. Y. Supreme Court, No. 28, *Trademark Record*; *Morse v. Worrell, Cox, Manual*, 2d ed. 251; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *American Grocery Co. v. Sloan*, 68 Fed. 539; *N. K. Fairbank Co. v. Central Lard Co.* 64 Fed. 133; *Gaines v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421.

The possibility of deceiving the consumer

it was based upon and controlled by the same principles to which all property was subject, and had no laws special to itself; that it was personal property, and had all the incidents thereof; that it was acquired by certain exclusive appropriation, continued use, descent, or purchase, and might be relinquished by gift, sale, or abandonment.

III. Transferability.

a. Generally.

A trademark now being considered a species of property, it may be bought and sold like other property, within limits which are defined and treated of in following subdivisions of this note.

The right to a trademark may, in general, treating it as property or as an accessory of property, be sold and transferred on the sale and transfer of the manufactory of the goods to which the mark has been affixed, and may be lawfully used by the purchaser, *Leather Cloth Co. v. American Leather Cloth Co.* 35 L. J. Ch. N. S. 53, 11 H. L. Cas. 523, 13 Week. Rep. 873, 4 De G. J. & S. 137.

Upon the dissolution of a partnership, the good will and the trademark belonging to the business, and not personal in character, should form a part of the valuation, where it was provided that the surviving partner might purchase the business. *Hall v. Barrows*, 9 Jur. N. S. 483.

A trademark may be bought and sold in connection with the article produced, like other property. *Morgan v. Rogers*, 19 Fed. 596.

In *Warren v. Warren Thread Co.* 134 Mass. 247, it is said that whatever may be the law as to a trademark which is strictly personal, it is the settled law that the right to use a trademark in connection with the business in which it has been employed is property, which will be protected by the courts, and which may be sold and transferred.

So *Skinner v. Oakes*, 10 Mo. App. 45, held that it is settled law that the right to use 1 L.R.A. (N.S.)

a trademark is not a mere personal privilege, but that, within certain limits, it is capable of being bought and sold as other property.

In *Sohl v. Geisendorf, Wilson Super. Ct. (Ind.)* 60, it was held that part of a trademark might be purchased, so that a party buying part of the mark, and adopting the balance, would be protected against infringement. The court stated that the authorities establish the proposition that a trademark may be devised and adopted by a party himself, or that he may acquire it by purchase from his predecessor; and that the courts would go as far to protect such a trademark as if the party devised and adopted it.

In *Lockwood v. Bostwick*, 2 Daly, 521, it was held that the title which a company had to the trademark "Boviline" passed to an assignee. The court said there was right of property in a trademark, which was capable of being transferred to another.

A trademark is a species of property which may be sold with the business in which it has been used. *Huwer v. Dannenhoffer*, 82 N. Y. 499.

Hazard v. Caswell, 93 N. Y. 259, 45 Am. Rep. 198, states that it seems to be clearly settled that a partnership trademark is an asset of the firm, salable on dissolution like any other asset.

A trademark can be owned, transferred, and sold like other species of property. *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707, *Affirming* 50 Hun, 230, 2 N. Y. Supp. 783.

Upon the dissolution of a partnership which has acquired proprietorship of a trademark, the mark must be sold and its proceeds distributed like other firm assets; and if not so disposed of, it remains the property of the individual members of the dissolved firm. *Ibid.*

A partner does not lose the right to sell his own trademark because he has permitted the partnership to use it. *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769.

In *Cleveland Stone Co. v. Wallace*, 52 Fed. 431, it was held that the use of certain

warrants the interposition of a court of equity.

Kerley, Trademarks, p. 187; Sebastian, Trademarks, pp. 145-242; Von Mumm v. Frash, 56 Fed. 830; LePage Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841.

Innocence of intent on the part of defendant is no defense.

Browne, Trademarks, 2d ed. p. 474; Coats v. Holbrook, 2 Sandf. Ch. 586; Dale v. Smithson, 12 Abb. Pr. 237; Amoskeag Mfg. Co. v. Garner, 4 Am. L. T. N. S. 176; Colman v. Crump, 70 N. Y. 573; Paul, Trademarks, § 196, p. 346.

The defendant's manager, Gregorio Lopez y Falco, could not confer any authority

upon the defendant to use part of his name in such a way as would perpetrate a fraud upon the plaintiffs.

Walter Baker & Co. v. Baker, 77 Fed. 181; Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; Allegretti Chocolate Cream Co. v. Keller, 85 Fed. 643; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 463, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Hopkins, Unfair Trade, 106.

As no exceptions were filed to the final judgment of the court at special term or to the decision of the justice affirming the report of the referee on the accounting for damages herein, the record herein presents no question for review on the part of the court of appeals.

Doremus v. Doremus, 76 Hun, 337, 27

trademarks in common by two companies, operating under a pool arrangement, and the subsequent use of the marks under a second pool agreement with others, did not prevent the companies, on selling out their business, from passing to the purchaser the exclusive right to use the trademarks.

In Johnson v. Schenck, 1 Ohio L. J. 374, Fed. Cas. No. 7,412, it appeared that the owner of a distillery sold his plant, and at the same time "extended the right to the use" of certain trademarks to the purchaser. For some time prior to the sale the vendor had permitted a firm of which he was a member to use them. It was held that the contention that the trademark had become the property of the firm, and that the former owner was without power to transfer it individually, was not available, it appearing that the partnership had consented to the transfer.

But a mortgagor cannot sell the right to his trademarks and to make and sell his medicinal compounds after a mortgagee has taken possession under a mortgage covering the entire stock, assets, and effects of the mortgagor's business, although the trademarks are not mentioned. Morgan v. Rogers, 19 Fed. 596.

b. Sales in gross.

The decision in FALK v. AMERICAN WEST INDIES TRADING CO., that a trademark cannot be sold by itself, is in harmony with all of the authorities. Apart from the thing the mark stands for, it is of no value. As it has been well put,—the shadow cannot be separated from the substance. This the courts have always held whenever the question has been up.

In Hall v. Barrows, 10 Jur. N. S. 55, the Lord Chancellor, in deciding that a trademark belonging to a partnership could be sold with the partnership business, stated that he did not want it understood, by what he had said, that the business might be sold in one lot, and that the right to use the trademark might be sold as a separate lot, and that one lot might be sold and 1 L.R.A. (N.S.)

transferred to one person and the other lot sold and transferred to another.

In Corwin v. Daly, 7 Bosw. 222, it was said by Robertson, J., that it was doubtful if the right of using a mere trademark by itself could be transferred like a copyright.

In Cotton v. Gillard, 44 L. J. Ch. N. S. 90, it was held that a trademark which had been employed in connection with the sale of a certain sauce could not be bought from an assignee not having the receipt for making the sauce, so as to give the purchaser the right to use it on another sauce.

A trademark cannot be sold as an abstract thing, apart from the business in which it is used. McVeagh v. Valencia Cigar Factory, 32 Pat. Off. Gaz. 1124. The court said that the question seemed to be free from all doubt; that no case could be found which supported the proposition that a bare trademark, aside from the property with which it was used, could be assigned and sold and a good title given to it; that the philosophy underlying the history of the law in connection with trademarks, and the final absolute recognition of trademark property, forbade the conclusion that anything of that kind could obtain.

In Royal Baking Powder Co. v. Raymond, 70 Fed. 376, Affirmed in 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231, the court even went so far as to say that a trademark could not exist apart from the good will, so that the original owner might himself cease to have the right to use it if the good will of the business had ceased to be of any value.

But where the seller undertakes to transfer the trademark alone, but the purchaser in fact takes the business, and develops it, and does no wrong to his vendor, he has a right to use the mark, sufficient to stop its infringement by a third person. Ibid.

The right to the exclusive use of a word or symbol as a trademark is inseparable from the right to make or sell the commodity which the mark has been appropriated to designate. Atlantic Mill. Co. v. Robinson, 20 Fed. 217.

In R. Heinisch's Sons Co. v. Boker, 86

N. Y. Supp. 1039; Atty. Gen. v. Continental L. Ins. Co. 64 How. Pr. 93; Re Buffalo Ice Co. 37 App. Div. 144, 55 N. Y. Supp. 783.

The courts below committed no error in assuming that plaintiffs had obtained a valid title to the "El Falcon" trademark.

Browne, Trademarks, 2d ed. p. 61; Paul, Trademarks, p. 162; Huwer v. Dannenhoffer, 82 N. Y. 499.

O'Brien, J., delivered the opinion of the court:

The plaintiffs have recovered a judgment against the defendant, enjoining it from the use of a trademark claimed to be their property, and for damages in the sum of \$10,000 for infringement and the wrongful use by the defendant of the trademark in question. It appears from the pleadings

Fed. 765, where the real purpose of a contract appeared to be nothing more than the sale of a person's name as a trademark, and it did not appear that the seller put any money into the business, or undertook any supervision of it, or exercised any skill in the manufacture of the goods with which it was used, it was held that the purchaser could not use the name to the injury of another, who had previously bought the right to use it, together with the business of which it was a part.

There is no such right of property in a trademark alone as to enable its owner to sell it, and clothe the purchaser with the exclusive right to its use at another place and in another business of the same character, but having no connection with the business in which the mark was first employed. *Bulte v. Igleheart Bros.* 137 Fed. 492.

A trademark cannot be conveyed in gross by independent transfer, without also conveying the business to which it attaches. *The Fair v. Jose Morales & Co.* 82 Ill. App. 499.

The mere sale of a trademark, apart from the article to which it is affixed, confers no right of ownership, because no one can claim to sell his goods as goods manufactured by another. *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

In *Chadwick v. Covell*, 151 Mass. 190, 6 L. R. A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068, the court, in holding that the donee of a trademark in gross could not stop another person from using it, said that the plaintiff could not prevail unless it should be held that a trademark might be erected into a new species of property, capable of lasting as long as the world did and certain goods were manufactured, and of being transferred for value or by gift from person to person, irrespective of good will, special right to make the goods, place of manufacture, or fraud upon the public.

In *Covell v. Chadwick*, 153 Mass. 263, 25 Am. St. Rep. 625, 26 N. E. 856, it was held that the vendee of patent medicine formulas and trademarks could not prevent the sale of the medicines and use of the marks by 1 L.R.A. (N.S.)

and findings of the trial court that about the year 1871 a partnership firm known as Lichtenstein Bros. & Co. engaged in the manufacture and sale of cigars, adopted and made use of the words "El Falcon" as a trademark to designate a particular brand of cigars. This firm afterwards, and about the year 1886, was merged in a corporation of the same name, which took over the assets of the firm and succeeded to the good will of the business. The corporation continued in the business of manufacturing and selling cigars, and in the use of the trademark, until the 31st of October, 1898, when it went out of business. On that day it executed and delivered to the plaintiffs an instrument in writing which purported to assign and set over to them the trademark in question, with the labels and devices that had been

the donee of the same. So far as it appeared, the court said, the business in which the trademarks were used by the owner of them had been wound up several years before the plaintiff acquired his title, and the plaintiff did not buy a business or anything else which carried with it property in a trademark.

Williams v. Farrand, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446, states that courts have uniformly held that a trademark has no separate existence; that there is no property in words, as detached from the thing to which they are applied.

In order that a trademark may be obtained from him who first has it, the right either to make or sell the merchandise to which the mark has been attached must also pass. *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82, Reversing 57 Barb. 526.

There is no such thing as a trademark in "gross," to use that term by analogy. It must be "appendant" to some particular business, in which it is actually used upon or in regard to specific articles. *Weston v. Ketcham*, 51 How. Pr. 455.

In *Baldwin v. Von Micheroux*, 5 Misc. 386, 25 N. Y. Supp. 857, it was held that trademarks which went with certain secret compounds could not be sold in gross. The court said that they would not only be useless to a purchaser, but could not constitute property in themselves, or separated from the manufactured articles with which they were connected. To sell the secret process would be to destroy the business at once; and to permit the trademarks to be used in connection with any other substance would be to perpetrate a fraud upon the public. They were only valuable to the owners as affixed to goods manufactured by such process, and the exclusive right to them existed for that reason alone; therefore they could not be sold as mere names or devices or symbols. The decision was affirmed in 83 Hun, 43, 31 N. Y. Supp. 696.

A trademark cannot be assigned in gross, nor can it be used, except in connection with the manufacture or sale of the article it

used with the same. The plaintiffs thereupon, assuming to have succeeded to all the rights of their assignor, continued the use of the trademark at their manufactory at Key West, in Florida. The defendant is a New Jersey corporation, but engaged in the manufacture and sale of cigars at Caguas, Porto Rico, with an office in New York. It appears that the manager of the corporation at that place, whose name is Gregorio Lopez y Falco, adopted his own name as a trademark for a brand of cigars that are now known in the trade as "El Falco." There is no similarity at all between the labels on the two trademarks, but there is a similarity in the names. No fraud, however, is alleged or claimed, and no fraud or intent to deceive the public was found by

the learned trial court. The judgment in this case is to the effect that the trademark so adopted by the defendant is an infringement upon the rights of the plaintiffs, and hence the injunction and award of damages.

The controlling question in this case is with respect to the plaintiffs' title, or exclusive right to the use of the trademark, for an infringement of which they procured the injunction and recovered the damages. It does not appear, and it is not claimed, that anything was assigned to the plaintiffs except the naked right to use the trademarks and labels. No business or good will was transferred to the plaintiffs by the instrument, and they did not succeed, by operation of law or otherwise, to the business

has served to identify. *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 20 N. Y. Supp. 462. "It may be stated as a general principle," said the court, "that the trademark cannot be severed from the good will. . . . While the property right may pass by assignment or operation of law, it must be to one who takes, at the same time, the right to manufacture or sell the particular merchandise to which the trademark has been attached."

In *Wiltberger v. Walker*, 8 Ohio Dec. Reprint, 588, it was said by Force, J., in reference to how far a name used as a trademark might be transferred, that one thing was clear: That a manufacturer could not transfer to another the right to use his name as a trademark without transferring the business too; that Thomas Brown, if engaged in the business of making blankets called Thomas Brown blankets, could not continue the making of the Thomas Brown blanket in his own place, and at the same time sell to somebody else, in some other place, the right to apply that term to blankets which he might be manufacturing there; but that if he transferred his entire business and good will to a successor, especially to a successor who continued the business in the same place, the exclusive right to use the trademark passed with the business to such successor.

Property in a trademark as a mere abstract right, having no reference to any particular person or thing, cannot exist, and so cannot pass by assignment. *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321, 7 Phila. 408.

Property in a trademark cannot be acquired or retained independently of the article which it symbolizes. *Gear v. Kenyon*, 10 Haw. 162.

A trademark is assignable only in connection with the good will of the business, generally or specifically, in which it has been used. *Gegg v. Bassett*, 3 Ont. L. Rep. 263.

But the good will of a business and trademarks, which are incidents of the business, and not of the place of business or plant, with the right to use the latter in the manu-

facture or sale, as the case may be, of the merchandise to which they have been attached, may be sold separately from the plant or property, and also from the book debts. *Tennant v. Dunlop*, 97 Va. 235, 33 S. E. 620.

c. Of marks denoting place or product of manufacture.

In what follows in this note, it may be assumed, if a sale of a trademark alone is mentioned, that a sale in gross is not meant.

If a trademark simply stands for the product of a particular business, or indicates that the article to which it is attached is made in or comes from a certain locality, it may be bought and sold. It is only where the use of the mark by the purchaser would amount to a fraud or deception upon the public, as in the case of sales in gross, that it is not allowed to pass from hand to hand, when sold with the business or thing with which it goes.

Trademarks are commonly of one or the other of two descriptions: Either they denote the spot where certain articles are manufactured, or they denote the person by whom they are manufactured. There is a distinction with reference to the right to sell and transfer trademarks, between the marks which denote the place where the goods are manufactured, and nothing more, and those which denote the person who manufactured them, and nothing more. The mark or brand which denotes goods manufactured at a particular place may be sold with the works themselves, and the mark would be, as it were, attached to the spot, to denote where it was first adopted, and which might possess peculiar local advantages for the manufacture of the article. *Hall v. Barrows*, 9 Jur. N. S. 483.

The owner of a trademark used with the products of a distillery located in a certain place may lawfully transfer the right to use the mark, upon the sale of the distillery and business. *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769.

In *Petrolia Mfg. Co. v. Bell & B. Soap Co.* 97 Fed. 781, it was held that the inven-

in which the trademark had been used and to which it was attached. They were simply authorized to use the trademark in their own business, established at another place. The use of the trademark by the plaintiffs denoted to the public that they were making and selling the Lichtenstien cigar, and that it was not applied to a cigar manufactured by other parties at any other place. The question is whether, under these circumstances, the plaintiffs had any right to maintain this action. A trademark is not a piece of property that passes from hand to hand by assignment, separate from the business of the owner of the trademark, or of the article which it may serve to distinguish. Generally, it passes only with the business and good will of which it is an

inseparable part. The rule in this respect is well stated in a recent work of great merit on that branch of the law with which we are now concerned: "As a mere abstract right, having no reference to any particular person or property, a trademark cannot pass by assignment or descend to a man's legal representatives. The reason for this is that, as an abstract right, apart from the business in which it is used, a trademark has no existence. To permit a trademark to be transferred apart from the business in which it is used would be productive of fraud upon the public. . . . The mere sale of a trademark apart from the article to which it is affixed confers no right of ownership, because no one can claim the right to sell his goods as goods manufac-

tured of the trademark "Coal Oil Johnny Soap" could sell it to a corporation formed for the purpose of manufacturing and dealing in the soap.

And in *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278, it was held that the right to use the words "No. 10" in connection with a business passed to the purchaser from the executors of the former owner. Reversing 6 Lans. 158.

A trademark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment. *Dant v. Head*, 90 Ky. 255, 29 Am. St. Rep. 369, 13 S. W. 1073.

J. G. Mattingly Co. v. Mattingly, 96 Ky. 430, 27 S. W. 985, states that the fact that a trademark or trade name affixed to an article manufactured at a particular place may be lawfully sold and transferred with the establishment is no longer an open question in Kentucky. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by the original designer.

When a trademark designates the place where and the person by whom the goods are made, the right to such mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

The trademarks used to distinguish and specially denote the product or manufacture of an established business are property, subject to sale. *Wilmer v. Thomas*, 74 Md. 485, 13 L. R. A. 380, 22 Atl. 403.

The owner of a trademark not personal in character cannot restrain his assignee in insolvency from selling it. *Warren v. Warren Thead Co.* 134 Mass. 247.

d. Of marks denoting personal skill.

But if a trademark stands for the honesty, reputation, or skill of its owner, it cannot be sold. All the cases so hold. 1 L.R.A. (N.S.)

If a trademark is a personal one, designating a particular person and his reputation or skill, it cannot truthfully be used by any other person, and consequently cannot be assigned. *Mayer v. Flanagan*, 12 Tex. Civ. App. 405, 34 S. W. 785.

Where the reputation of the goods and of the name has grown out of the excellence of manufacture, depending on the honesty and skill of the maker, it is more difficult to hold that a trademark can be sold to a stranger, or that it is generally assignable. *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481; *Coddington*, Trademarks, 51.

In *Messer v. The Fadettes*, 168 Mass., 140, 37 L. R. A. 721, 60 Am. St. Rep. 371, 46 N. E. 407, it was held that the trademark of an orchestra, depending for its value upon the personal skill of the organizer and leader of the organization, could not be sold and assigned.

e. Of names as trademarks.

A trademark bearing the name of a person may be sold if it has become a mere sign of quality, and has ceased to mean that any particular person is the maker of the article with which it goes. In other words, it is the same old question as to whether its use by the purchaser would deceive consumers. It is harder to answer in the case of the employment of personal names as trademarks, because of the difficulty in determining when they have ceased to be personal. Other names used as trademarks go by the same rule.

How far a trademark is capable of sale if it bears the name of a person is hard to say. "We think that the answer to this question," says the court in *Skinner v. Oakes*, 10 Mo. App. 45, "depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by

tured by another." Paul, Trademarks, §§ 116, 117, 144. The learned author, in the notes to the three sections referred to, has collected the leading cases on the subject, and it will be seen, upon an examination of those authorities, that they amply support the propositions contained in the text. Some of the cases thus referred to, and in which the principle was discussed, are the following: *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Macmahon Pharmacal Co. v. Denver Chemical Mfg. Co.* 51 C. C. A. 302, 113 Fed. 468; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 523, 534, 544; *Williams v. Farrand*, 88 Mich. 473, 480, 14 L. R. A. 161, 50 N. W. 446; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321, 339; *Witthaus v. Braun*, 44 Md.

303, 22 Am. Rep. 44; *Skipper v. Oakes*, 10 Mo. App. 45, 59; *Weener v. Brayton*, 152 Mass. 101, 103, 8 L. R. A. 640, 25 N. E. 46; *The Fair v. Jose Morales, & Co.* 82 Ill. App. 499; *Messer v. The Fadettes*, 168 Mass. 140, 37 L. R. A. 721, 60 Am. St. Rep. 371, 46 N. E. 407; *Weston v. Ketcham*, 51 How. Pr. 455; *Cotton v. Gillard*, 44 L. J. Ch. N. S. 90; *Wood v. Lambert*, L. R. 32 Ch. Div. 247.

There is no allegation, proof, or finding in this case that the plaintiffs, upon the execution of the writing referred to, or at any other time, succeeded in any way to the business of the assignor or any part of it, or to the good will to which, up to that time, the trademark had been attached. It was, as already suggested, simply a written transfer of the naked trade-

the courts; for to do so would be to protect the perpetration of a fraud upon the public. Thus, if an author were to assign to another the privilege of publishing books with his name upon their title-page, or if a painter were to sell to another the privilege of placing the former's signature on pictures painted by the latter, it cannot for a moment be supposed that any court would protect such a supposed right, even as against the original assignor. This point is absolutely clear, both upon principle and authority."

In *Hall v. Barrows*, 9 Jur. N. S. 483, it was held that a trademark, although originally bearing the name of the first maker of the goods to which it was attached, might, in time, become a mere trademark or sign of quality, and cease to denote or to be current as indicating that any particular person was the maker. In such a case the trademark might be sold with the business in which it was used.

In *Bury v. Bedford*, 10 Jur. N. S. 503, it was held that a trademark bearing the initials of a former owner had, by being used by a partnership of which he was a member, become so impersonal in character as to be capable of assignment. The court said that whether a trademark was transferable depended much upon the nature of the mark and the mode in which it had been used; that it was evident that a mark, although it might in some respects indicate the person by whom the goods had been manufactured, might refer more closely to the place of manufacture than to the person of the manufacturer; and that it was not less evident that a mark, although personal in its inception, might, from the mode in which it had been used, become appropriated to goods manufactured at a particular works.

The exclusive right to use a name as the distinctive part of a trademark may be sold, together with the right to manufacture and sell the article to which it is attached, and which is made according to the original formula. *Filkins v. Blackman*, 13 Blatchf. 440, Fed. Cas. No. 4786.

In *Oakes v. Tonsmierre*, 4 Woods, 547, 49 Fed. 447, it was held that a trademark bear-

ing the name of one partner in a candy business might be sold, where the name was used merely because easy to pronounce and remember, and not to indicate that candies were made under the supervision of that member of the firm.

A man may so sell the right to use his name as a trademark as to take from himself the right to use it on articles of his own manufacture. *Probasco v. Bouyon*, 1 Mo. App. 241.

A manufacturer who has sold an article of his make in such a way as to identify it with a trademark bearing his name may sell such mark, and conclude himself from its future use. *Frazer v. Frazer Lubricator Co.* 15 Ill. App. 450, Affirmed in 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639.

In *Mattingly v. Stone*, 12 Ky. L. Rep. 72, 12 S. W. 467, 14 S. W. 47, in an action to recover a balance on the contract, it was assumed that a vendor could sell the use of his name as a brand for whisky to a corporation for a certain amount of stock and a royalty, or in consideration of the transfer of certain distilleries, one of which he was to manage at a stated compensation.

A trademark bearing the name and initials of its owner may be sold by him so as to prevent him from using them to the harm of the purchaser, whatever may be the rights of the purchaser as against third parties not affected by the contract. *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

It was said in *Sohier v. Johnson*, 111 Mass. 238, that a trademark consisting of a firm name was a valuable property, which could be disposed of in connection with the business.

A trademark made up of the initials of the owner, and used with cigars manufactured for him by another, is subject to sale. *Frank v. Sleeper*, 150 Mass. 583, 23 N. E. 213.

One who has carried on a business under a trade name, and sold a particular article in such a manner, by the use of his name as a trademark or trade name, as to cause the business or article to become known or established in form under such name, may

mark and labels, detached from the business in which it had been theretofore used, and, when used by the plaintiffs, no longer denoted or distinguished the article or business to which it had been attached. We do not say that the principle above suggested would apply to an assignment of all trademarks made in a similar way. There are doubtless some trademarks that consist of words that identify an article produced by some secret process, and without the use of which the article could not be described. In other words, the name used may be inherent in the article itself, and is not used, as in this case, to distinguish one cigar from another. The celebrated cordial, which is in use the world over, known as "Chartreuse," is a sample of a trademark,

sell or assign such trade name or trademark when he sells the business or manufacture, and, by such sale or assignment, conclude himself from the further use of it in a similar way. *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304.

It is in accordance with the principles of law, and with justice to the community, that any trademark including a surname may be sold with the business or the establishment to which it is incident; because, while it may be that individual efforts give it its value at the outset, yet, afterwards, this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforth depends less on the individual efforts of the originator than on the combined result of all which he created. *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

In *Noera v. H. A. Williams Mfg Co.* 158 Mass. 110, 32 N. E. 1037, it was held that a trademark consisting of the surname of one of the members of a partnership could be sold, and that the buyer could have a bill in equity to stop its infringement.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 402, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490, states that it is well settled that the exclusive right in a name in which a business has been carried on, which is in the nature of a right to a trademark, may be sold or assigned.

In *Burkhardt v. A. E. Burkhardt Fur & Hat Co.* 4 Ohio N. P. 358, it was held that a trademark bearing the name of its originator passed to the purchaser of a hat and fur business, at both private and judicial sale.

The name of a person is, for certain purposes, of commercial value. If he estimates that value by dollars, and sells it to be used as a trademark, to the extent and for the purposes for which he sells it, he has no right to use it. *Aver v. Hall*, 3 Brewst. (Pa.) 509, 8 Phila. 231.

In *Pittsburgh Brass Co. v. Adler*, 2 Monaghan (Pa.) 235, it was held that the pur-
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the bare assignment of which might confer upon the assignee the right to manufacture and sell that article. Other examples might be cited that would not come within the rule above suggested, but in the case at bar the trademark was originally adopted by the Lichensteins to distinguish a cigar manufactured by themselves. The trademark in their hands represented their own article, their own skill and business experience. When used by the plaintiffs in their business it does not truly denote anything of the kind, and the plaintiffs' claim really is that they have acquired the right to sell their own goods as the goods of someone else.

We do not, upon this appeal, assume to deal with any of the proceedings, which ap-

chaser of all of the interest of an inventor in his patents for a metal fender obtained, as against him, the sole right to use the seller's name as a trademark in connection with metal fenders.

But an assignee in bankruptcy cannot sell a trademark bearing the name of the bankrupt as its distinguishing feature, as the right of a man to use his own knowledge and name cannot be taken from him in any judicial proceeding whatever. *Helmhold v. Helmhold Mfg. Co.* 53 How. Pr. 453. It was said, however, in the same case, that a man might, by voluntary sale, transfer the right to such a use of his name.

The fact that a registered trademark bears the name and portrait of its original owner does not make it unassignable to a corporation which buys the right to make and sell a medicine in connection with which the mark is used. *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293, 40 L. ed. 155, 16 Sup. Ct. Rep. 30.

A trademark made up of the words "Samaritan Nervine" and "New Style," and bearing the name of the inventor of a medicine, may be sold by him. *Ibid.*

A retiring partner may sell out his interest in a trademark made up of the words "Twin Brothers Yeast," and bearing the portraits of the original owners of the business and mark. *Burton v. Stratton*, 12 Fed. 696.

In *Julian v. Hoosier Drill Co.* 78 Ind. 408, it was held that the trademark "Hoosier" could be sold in connection with certain patented rights and the right to make and sell certain drills.

And in *Wiltberger v. Walker*, 8 Ohio Dec. Reprint, 588, it was held that the trademark "Barlow's Indigo Blue" was assignable.

And in *Fulton v. Sellers*, 4 Brewst. (Pa.) 42, it was held that upon the sale of all the vendor's interest in an article known as "J. M. Lindsay's Improved Blood Searcher," together with the right to use his name and all his interests so far as necessary to the successful and perfect preparation of the article for the market, whatever property the vendor had in the name which

pear at great length in the record, and resulted in the ascertainment of damages as upon an accounting. The proofs on that branch of the case were taken before a referee, upon whose report the court finally acted. The only question with which we are concerned upon this appeal is the question which was raised upon the trial of the issues made by the pleadings before the court. That trial resulted in a decision which contains findings of fact and conclusions of law in the short form. The conclusion of law, which was to the effect that the plaintiffs were entitled to judgment, was excepted to by the defendant's counsel. This exception raises the question in this court whether the conclusion of law upon which the judgment is based is sustained by the findings of fact, and, since it does not appear from the findings that there was a transfer to the plaintiffs of anything but the naked trademark, these facts do not sustain the judgment. The complaint

does not state that anything was transferred to the plaintiffs except the naked trademark. The findings are no broader than the complaint, and the proofs in the case, including the written assignment, are entirely silent on that point. Hence, although this was a short decision, unanimously affirmed, we cannot presume that any fact was found not embraced within the scope of the pleadings, the findings as they appear in the record, and the proofs upon which the decision was made. So the general exception raises the question of law with respect to the plaintiffs' right to maintain the action.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Gray, Haight, and Vann, JJ., concur. Cullen, Ch. J., and Bartlett and Werner, JJ., dissent.

was used as a trademark passed to the vendee.

And the right to sell the name "Rogers Bros." as part of a trademark is recognized in *International Silver Co. v. Simeon L. & George H. Rogers Co.* 110 Fed. 956.

And in *McLean v. Fleming*, 96 U. S. 250, 24 L. ed. 830, the right to sell a trademark containing the words "Dr. McLean's Universal Pills" was impliedly recognized. The plaintiff, who had become possessed of the trademark through various purchases, was held entitled to an injunction against an infringer. The question whether the mark was transferable, however, was not directly raised.

In an unreported case it appeared that the proprietor of a hotel known as "Woods Hotel" sold it and the right to use the name. While in the hands of the purchaser, the hotel burned down, and the original owner bought back the right to use the name, and set up the hotel in another place. It was held that the trademark was assignable, or, at least, that it could be assigned for the purpose of being used on the premises where it had previously been employed; that whatever value there was in the trademark was the plaintiff's property. *Woods v. Sands*, Coddington. Trademarks, 51.

f. Under special statutes.

What statutes there are upon the transferability of a trademark provide that a registered mark may be assigned. Some of the statutes limit the assignability somewhat, as will appear in what follows on this point. Registration of the assignment is also provided for, but does not seem to be vital to change of ownership.

In England a trademark, when registered, may be assigned and transmitted only in connection with the good will of the business. *L.R.A. (N.S.)*

ness concerned in the particular goods or classes of goods for which it has been registered, and is determinable with that good will. § 70. of the patents, designs, and trademark act of 1883.

Under this act, it would seem that the seller of the good will and the business of manufacturing antifriction metal could not pass to the purchaser the right to use a trademark registered in connection with the manufacture and sale of antifriction metal bearings; but it was held that where the seller of the metal had been engaged, indirectly, through an agent, in the business of marketing the metal bearings, the right to use the trademark could be transferred. *Re Magnolia Metal Co.* [1897] 2 Ch. 371.

Where a trademark was registered under § 70 of the trademark act of 1883 in the name of an agent instead of the owner, it was held that it might be assigned to the owner, as this would be an assignment in connection with the good will, within the meaning of the act. It was said by the court that it would be too narrow a construction of the section to read it as if the assignment of the trademarks must be contemporaneous with the assignment of the good will. It was held that an assignment could be made without the good will, because the good will of the business had always been vested in the person applying for relief. *Re Wellcome*, L. R. 32 Ch. Div. 213.

In *Re Farina*, 44 L. T. N. S. 99, where a trademark was registered, by mistake, in the name of the senior member of a firm as sole proprietor, it was suggested by the master of the rolls that, after the death of the senior member, the good will belonging to the firm, an administrator should be appointed in order that an assignment of the trademark might be made to the firm.

Under the trademark act of 1875, which contained a similar provision in relation to the assignment of a trademark, it was

held that where the manager of a firm had wrongfully registered a trademark in his own name, the entry would be expunged from the register, leaving the firm to make a new application in the usual way, to register their trademark. The master of the rolls said that he could not direct the assignment of the mark without the assignment of the good will of the business. *Ex parte Lawrence*, 44 L. T. N. S. 98.

By § 66 of the English trademark act of 1883, a series of trademarks is assignable and transferable only as a whole.

In California any person may secure the exclusive right to the use of a trademark or name by filing with the secretary of state his claim to the same, and otherwise complying with § 3197 of the Political Code; and when the claimant has thus secured a trademark or name, he may transfer the same and the right to the exclusive use thereof to another, and the property right so transferred will be protected from infringement by injunction. Pol. Code, § 3199. *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362.

Section 655 of the Civil Code of California, § 3267 of the Code of North Dakota, and § 183 of the Civil Code of South Dakota, all provide that there may be property in a trademark.

Section 4902 of the General Statutes of Connecticut provides that the exclusive right to a registered trademark shall be assignable, but that all assignments shall be good only against the assignor and his personal representatives, until lodged for record in the office of the secretary of state. Maine has a similar provision. Gen. Laws, chap. 40, § 24.

In *Smith v. Fair*, 14 Ont. Rep. 729, where an assignee of a trademark of an American firm had it registered in Canada, it was urged that the assignment was of no effect, as there could not be a trademark in gross, and that it could not be assigned independently of the good will. The court pointed out that there was no provision in the Canadian act of 1879, 42 Vict. chap. 22 (D) like that of § 70 of the English act of 1883, providing that a registered trademark could only be assigned and transmitted in connection with the good will of the business concerned in the particular case for which it had been registered; and that the Canadian statute provided, generally, that every registered trademark should be assignable in law, and that an assignment might be registered, but that there was no mention of the good will. "It may readily be granted," said the court, "that it cannot exist in gross, not attached to specific articles, and that by a sale of the good will of a business a trademark would pass."

It was held that as the trademark had been used extensively by the former owners, it was no longer in gross, but was attached to their manufactures, which they might at any moment import into Canada, and that the assignment of the right to use the mark in Canada was, in truth, assignment of the good will of the Canadian trade.

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In *White v. Schlect*, 14 Phila. 88, a special injunction was dissolved on the ground that the only claim to title made by the complainant was an assignment of a registered trademark under an unconstitutional law.

IV. Method of transfer.

a. By sale of business or article with which mark is used.

As a usual thing the title to an assignable trademark will pass without express mention to the purchaser of the business in which it is used, or with the right to make and market the thing to which it is affixed. This is especially so if the good will of the business is included in the bill of sale, or if it is the plain intention to transfer title to the mark. So one partner buying out another will get the firm trademarks by operation of law. If a trademark denotes that an article is produced at a particular place, it may pass upon the sale of real estate, without mention of the business or good will. It has been held, however, that the mere sale of a business and its assets will not pass the exclusive right to a trademark bearing a personal name. The other cases mentioned under this head, in which it was held that the trademarks did not pass by operation of law, do not in any way shake the authority of the general rule.

It was held in *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408, that the true rule to be deduced from the cases would appear to be this: That the property or right to a trademark may pass, upon an assignment or by operation of law, to anyone who takes at the same time the right to manufacture or sell the particular merchandise to which the mark has been attached.

In *Thompson v. Mackinnon*, 21 Lower Can. Jur. 335, it was held that on the sale of the business of a biscuit maker, with the good will and all advantages pertaining to the name and business, the exclusive title to the business trademark passed to the buyer, although not expressly mentioned. The court said that all of the authorities—French, English, and American—agreed that, where a business was sold, the entire good will and right to use a trademark passed to the purchaser, without any express mention being made of them in the deed of assignment.

In *Shipwright v. Clements*, 19 Week. Rep. 599, it was held that, one partner buying out another's interest in a perfumery business obtained title to the trademark "Zingari Bouquet" as against the seller, although there was no mention of the good will or trademark. The court said that, in the sale of a business, a trademark passed, whether specifically mentioned or not.

The sale by one partner to another of all the former's interest in the business includes the right to the exclusive use of a firm trademark. *Blackwell v. Dibrell*, 3 Hughes, 151, Fed. Cas. No. 1,475.

The right to use a trademark consisting merely of the name of a famous distillery, and indicating that a favorite brand of whisky was made there, will pass to the purchaser of the distillery upon a sale in bankruptcy, so that the name may be used in connection with whisky produced at the same place. *Pepper v. Labrot*, 8 Fed. 29.

In *Martha Washington Creamery Buttered Flour Co. v. Martien*, 37 Fed. 797, it was held that the purchaser of machinery from its inventor for the purpose of making a certain brand of flour had the right to sell the flour under the trademark adopted by such inventor. It was held that the privilege extended to everyone who acquired the right to make and sell the flour covered by the invention.

In *Atlantic Mill. Co. v. Robinson*, 20 Fed. 217, it was held that the right to use the trademark "Champion," designating the flour of a certain mill, passed to successive purchasers of the mill property and business as an accessory thereof, without any agreement respecting the trademark.

In *Batcheller v. Thomson*, 86 Fed. 630, it appeared that a trademark bearing the name of an English manufacturer had been used for a number of years in the United States, where it had come to signify the goods of a New York firm of which the English manufacturer was a member. The same trademark was used in England by the owners in the sale of his goods there, but it was not clear in which country it had first been used. It was held that, upon the sale of the New York business, the right to use the trademark in the United States passed with it, even as against the English manufacturer. The case was reversed in 35 C. C. A. 532, 93 Fed. 660, but on the ground that the evidence showed the trademark to have originated abroad, and that the New York firm never had anything more than a license to use it.

Where it is the plain intention in the sale of a business to a corporation, to pass title to the trademark, equitable relief against infringement by a third party will not be refused because no formal transfer was made of the right. *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. 556.

The transfer of the property and effects of a business carries with it the exclusive right to use such trademarks or trade names as have been used in the business. A corporation organized to carry on the business of a partnership, and composed of the same persons, acquires, with the transfer of the business, the right to the use of a trade name or mark used in the business, although not formally transferred. *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129, 52 N. E. 487, 76 Ill. App. 581.

In *Wilmer v. Thomas*, 74 Md. 485, 13 L. R. A. 380, 22 Atl. 403, it was held that an insolvent manufacturing company's trademark, consisting of the words "Druid Mills," would pass to the purchaser at an assignee's sale of the plant, under assignment transferring all of the company's property, and 1 L.R.A. (N.S.)

under an advertisement describing the property as the old established mills known as "Druid Mills."

A sale by one partner to another of all of his interest in the entire assets of the firm includes trademarks bearing the names and initials of the seller, although not mentioned. *Hoxie v. Chaney*, 143 Mass. 522, 58 Am. Rep. 149, 10 N. E. 713.

An assignment of all of the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the sole right to such trademarks as have been used in the business. These incidents attach to the business or right of manufacture, and pass with it. *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446.

In *Mattingly v. Stone*, 12 Ky. L. Rep. 72, 12 S. W. 467, 14 S. W. 47, it was held that the right to use the name of the seller of a distillery as a brand for whisky did not pass with the transfer of the distillery. The deed did not mention the whisky brand, and as the testimony as to whether it was included in the purchase was conflicting, the appellate court refused to disturb the finding of the chancellor that the mark did not pass.

The right to the exclusive use of a trademark employed in connection with the sale of the waters of a certain spring passes to the purchaser upon the sale of the spring, although the business, good will, and marks are not mentioned. *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82, Reversing 57 Barb. 526.

But a trademark which does not signify that the goods upon which it is placed are manufactured or produced in any particular locality does not pass as incident to the sale of the real estate or personal property of a partnership. *Huwer v. Dannenhoffer*, 82 N. Y. 499.

In *Hazard v. Caswell*, 57 How. Pr. 1 (Special Term) it was held that the right to use a trademark "established A. D. 1780," which belonged to a partnership business, passed to the successors of the old firm upon the sale, by a retiring partner, of his interest in the business.

Upon the dissolution of a partnership, the sale by one partner of a stock in trade and property of every kind of a copartnership in one of three places run by the firm does not include the trademark used generally by it, and not mentioned. *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198.

And a partner buying out may get the exclusive right to use the trademarks of the firm, although not expressly mentioned in the deed of assignment. *Merry v. Hoopes*, 111 N. Y. 415, 18 N. E. 714.

The proprietary right which a man has acquired in a trademark will pass with the sale of the business to which the mark is attached. *Hegeman v. Hegeman*, 8 Daly, 1.

Trademarks are proper subjects of assignment, to the extent, at least, that, unless reserved, they pass with the assign-

ment of the business. *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415.

By buying the assets and good will of a drug firm, a purchaser who gets the sole right to a formula for a patent medicine made and sold by the firm will, by operation of law, acquire the firm trademarks used in placing such medicine upon the market. *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880.

In *Listman Mill Co. v. William Listman Mill Co.* 88 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. 261, it was held that upon the sale of a flour mill the right to the mark, "Marvel," passed, without express mention, to the purchaser.

In *Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish)* 82 Wis. 546, 16 L. R. A. 453, 33 Am. St. Rep. 77, 52 N. W. 595, it was held that the right to use the words "Fish Bros. & Co.," with the picture of a fish, as a trademark in connection with the sale of wagons, passed to the purchaser at a receiver's sale of a business formerly owned by persons of that name, although not specifically mentioned, but that the right was not exclusive. See *infra*.

In *Mossop v. Mason*, 18 Grant, Ch. (U. C.) 453, it was held that upon the sale of the good will of the business of an innkeeper, the right to the name of the hotel passed to the purchaser.

But in an Illinois case it was held that the mere sale of a business and its "assets," without any mention of good will or trademarks, was not sufficient to give the right to the exclusive use of a trademark bearing the personal name of a former vendor, so as to prevent the latter from afterwards using his own name in the same business. The court said that the right of a man to use his own name in connection with his own business was so fundamental that an intention entirely to divest himself of such right, and transfer it to another, would not readily be presumed, but must be shown. Where it was so shown, the transaction would be upheld; but it would not be sustained on doubtful or uncertain proof. *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339, Affirming 40 Ill. App. 430, Distinguishing *Frazer v. Frazer Lubricator Co.* 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639, *supra*, in which the seller expressly authorized the use of his name as a trademark.

A trademark is not an asset of a firm so as to pass in a sale of all right, title, interest, property, claim, and demand in or to the assets of the firm. *Young v. Jones Bros.* 3 Hughes, 274, Fed. Cas. No. 18,150.

The purchaser at foreclosure sale of real estate upon which is a mine producing ore from which paint is made, does not obtain title to the trademark used by the mortgagor in connection with the sale of the paint. *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 20 N. Y. Supp. 462. The decision in this point was reversed in the general term (39 N. Y. S. R. 488, 15 N. Y. Supp. 249), on the ground that it was the evi-

dent intention of the parties that the exclusive right to the trademark should pass with the property. The general term decision was reversed in the court of appeals (135 N. Y. 32, 17 L. R. A. 129, 31 N. E. 990), but this point was not passed upon.

In *Lewis v. Smith*, 8 Pa. Co. Ct. 327, it was held that a sale by a surviving partner of the firm lease and good will of the place of business did not pass the partnership trademark. It was true, said the court, that if he had sold the business out and out, with the good will which accompanied it, it might have included the trademarks used in the business, because they must be considered as part of the business.

The right to use a facsimile of the signature of the vendor in connection with trademarks, as formerly employed, is not included in the sale of the trademarks, where its use was merely fanciful, and it was not the essential part of the marks; and the vendor may therefore restrain the use of such signature. *Geo. T. Stagg Co. v. Taylor*, 95 Ky. 651, 27 S. W. 247.

And the sale of a drug store with the right to sell certain medicine bearing a trademark does not transfer the right to use the mark on other medicines. *Hege-man v. O'Bryne*, 10 N. Y. Week. Dig. 296.

And the mere sale of wood cuts from which a trademark is printed does not pass title to the trademark itself. *Lockwood v. Bostwick*, 2 Daly, 621.

For other cases on transfer of title by operation of law, see the next subdivision.

b. Judicial sales.

An assignable trademark may be disposed of with other assets of a bankrupt, but it would seem that it cannot be sold to satisfy a judgment, in absence of statutory authority. The cases are too few, however, to venture any general rule.

In *Burkhardt v. A. E. Burkhardt Fur & Hat Co.* 4 Ohio N. P. 358, it was held that a judicial sale under an order directing a receiver to sell as an entirety the property of a corporation as a going concern, including the good will, passed title to the business trademark. The court said that a bill of sale with that language would unquestionably have carried the trademark, and saw no reason why the fact that the sale was a judicial one should make any difference.

In this case it was also held that the sale of a business, including the stock, furniture and fixtures, cash, accounts receivable, and good will, included the business trademark which bore the name of the seller.

The trustees of an insolvent corporation may sell its trademarks bearing the name and initials of a former owner so as to entitle the purchaser to use the marks, upon giving due notice of change of ownership. *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

Hudson v. Osborne, 39 L. J. Ch. N. S. 79, 21 L. T. N. S. 386, states that there is no

distinction between a sale by a man himself of his business and the good will of it, and the sale by the assignees in bankruptcy of all a bankrupt's assets of every kind.

A trademark, or a designation of one's trade, may be sold by order of the court, whether it be attached to a new business or to one long existing. In such case "good will" and trademarks are governed by similar rules. *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278.

Upon a general assignment for the benefit of creditors, the trademark of the assignor is among his assets, and may be disposed of the same as other assets, and no order of the court is necessary. *Special Term Dec. 1879; Re Knox*, 1 Month. L. Bull. 47.

But in *Lewis v. Smith*, 8 Pa. Co. Ct. 327, it was held that upon a bill filed by a surviving partner against the representative of a deceased partner, to stop infringement of a trademark, the court could not, in such action, order the sale of the mark as an asset of the firm.

In *Re Adams*, 24 Misc. 203, 53 N. Y. Supp. 666, it was held that a general assignee should not be permitted to sell a common-law trademark, particularly where he had already sold half a million labels bearing the trademark.

The question whether title to a corporation trademark could be acquired by purchase at an execution sale of the franchises and rights of the corporation, granted by the state, was raised in *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 20 N. Y. Supp. 462, 39 N. Y. S. R. 488, 15 N. Y. Supp. 249, 135 N. Y. 32, 17 L. R. A. 129, 31 N. E. 990, and *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938, but not decided.

Prince Mfg. Co. v. Prince's Metallic Paint Co. 20 N. Y. Supp. 462, stated that a trademark is not a thing that can be levied on and sold under an execution as a species of tangible property, unless under a local statute authorizing it. The general term, however (39 N. Y. S. R. 488, 15 N. Y. Supp. 249), held that the trademark could be thus sold under a statute of Pennsylvania authorizing a levy and sale of any of the property, franchises, and rights of a corporation. The trademark, the court said, was a species of property which the statute made vendible and purchasable under the execution, and afterwards transferable by the purchaser. The general term decision was reversed by the court of appeals (135 N. Y. 32, 17 L. R. A. 129, 31 N. E. 990), but this point was not passed upon.

It was held in *Gegg v. Bassett*, 3 Ont. L. Rep. 263, that a registered trademark could not be sold on execution.

And in *Taylor v. Bemis*, 4 Biss. 406. Fed. Cas. No. 13,779, it was held that a court of equity could not order a partner's interest in a firm trademark sold to satisfy a judgment against him.
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V. Rights resulting from or affected by transfer.

a. Of vendor.

The mere sale of a trademark, although it bears the name of a vendor, and passes exclusive title to the mark itself, does not take away the seller's right to use his own name in a similar business, if done in such a manner as not to violate his contract of sale, or infringe his former trademark. It is not intended, under this head, to deal with any rights of the vendor after the sale, except those relating to the use of trademarks.

In *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 40 Ill. App. 430, it was held that a vendor who had sold out his interest in a trademark bearing his name, together with the business of boiler making, could still use his name in a similar business, if done in such a way as not to amount to deception and fraud.

In *Burch v. Toledo Plow Co.* 15 Ohio C. C. 482, it was held that a manufacturer of a plow which he called "The Burch," and who sold out his business and afterwards engaged in the making and selling of a new plow, which he called "The New Burch," could prevent the purchaser of the old business from using this new name, although the seller carried on the business of manufacturing plows in violation of his contract.

In *Charles S. Higgins Co. v. Higgins Soap Co.* 71 Hun. 101, 24 N. Y. Supp. 801, it was held that where a business, together with its trademarks, was sold to a corporation, the seller would not be enjoined from using his name in a similar enterprise, on the ground that he was infringing the purchaser's right to the use of the name which was in the nature of a trademark.

And if a manufacturer of silk does not transfer to the purchaser of his business his formula or his method for making certain silks, to the exclusion of that right in himself, there can be no question as to his right afterwards to use his own name as a trademark in the same business. *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 371, 55 N. Y. Supp. 298.

But in *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304, it was held that Le Page, the inventor of a glue, who sold the right to manufacture it to a corporation, together with the trademark "Le Page's Liquid Glue," could not afterwards sell a similar article under the name "Le Page's Improved Liquid Glue."

To the same effect is *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

And in *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766, it was held that the owner of a medicine called "Brewer's Lung Restorer," having sold his right to manufacture and sell it, together with his trademark, and agreed not to use his name on any preparation which could be recommended and sold for the same purpose,

could not afterwards offer to sell a preparation advertised to cure all diseases of the lungs and throat, under the name of "Brewer's Sarsaparilla Syrup."

If a trademark has never lost its primary signification, and has never acquired any secondary meaning, as the words "Old Oscar Pepper Distillery," merely characterizing certain whisky as entitled to public favor by reason of the reputation of a particular distillery, a former owner of the distillery, after its sale in bankruptcy, cannot use the same words to denote a whisky manufactured elsewhere. *Pepper v. Labrot*, 8 Fed 29.

In the case of *Compere v. Bajou*, decided by the tribunal of commerce, Paris, 1854, and subsequently by the court of appeals, and reported in *Upton, Trademarks*, 73, it appeared that there was an assignment by a glovemaker of his business, including the good will and the stamp used by him as a manufacturer's mark for his gloves, which was a facsimile of his signature. He afterwards began making gloves again in violation of his contract, but the court stopped him from using his former mark.

And in *Mossop v. Mason*, 18 Grant, Ch. (U. C.) 453, it was held that an innkeeper selling the good will of his business passed title to the name of the place, and that he could not afterwards set up in the same business, under the same name, in the same town.

It was held in *Bury v. Bedford*, 9 Jur. N. S. 956, that even assuming a trademark not to be assignable, an assignor of such a mark could not dispute his own assignment of it.

A person who, on a mere percentage of the profits of a business, sells the right to use his name in connection with that of another, as a trademark, has no right to the mark that will support an action for infringement. *Hallett v. Cumston*, 110 Mass. 29.

b. Of vendee.

1. Exclusive.

There is no doubt but that the purchaser of a trademark may acquire the exclusive right to its use. Where the title comes to him through a judicial sale or by operation of law, the right is not always held to be exclusive, but the cases are too few on this point to draw from them a general rule on the question.

In *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79, 21 L. T. N. S. 386, it was held that the purchaser from an assignee in bankruptcy of a business run under the name of the "Osborne House" acquired the exclusive right to the use of the name as against the former owner, who gave his own name to the place.

Where one partner assigns to the partnership his trademark under the agreement that, upon the dissolution of the partnership, each partner is to have the right to use it, and the firm goes into bank-
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ruptcy, and the assignee sells the partnership trademark, the purchaser acquires the exclusive right to use it, although it bears the name of its original owner. *Bury v. Bedford*, 10 Jur. N. S. 503, Reversing 9 Jur. N. S. 956, in which it was held that the original owner of the mark might continue to use it himself, but that he would be enjoined from assigning that right to another.

Upon the sale of a business the extension of the right to use trademarks transfers the exclusive right to their use. *Johnson v. Schenck*, 1 Ohio L. J. 374, Fed. Cas. No. 7,412; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769.

In *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 301, it was held that the exclusive right to use the name "Peck Bros. & Co." on certain goods was acquired by the purchaser from the receiver of an insolvent corporation, at a reorganization sale of all of the property of the old corporation, "together with the franchises, name, and good will, and all trade names, trademarks, and patents, and all the assets of every kind," etc.

And the failure to employ the seller for the length of time agreed upon in the contract of sale of the business, good will, and trademarks will not forfeit the buyer's sole right to the use of the marks. *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

The right to the exclusive use of certain brands in connection with whiskies, by the purchaser of a distillery and its brands, was recognized in *Kentucky Distilleries & Warehouse Co. v. Wathen*, 110 Fed. 643, on a motion for an injunction to restrain infringement by former owners.

In *Chattanooga Medicine Co. v. Thedford*, 49 Fed. 949, Affirmed in 58 Fed. 347, it was held that the sale of the right to use the name "M. A. Thedford & Co." as a trademark in connection with the sale of "Dr. Simmons Liver Medicine" did not, upon the forced abandonment of the name "Simmons," permit the sale of the medicine as "M. A. Thedford & Co's Original and Only Genuine Liver Medicine of Black Draught." The ruling was reversed in 14 C. C. A. 101, 30 U. S. App. 35, 66 Fed. 544, and an injunction directed to issue against the vendor's selling a compound under the name "M. A. Thedford's Liver Invigorator."

In *Miller v. Billington*, 6 Pa. Dist. R. 335, an action to enforce the payment of a royalty, the consideration for the sale of an article and its trademark, it was said by the court that, by buying the business of making and selling the article, the purchaser might reap the advantages of the trademark in equity, independently of statutory regulations.

In *Pittsburgh Brass Co. v. Adler*, 2 Monaghan (Pa.) 235, it was held that the purchaser of certain patent rights and of a trademark bearing the name of the inventor of a metal fender was entitled, under the agreement, to its exclusive use as against the seller.

In *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304, it was said that the sale of the right to use a trademark in connection with the business in which it was employed, necessarily passed the exclusive right to its use.

But one who buys a trademark bearing the name of a former owner from the assignee of a corporation cannot prevent the former owner from using his own name in connection with the same business. *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 371, 55 N. Y. Supp. 298.

On a second appeal in the last-mentioned case (44 App. Div. 605, 61 N. Y. Supp. 225), it was held that if the original owner of a trademark, upon the sale of a business to a corporation, would be under binding obligation to permit the use of the mark by the corporation, the purchaser from the general assignee of such corporation would not acquire such a right. The court said that, upon the assignment by the corporation, both it and the stockholders ceased to have any personal interest in the trademark which was the subject of protection, and that an assignee's sale passed no title to the use of the former owner's name as a trademark.

And in *Fish Bros. Wagon Co. v. La Belle Wagon Works* (*Fish Bros. Wagon Co. v. Fish*) 82 Wis. 546, 16 L. R. A. 453, 33 Am. St. Rep. 72, 52 N. W. 595, it was held that the right of the purchaser of the assets of an insolvent wagon company to use a trademark bearing the name of the former owners, and which passed over with the business, was not exclusive, and that the former owners could not be prevented from making similar wagons at another place, and selling them under their name, so long as they did not represent them as coming from the old factory. On this proposition, Winslow, J., dissented. The right of the purchaser to use the trademark, he said, was, in its very nature, exclusive, and that if the purchaser owned it the seller manifestly did not own it.

In the later case of *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 87 Fed. 203, it was held that the right to the use of the trademark possessed by the original owners under the decision in the Wisconsin case, above mentioned, could be sold to a third party, but that neither the first nor second purchaser could advertise as selling the only genuine wagon. This case was affirmed in 37 C. C. A. 146, 95 Fed. 457.

But if one who buys the personal effects of an insolvent corporation at sheriff's sale does not acquire good title to its trademark, acquiescence by the corporation for eight years in the use of the mark by the purchaser under color of title will prevent another purchaser of the same trademark, at a later sale of the franchises of the corporation, from getting the sole right to use it. *Prince's Metallic Paint Co. v. Prince Mfg. Co.* 6 C. C. A. 647, 17 U. S. App. 145, 57 Fed. 938.

In *Lippincott v. Hubbard*, 28 Pittsb. L. J. N. S. 303, it was held that the purchaser 1 L.R.A. (N.S.)

of the assets of a bankrupt partnership, from the trustees, acquired the right to the use of the firm trademarks as against a former partner, who had sold out his interest in the business before the failure, specifying that his vendees might use the old firm trademarks.

In *H. B. Chaffee Mfg. Co. v. Selchow*, 131 Fed. 543, Affirmed in 68 C. C. A. 668, 135 Fed. 1021, it was held that one buying at sheriff's sale the assets and trademarks of an insolvent firm having the right to sell a certain game under the trademark "Flinch" did not acquire the right to the mark as against the purchaser of the game itself from the executrix of its inventor, who had continued to sell it until his death. In this case the court did not decide whether the second purchaser owned the trademark, but simply that the complainant, the purchaser at the sheriff's sale, did not.

Where the question as to the exclusive right to the use of a name as a trademark by the purchaser is clouded with doubt, it is no abuse of discretion to dissolve a temporary injunction in an action brought by the vendee to restrain infringement of the mark. *American Cereal Co. v. Eli Pettijohn Cereal Co.* 22 C. C. A. 236, 46 U. S. App. 188, 76 Fed. 372, Affirming 72 Fed. 903.

A wife does not, by her marriage, acquire the right to use the name of her husband as a trademark, so as to interfere with the enjoyment of the use of the mark by one to whom he has sold it. *Skinner v. Oakes*, 10 Mo. App. 45.

And a son cannot get from his father the right to use the latter's name as a trademark, as against one who has acquired the right by contract. *Ibid.*

One who buys a trademark from a former purchaser will not be hurt by a secret agreement between the original parties, of which he has no notice. *Oakes v. Tonsmierre*, 4 Woods, 547, 49 Fed. 447; *Skinner v. Oakes*, 10 Mo. App. 45.

2. Injunction.

The purchaser of an assignable trademark may restrain infringers upon the same grounds that apply in the case of the original owner.

One who buys an assignable trademark may enjoin infringers. *Filkins v. Blackman*, 13 Blatchf. 440, Fed. Cas. No. 4786; *Walton v. Crowley*, 3 Blatchf. 440, Fed. Cas. No. 17,133.

The purchaser of a trademark containing the words "Twin Brothers," and bearing the portraits of the twins, the original owners of the business and mark, may enjoin such owners from using the mark in the same line of business. *Burton v. Stratton*, 12 Fed. 696.

And in *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. 212, it was held that a corporation buying the trademark "Moxie," in connection with a beverage known as "Moxie Nerve Food," could prevent the trademark from being copied.

In *Hill v. Lockwood*, 32 Fed. 389, it appeared that the lessee of a spring gave it the name of "Clysmic," and sold its waters as "Clysmic Water." He afterwards entered into another contract for the sale of the water with a subsequent purchaser of the spring. It was held that the vendee of the spring took the right to the use of the name so as to stop the lessee from selling, under the same name, the water of another spring,—at least, during the life of the contract.

And in *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82, Reversing 57 Barb. 526, it was held that the purchaser of a spring the waters of which were sold under the trademark "Congress" might stop the owners of another spring from making use of the same word as a trademark in the sale of similar water.

In *Kyle v. Perfection Mattress Co.* 127 Ala. 39, 50 L. R. A. 628, 85 Am. St. Rep. 78, 28 So. 545, it was held that a corporation purchasing the trademark "Perfection Mattress" with the good will of the business, in which it was used, could prevent the original owner from selling similar mattresses under the name "Kyle's Perfection Mattress," where the trademark indicated a particular quality of mattress.

One who gets the sole right to produce a play for five years may stop a third party from copying its trademark. *Hopkins Amusement Co. v. Frohman*, 103 Ill. App. 613.

A corporation formed to take the place of a partnership, and made up of the same persons, may stop the use of a trade name or mark of the business, although there was no formal transfer of it to the corporation. *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129, 52 N. E. 487, 76 Ill. App. 581.

In *Julian v. Hoosier Drill Co.* 78 Ind. 408, it was held that the transferee of the trademark "Hoosier," together with the right to manufacture and sell certain drills, could enjoin the wrongful use of the name by a company selling similar drills.

And in *Metcalf v. Brand*, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. 773, the purchaser of a trademark consisting of the words "Lexington Mustard," long used by prior vendors, was held entitled to stop infringement.

It was held in *J. G. Mattingly Co. v. Mattingly*, 96 Ky. 430, 27 S. W. 985, that where the members of a firm, as partners and individuals, sold all their interest in a distillery formerly operated by them, together with the good will, firm name, and trademarks, they would be stopped from afterwards copying any of the trademarks.

In *Frank v. Sleeper*, 150 Mass. 583, 23 N. E. 213, it was held that where the owner of a trademark consisting of his initials, and used with cigars made for him, sold the business and assigned the trademark, and the buyer continued to have the cigars made by the same manufacturers, at the same place, and gave notice that the trademark had been assigned to him, he could have an injunction against an infringer.

In *Kinney Tobacco Co. v. Maller*, 53 Hun. 340, 6 N. Y. Supp. 389, it was held that the 1 L.R.A. (N.S.)

fact that one had derived his title to the use of a trademark from successors of its original owners was sufficient to entitle him to protection from infringement.

In *Cook v. Starkweather*, 13 Abb. Pr. N. S. 392, a complainant who had derived his title to a trademark bearing the words "Old Valley Whisky" through successive sales was granted a perpetual injunction against its infringement.

In *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408, it was held that a trademark bearing the name of its originator could be used after his death by a purchaser of the business in which it was employed, and that an infringement of it would be stopped.

In *Van Stan's Stratena Co. v. Van Stan*, 209 Pa. 564, 103 Am. St. Rep. 1018, 58 Atl. 1064, it was held that on the sale by a father of the right to use his name as a trademark in connection with the transfer of a business, in effect joined in by the son, the purchaser could prevent the son from afterwards using his own proper name in such a manner as to injure the vendee.

In *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880, it was held that the purchaser of a patent medicine and its trademark, "Storm's Liver Regulator," could stop the infringement of the trademark by a son of the man whose name the mark bore. In this case the infringer was using the trademark in connection with the sale of a medicine made from a different formula.

And one buying the sole right to use a trade name or mark in connection with the business purchased, but who does not use the name, may prevent the seller from employing it in a similar business, if he has agreed not to do so. *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404.

And the purchaser of a trademark apart from the business in which it is used, although not acquiring ownership, may invoke the aid of a court of equity to stop an infringement, on the ground of unfair and fraudulent competition. *The Fair v. Jose Morales & Co.* 82 Ill. App. 499.

Where the owner of a newspaper, "The Commercial Travelers' Journal," was registered under the Canadian trademark and design act of 1879, and the paper and good will were afterwards sold, it was held that the purchaser could prevent the publication of a new paper under the name of "The Traveler," and that registration of the assignment was not necessary to give it effect. *Carey v. Goss*, 11 Ont. Rep. 619.

But before an assignee of a trademark obtains the right to restrain infringers, he must show that it has actually been used and applied upon an article so that the public has come to understand that the article to which it is attached is known under the mark. *Filkins v. Blackman*, 13 Blatchf. 440, Fed. Cas. No. 4,786.

3. Purchase of stock containing trademark.

Where a stock of goods is sold, the various articles having trademarks upon them, the purchaser merely gets the right to the use of

the marks in the resale of such stock. He acquires no right to use the marks generally, but he cannot be prevented from employing them so far as the sale of the purchased stock is concerned.

Where the name or trademark of a firm is impressed upon a stock of goods sold, the purchaser at least has the right to use the marks in the sale of such goods. *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707, Affirming 50 Hun, 230, 2 N. Y. Supp. 783.

The purchaser of the stock of an insolvent corporation has the right to sell it, although containing the trademark bearing the surname of a former owner of the business. This would not be a deception of the public. *Cutter v. Gudebrod Bros. Co.* 36 App. Div. 371, 55 N. Y. Supp. 298, 44 App. Div. 605, 61 N. Y. Supp. 225.

The mere fact that, upon the sale of a business to a corporation, the inventory included cabinets bearing the seller's name or trademark, does not convey the exclusive right to the mark, when the seller still owns some of the machinery used in the business, and no special mention of the trade names or marks is made. *Ibid*.

And the sale by one partner, of his interest in a quantity of bottles and labels bearing the firm trademark, and the molds and stamps with which they were made, does not include the exclusive right to use a trademark not specifically mentioned. *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198.

A new corporation buying the stock of goods located at the branch office of an insolvent corporation, but not purchasing the good will, does not get the right to use the name of the insolvent corporation on its goods, to the injury of the purchaser at a later sale of the main business with its good will and trademarks, it appearing that there were no persons of the same name in the corporation seeking to appropriate the name. *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 301.

And in *Godillot v. American Grocery Co.* 71 Fed. 873, it was held that one buying from a receiver the stock of goods of an insolvent concern did not thereby acquire the right to use the trademark of the business generally.

c. Of partners.

The right of a partner who has bought out the other members of the firm, to the exclusive use of the partnership trademarks and to protection against infringement, in no wise differs from that of ordinary purchasers.

An assignment by one partner of all his interest in the firm to his copartners will carry with it the exclusive use of the trademark of the firm. *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415.

In *Burekharut v. Burekhardt*, 42 Ohio St. 474, 51 Am. Rep. 842, it was held that upon the sale of a business, including the good will, by one partner to another, the exclusive right to the use of the name "Burck-

hardt & Co." as a trademark passed to the buyer.

In *Piper v. Laughman*, 6 Pa. Co. Ct. 233, it was held that the assignment and transfer by one partner of all his interest in the personal property of the firm passed the right to the use of the trademark. "Sonman Coal." The case was reversed in 128 Pa. 1, 5 L. R. A. 599, 18 Atl. 415, but on the ground that the trademark was a geographical name, and not capable of appropriation.

Where a partner sells out all of his interest in the partnership property and assets, the grant is not limited by a provision that the purchasers may use the old firm trademarks and stamps, but the sole right to the trademarks will pass over to the buyer. *Lippincott v. Hubbard*, 28 Pittsb. L. J. N. S. 303.

One partner buying the other's interest in the business and property of the firm, including its good will, may continue to use the partnership trademark. *Adams v. Adams*, 7 Abb. N. C. 292.

But in *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198, it was held that if, upon the dissolution of a partnership, the members of the firm buying out the retiring partner were the sole successors of that firm and its business, with the right to trade in the firm name, this did not, in the absence of agreement, confer exclusive right to the use of the trademarks.

In *Ilhee v. Henshaw*, L. R. 31 Ch. Div. 323, 55 L. J. Ch. N. S. 273, 53 L. T. N. S. 949, 34 Week. Rep. 269, it was held that where one partner had assigned all his interest in the business and good will of a partnership, including a registered trademark, the purchaser could maintain an action against an infringer before registering the assignment of the mark.

A third person cannot question the right of an outgoing partner to authorize the firm to use a trademark bearing his name, upon selling out his interest in the article to which it is affixed. *Brown Chemical Co. v. Mever*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

A partner succeeding to the rights of the firm in a trademark may restrain its infringement, although he was not the original designer or owner of the mark. *Cuervo v. Landauer*, 63 Fed. 1003.

In *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362, it was held that where a partner whose name appeared in the firm style "T. M. Lash & Co." sold out his interest in the business and good will to the other partner, and afterwards transferred to the purchaser the trademark "Lash's Kidney and Liver Bitters," together with the right to use the same, the seller would be stopped from imitating the trademark in connection with the sale of similar goods.

A partnership buying the sole right to the use of the name of a retiring partner as a trademark may stop the latter from afterwards using his name in connection with similar business in such a manner as to deceive the public. *Frazer v. Frazer Lubricator Co.* 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639, Affirming 18 Ill. App. 450.

In *Chaney v. Hoxie*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713, it was held that one Hoxie, who parted with his interest in the trademark "A. N. Hoxie's Mineral Soap," upon selling out to his partner, would be restrained from holding himself out as having the right to use the trademark.

And in *Probasco v. Bouyon*, 1 Mo. App. 241, where a partner named Oakes sold out his interest in the stock, equipments, and good will of the partnership, together with the firm name and the exclusive right to make "Oakes' Candies," and to use the name, it was held that he would be restrained from afterwards selling candy under the name of "Oakes' Candies."

Upon the dissolution of a partnership, one of the partners buying the trademark of the firm at a receiver's sale acquires the right to use it, and a retiring partner, receiving a benefit from the sale, is estopped from making any claim to use the mark adversely or in competition with the purchaser. *Rorke v. Société des Huiles d'Olive*, 14 App. Div. 173, 43 N. Y. Supp. 548.

d. As affected by fraud.

1. Generally.

The purchaser of a trademark who would not have a rival trader cheat the public by the use of false symbols must himself be without sin. If he comes into a court of equity with a prayer for the protection of a mark that speaks a falsehood to the world, he will be turned out as a suitor with unclean hands. He must deal fairly himself or he will not be heard. This rule applies to owners of trademarks generally, as well as to purchasers; but in this note only such cases have been taken as bear upon the application of the rule to purchasers; or, in other words, only such fraud as relates to a sale and change of ownership,—the fraud of the buyer himself.

In *Leather Cloth Co. v. Hirschfeld*, 1 New Reports, 551, it appeared that after the sale of a trademark which contained the words "tanned leather cloth," the purchaser had discontinued the tanning of the cloth without changing the mark. It was held that this omission was not such a fraud as to prevent the plaintiff from having an injunction against an infringer.

And in *Edleston v. Vick*, 23 Eng. L. & Eq. 51, 18 Jur. 7, it was held that the mere fact that a trademark bore the word "patented," the patent having run out after the sale of the mark, was not sufficient to prevent the purchaser from having the help of the court to stop an infringement.

In *Leather Cloth Co. v. American Leather Cloth Co.* 1 Hem. & M. 271, 32 L. J. Ch. N. S. 721, 11 Week. Rep. 931, 8 L. T. N. S. 820, it was held that, upon the sale of the good will and the business of manufacturing a particular kind of cloth, the place of business continuing the same, and the secret, if any, being handed over, it would be impossible to say that the purchaser was not entitled to describe his articles by the name by 1 L.R.A. (N.S.)

which they had always been known. It was urged that relief against an infringer should be refused the purchaser because the mark indicated that a patent had been issued for the goods it stood for on Jan. 24 instead of Jan. 14; that it represented that all of the goods were patented, when in fact only a small portion were; that it stated that the goods were manufactured by an American firm in America, whereas they were made by an English firm in England. It was held that these objections were not well taken. The case was reversed in 33 L. J. Ch. N. S. 199, 12 Week. Rep. 289, 10 Jur. N. S. 81, 9 L. T. N. S. 558, on the general ground that each of these statements was false, the most material statement being that the goods to which the mark was attached were patented. It was said that the purchaser, while seeking to restrain a rival dealer from selling his goods as those of another, was himself doing the same thing in representing the goods to be of American manufacture, and that he was not entitled, therefore, to equitable relief. This decision was affirmed in the House of Lords (35 L. J. Ch. N. S. 53, 11 H. L. Cas. 523, 11 Jur. N. S. 513, 13 Week. Rep. 873, 4 De G. J. & S. 137), mainly on the ground that there was no infringement; but Lord Kingsdown said that where a trademark indicated that the goods to which it was attached were manufactured by a particular individual, which fact gave an increased value to the goods, a purchaser of the good will and business could not obtain the help of the court to stop an infringement, on the ground that his own use of the mark would, in that case, amount to a deception of the public.

In *Thorneloe v. Hill* [1894] 1 Ch. 569, in deciding that the mere right to stamp the name of a watchmaker upon watches not made by him was not assignable, the court said that, speaking generally, the purchaser of a business, if he continued it, had the right to use the trade name and trademarks of the business in any way he pleased, which was not calculated to deceive, and that in particular, as a rule, the purchaser of a business might mark goods made by him in the course of that business with the name of the vendor, although the vendor or his old workmen did not assist in making such goods; and by so marking the goods the purchaser would not be considered as doing that which was calculated to deceive his customers or the public, for the reason that the purchaser, continuing the business, the mark might fairly be held to be only a representation that the goods were manufactured in the course of the business, without any representation as to the persons by whom that business was being carried on; and that there would be no substantial risk of deception. But in cases where deception would result, the rule was different.

In *Hall v. Barrows*, 9 Jur. N. S. 483, it was stated that the right of successive partners or owners of a partnership business to use the firm name or trademark depended upon the continuity of the partnership. And if there had been no break in it, the same name

or marks might be used, although the original members of the firm had long been dead. The name in such cases denoted that the original firm continued without interruption by successive additions of partners down to the present.

An assignee of a trademark cannot have leave to put it on goods not the same in character or species as the original article with which it went; but it is not necessary that the genuine thing should always be produced at the same place where first made. *Filkins v. Blackburn*, 13 Blatchf. 440, Fed. Cas. No. 4,786.

And one who buys a trademark bearing the surname "Oakes" cannot use the name "Peter Oakes" with it. *Oakes v. Tonsmierre*, 4 Woods, 547, 49 Fed. 447.

A trademark, after abandonment, cannot be sold if, in the meantime, another has taken it up and clothed it with a new meaning, so that its use by a purchaser would deceive and defraud consumers. *Blackwell v. Dibrell*, 3 Hughes, 151, Fed. Cas. No. 1,475.

Purchasers of trademarks will be restrained from using them so as to lead the public to suppose the goods upon which they appear were packed by their vendors. *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

So in *Alaska Packers' Assn. v. Alaska Improv. Co.* 60 Fed. 103, the court turned out an assignee of a trademark which indicated that canned salmon with which it went were still packed by the assignor, because of the false representation; and held that a correction after the commencement of an action was too late.

The purchaser of a mere trademark, in order to have its use by another stopped, must show that it was employed to designate goods of a certain quality or description, and that he is in fact using it to designate goods of substantially the same quality or description. *Skinner v. Oakes*, 10 Mo. App. 45.

A valid sale may be made of a trademark to the manufacturer of the article to which it is affixed, by one for whom the article was made. *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

The sale of the orders, correspondence, and good will of an insolvent manufacturers' partnership passes to the vendee the right to use the firm name as a trademark on articles bought and sold, but not on those manufactured by the vendee. *Rogers v. Taintor*, 97 Mass. 291.

One who buys from the organizer and employer of a band of musicians known under a certain name all his right, title, and interest to the organization, its trade name and mark, cannot, upon the retirement of the seller and other members of the orchestra, enjoin the use of the trademark by another organization, made up in part of members of the original company. *Messer v. The Fadettes*, 168 Mass. 140, 37 L. R. A. 721, 60 Am. St. Rep. 371, 46 N. E. 407.

It is when an assigned trademark not only contains the name of the original manufacturer, but also asserts that the articles

to which it is affixed continue to be made by him, though sold by the assignee, that the use of the trademark by the latter is a deception, and will not be protected by an injunction. *Wiltberger v. Walker*, 8 Ohio Dec. Reprint, 588.

In *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 48, it was held that the successors of an old firm would be refused an injunction for the infringement of its trademark, where it appeared that no one in the new firm was a member of the old partnership, and where the goods were described as made by the old firm as if it still existed. *Durfee, Ch. J.*, in dissenting on this point, did not think the continuance of the old firm name on the labels of the purchaser was intrinsically a fraud upon the public, who, he said, were interested in getting the same or a better manufacture, but who, so long as they did get it, could have little care whether it came from the original manufacturers or their successors.

In *Fetridge v. Wells*, 4 Abb. Pr. 144, it was even held that the purchaser of a secret preparation and trademark, by deceiving the public as to the price paid, might be refused an injunction against an infringer. The court would not say that the title thus acquired was not valid in law, but could not believe that it deserved to be aided by an injunction from a court of equity.

The successors of a partnership, upon its dissolution, cannot be protected in the use of a trademark which would wrongfully represent that they were the sole makers of the article to which it was attached. *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198.

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 135 N. Y. 32, 17 L. R. A. 129, 31 N. E. 990, it was held that the purchaser of a trademark which had come to signify that certain paints were made from ore taken from a particular tract of land, producing an especially high quality of ore, could not, after enlarging the plant, and using the trademark on paints made of other ore, enjoin its infringement by a rival concern.

Although the trademark itself may not bear false witness, if it has come to mean to the trade and the public that the article it represents is made in a particular locality, which gives it its value, while in fact the articles come from another place, the owner of the mark will not be protected from infringement. *Ibid.*

The court held, in the same case, that it was no answer that the bogus article was as good as the genuine. A party, said the court, could not secure the confidence of the public in an article on the ground that it was made of one material, of which the trademark was a guaranty, and then, without advising the public, substitute another material, and sell that upon the credit of the true article, and justify the false use of a trademark or label on the ground of similar quality. If this was permitted it would offer a temptation to fraud, and an inferior article might be palmed off on unsuspecting purchasers.

A court will not stop the sale of watches

bearing the maker's name for one who has bought the right to stamp his own watches with that name. This would be protecting the bogus article at the expense of the genuine. *Samuel v. Berger*, 24 Barb. 163, 4 Abb. Pr. 88, 13 How. Pr. 342.

A court of equity will not help a purchaser stop the infringement of a trademark which misrepresents the name of the manufacturer and the place of manufacture. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436, Affirming 4 Cliff. 461, 14 Pat. Off. Gaz. 519, Fed. Cas. No. 9,026.

So in *Siebert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101, an injunction was refused because the trademark said the article was made by the original manufacturer, who was dead, and because it misrepresented the place of manufacture.

In *Partridge v. Menck*, 1 How. App. Cas. 558, it was held that the purchaser of a match-manufacturing business and its trademarks would not be heard in a court of equity if the marks, as used by him, made it appear that the matches were still made by his vendor. *Gardiner, J.*, said that it was no sufficient answer that the complainant obtained from the seller the secret of preparing the matches, or that he made an article in all respects equal to that offered by the former proprietor. Nor did it alter the case that the complainant purchased the right to use the vendor's name. The privilege of deceiving the public was not a legitimate subject of commerce; that if the maxim that he who asks equity must come with pure hands were not altogether obsolete, the complainant had no right to invoke the extraordinary jurisdiction of the court of chancery in favor of such a monopoly.

It was held in *Cutter v. Gudebrod Bros.* Co. 36 App. 362, 55 N. Y. Supp. 298, that a corporation buying at an assignee's sale the right to the use of a trademark could not enjoin the originator of the trademark from the use of his name in the transaction of the same business, where it would permit the corporation to put its goods upon the market as the product of another, which the latter had no part in producing, and for the quality of which he was in no wise responsible. This, said the court, was a fraud upon the public, and the case was not altered by the alleged fact that the goods were better than those formerly offered under the same name.

And the vendee will not be heard where the trademark bearing the name of the vendor falsely represents that the article to which it is attached is still made under the superintendence of the vendor, and that the latter certifies its genuineness by his own signature. *Helmhold v. Helmhold Mfg. Co.* 53 How. Pr. 453.

Territorial rights in a trademark cannot be sold to different persons so as to enable each to make and sell his goods as those of the original owner of the mark, in fraud of the public. *Snodgrass v. Welle*, 11 Mo. App. 590.

But in *Hard v. Seeley*, 47 Barb. 428, it was 1 L.R.A. (N.S.)

held that the mere fact that the seller of the art and mystery of compounding a certain medicine had authorized the use of his name as a trademark did not necessarily imply a fraud upon the public.

2. Notice of change of ownership.

It would always be the safe way in doubtful cases for the buyer of a trademark to give notice of change of ownership; but this is not necessary in every instance. If the personal meaning has gone from the mark, and its new use will not deceive the public, it would be idle, perhaps, to make mention of the transfer.

"The object of the trademark being to indicate, by its meaning or association, the origin or ownership of the article," said the court, in *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436 "it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practised upon the public, and the very fraud accomplished to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer."

In *Stachelberg v. Ponce*, 23 Fed. 430, the court would not hear one who had bought the right to use the trademark "La Normanda," because of failure to give notice that he was a purchaser from the original owner. The case was affirmed in 128 U. S. 686, 32 L. ed. 569, 9 Sup. Ct. Rep. 200, but on the ground that the original owner had no exclusive right to the mark.

If the sale of a trademark apart from the business in which it was used would give valid title, equitable relief against an infringer would be refused if the purchaser failed to give notice of the transfer in using the mark. *Bultte v. Igleheart Bros.* 137 Fed. 492.

The purchaser's use of a trademark bearing the names and initials of its former owner, without indicating change of ownership, would so mislead the public as not to entitle the buyer to protection against infringement. *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

But where the purchaser gives notice of change of ownership before bringing an action against an infringer, he will be heard. *Ibid.*

The successors of a partnership failing to give notice, in the use of the old firm trademark, that they were such, should, on that ground, be denied relief against a retiring partner claiming the right to use the mark. *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198; but this language was said to be *obiter* in *Caswell v. Hazard*, 50 Hun. 230, 2 N. Y. Supp. 783, and on the appeal of the same case in 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707.

A corporation getting title to the good will and trademark of an insolvent partnership through a purchaser at the assignee's

sale cannot have an injunction against an infringer, if it represents itself as the former firm, and not as successor of the old partnership. *Hegeman v. Hegeman*, 8 Daly. 1.

But where a corporation obtains the right to use the trademark "*Coal Oil Johnny Soap*," the placing of its name upon the wrappers is sufficient notice of change of ownership. *Petrolia Mfg. Co. v. Bell & B. Soap Co.* 97 Fed. 781.

And where the use of an old trademark by the purchaser is not a fraud or imposition upon the public, he need not give notice of the fact that it has been assigned. *Royal Baking Powder Co. v. Raymond*, 70 Fed. 376, Affirmed in 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231.

And in *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841, it was held that it was unnecessary for a corporation taking over the business of a flouring mill to give notice of the transfer of the brand "*Pillsbury*," which was the name of one of the former owners of the mill, who managed and controlled the business of the corporation, to entitle it to stop a rival from copying the name and brand, distinguishing *Partridge v. Menck*, 1 How. App. Cas. 558; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Siebert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101, on the ground that here the transaction was really nothing more than the incorporation of the parties who had built up the business, and that the brand spoke the truth in spirit and essence.

In *Benedictine Distillerie v. Micalovitch*, 36 Alb. L. J. 364, it was said that where a trademark contained no distinct assertion as to who the maker or seller was, and had come to represent, not the seller or manufacturer, but the place or process or quality of manufacture, the assignee so long as the place, process, or quality of manufacture remained the same, might continue to use the trademark without any words denoting succession or change of ownership. In this case a trademark "*Benedictine*," together with the secret for making a *liqueur* invented before the French Revolution by the Benedictine monks, was transferred to a corporation, and an injunction against the infringement of the mark was issued, as its use was said to impose no deception upon the public.

But in *Fulton v. Sellers*, 4 Brewst. (Pa.) 42, it was held that the purchasers of a trademark bearing the name of the original owner, and used in connection with the sale of a patent medicine, would not be refused relief because they were only assignees of the trademark, and used it without designating themselves as such. The court did not see how, by using the mark after they had bought it, without giving notice that they were not the original owners, it could be a fraud upon the public of which the defendant could avail himself.

3. Immaterial inaccuracies.

The courts are not overnice about false
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statements in trademarks. Trifling inaccuracies they will not take notice of. Where the misrepresentations do not amount to a fraud upon the public, the purchaser may still have the ear of equity, which will not allow the piracy of the mark by a rival dealer.

While courts of equity will not protect a trademark which deceives the public, and while that deception need not be of such a character as to work a positive injury to purchasers, on the other hand, every erroneous impression which the public may get will not be sufficient to destroy the validity of a trademark. *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 406.

The use of a trademark bearing the name "*Rogers Brothers*" as a distinguishing part, by the company securing the right to manufacture and market the goods with which it was used, was held not to be such a misrepresentation as to manufacture as to deny the mark protection against infringement, where it appeared that the original owners superintended and devoted their time and skill to the business. *Ibid.*

It was urged in *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408, that the purchaser of a trademark that went with a stove blacking should not be heard in a court of equity, because the mark represented that the blacking, which was native plumbago, was prepared from pure carburet of iron. The judge said that at best this was but a question of science; and that whether or not plumbago was to be added to the list of pure forms of carbon was altogether too nice a question to be decided upon a motion for a special injunction.

In *Edleston v. Vick*, 23 Eng. L. & Eq. 51, it was held that a purchaser's use of a trademark bearing the name "*Taylor & Co.*," its original owner, would not be such a fraud on the public as to take from him the right to be heard in a court of equity.

In *Jennings v. Johnson*, 37 Fed. 364, it was held that the purchaser of a remedy known as "*Johnson's Anodyne Liniment*" acquired such a proprietary right in the business and to the use of the bottles, labels, and wrappers with which the medicine was associated and identified as to entitle him to maintain an action for an injunction against one copying the name and label. In this case the sale was made after the death of the inventor of the medicine, a facsimile of whose signature appeared on the label.

In *Feder v. Benkert*, 18 C. C. A. 549, 44 U. S. App. 99, 70 Fed. 613, it was held that one of the original members of a partnership who bought out the business together with the right to the use of the firm name as a trademark could continue to use the mark unaltered, for the reason that the public could not thereby be misled. To the same effect is the interlocutory decree in the case, 34 Fed. 534.

Where a merchant sells out his business and the sole right to use the style "*Little Jake*" as a trademark, he cannot resist an injunction on the ground that the use of the words by the purchaser would amount to

a deception upon the public, where it appears that the latter has, for some time, been carrying on the business in his own name. *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404.

It is not a fraud upon the public for the buyer to use a trademark consisting of the personal name of the seller, where the mark does not signify that the articles to which it is attached were actually made by him. *Probasco v. Bouyon*, 1 Mo. App. 241.

In the sale of a trademark for a certain tobacco to its manufacturer there is no false representation to the public, because the tobacco is still made at the same place and by the same person, and is in fact the same article. *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

VI. Fraudulent sales.

The rules applicable to fraudulent sales generally seem to be the same in the case of fraudulent sales of trademarks.

The sale, by an executrix of a deceased partner, of the latter's interest in the good will and trademarks of the firm at a grossly inadequate price, induced by misrepresentations of the surviving partner, amounting to a breach of trust, will not be allowed to stand. *Tennant v. Dunlop*, 97 Va. 235, 33 S. E. 620.

The law requires a surviving partner, in buying the good will and trademarks of a firm, to put the representative of a deceased partner in as complete a condition of knowledge as himself. It is his duty to impart all information possessed or known by him as to their value, and he will not be allowed to reap any advantage from his failure to do so. *Ibid*.

Where the surviving partner has bought, at an inadequate price, his deceased partner's interest in the good will and trademarks of the firm, through misrepresentations amounting to a breach of trust, a court of equity will ascertain the value of the interest of the deceased partner at the dissolution of the firm, in the good will, brands, etc., purchased from his representative by the surviving partner, and will decree that the latter pay over its value, subject to a credit for the amount already paid by him. *Ibid*.

Fraudulent concealment of the fact that the value of a brand or trademark had been impaired by acts of the seller, the latter fraudulently representing it to be of good repute, and the purchaser relying on the representations, is a good defense to an action for the purchase price. *Dant v. Head*, 90 Ky. 255, 29 Am. St. Rep. 369, 13 S. W. 1073.

One who uses a trademark for four and a half years after he buys it cannot then have the sale rescinded on the ground of fraud and misrepresentation. *Nerve Food Co. v. Robertson*, 199 Pa. 486, 49 Atl. 234.

VII. Proof of sale.

The sale of a business and its trademarks by a partnership to a corporation being called L.R.A. (N.S.)

pable of direct and positive proof, the fact cannot be established by accidental expressions of witnesses, so as to entitle the corporation to the help of the court to stop an infringement. *P. Lorillard Co. v. Peper*, 65 Fed. 597. H. C. S.

NEW YORK COURT OF APPEALS.

JOSHUA C. SANDERS, Respt.,

v.

CHARLES T. SAXTON, Lieutenant Governor, et al., Appts.

(182 N. Y. 477.)

Tax sale—suit against state to cancel.

No suit lies to cancel a tax sale to the state as a cloud on title, since the state cannot be sued, and the result cannot be reached indirectly by making the officers of the state parties defendant.

(October 24, 1905.)

A PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in plaintiff's favor in an action brought to cancel a tax deed as a cloud on title. *Reversed*.

The facts are stated in the opinion.

Messrs. **Julius M. Mayer**, Attorney General, and **Horace McGuire**, for appellants:

This action is, in effect, an action against the state, and the state cannot be sued without its consent.

People v. Turner, 145 N. Y. 460, 40 N. E. 400.

The plaintiff must avail himself of his legal remedy by ejectment.

Moore v. Townshend, 102 N. Y. 387, 7 N. E. 401; *Churchill v. Onderdonk*, 59 N. Y. 134; *Miller v. Long Island R. Co.* 71 N. Y. 380; *People ex rel. Millard v. Roberts*, 151 N. Y. 543, 45 N. E. 941.

Case Note.—The closeness of the line of distinction between suits against state officers which are to be deemed actions against the state and those which are not is indicated by the fact that, in the above case of *SANDERS v. SAXTON*, the New York court of appeals reversed a decision in which two lower courts had agreed. The judges of the appellate division unanimously affirmed the decision of the supreme court at special term, holding that the suit could be maintained, while the court of appeals decides to the contrary, on the ground that it is a suit against the state.

In addition to the cases considered in the opinion, attention is called to the decision of the United States Supreme Court in *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770, in which a very

Mr. Robert Goeller, for respondent:

The proper parties defendant are before the court.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Rolston v. Missouri Fund Comrs.* (*Rolston v. Crittenden*) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *People ex rel. Millard v. Roberts*, 151 N. Y. 540, 45 N. E. 941; *Nehasane Park Asso. v. Lloyd*, 167 N. Y. 431, 60 N. E. 741.

Cullen, Ch. J., delivered the opinion of the court:

The action was brought by the plaintiff, as the owner in fee and possessor of certain lands in the late town of New Utrecht, in the county of Kings (now part of the borough of Brooklyn, in the city of New York), against the defendants, except the defendant Roberts, as commissioners of the land office of the state of New York, and against the defendant Roberts, as comptroller of said state, to have certain deeds executed by the comptroller to the people of the state on sales of said lands for unpaid taxes adjudged illegal and void and the record of the same in the registrar's office to be so marked, and to require the comptroller

to cancel and vacate the record thereof in his office. Judgment was granted substantially as prayed for in the complaint, and that judgment affirmed by the appellate division, from which affirmance an appeal has been taken to this court.

At the threshold of the examination of this appeal there is presented to us the question of the right of the plaintiff to maintain an action of the character specified against the defendants as officers of the state. This question was raised in the trial court by a motion made at the opening of the case to dismiss the complaint on the ground that it stated no cause of action against the defendants and that the court had no jurisdiction of the subject-matter of the suit. To the denial of that motion the appellants properly excepted. The motion being made on the pleadings, no consideration of the sufficiency of the evidence is involved, and the exception survives the unanimous affirmance by the appellate division. We think the question has been erroneously decided by the courts below. That the action was not maintainable, and that the complaint should have been dismissed on the defendants' motion. It is elementary law that the state, being a sovereign, cannot be sued, except with its own consent (*Cohen v. Virginia*, 6 Wheat.

elaborate discussion of the decisions on this question can be found. That case held that an action against individuals to recover land of which they had actual possession and control was not to be deemed an action against the state simply because the individuals claimed to be in rightful possession as officers or agents of the state, and asserted title and right of possession in the state. But it held that the state would not be concluded by the judgment in that case, because the state was not a party to the suit. But the case of *SANDERS v. SAXTON* is distinguishable from this in the fact that the suit is brought to cancel deeds which are held by the state; that is, they have been executed to the state and belong to the state. Unless a deed can be canceled without making the grantee a party, the state is the real defendant in the suit.

A case that seems close to the line, but is nevertheless distinguishable, is that of *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665, where it was held that an action by a foreign insurance company to recover from a state treasurer moneys, which he had collected from the company as taxes under an unconstitutional statute could be maintained, although the moneys had been paid over into the state treasury. But this was not maintainable on the theory that the state must pay back the money, but on the theory that, if the statute were unconstitutional, it could not constitute any protection to the treasurer for collecting the

money, or in paying it over to anybody except the real owner.

So, a suit against the state auditor to prevent him from acting under an unconstitutional statute in making valuations of property for local officers, on the ground that, by doing so, he would create a cloud upon the complainant's title, was held in *Western U. Teleg. Co. v. Henderson*, 68 Fed. 588, not to be an action against the state; but in this case the court said that, in doing such act, the officer would not be acting for and in behalf of the state, because no valid statute gave him any authority to do it.

The case most similar to that of *SANDERS v. SAXTON* is *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141, where an action was brought against the commissioners of the sinking fund of the state to recover the possession of deeds made by the plaintiff to a land commissioner of the state, on the ground that they had been delivered to an agent of the commissioner only for the purpose of examination and approval, precedent to the payment of the balance of the purchase money, but that they were surreptitiously put on record. The court held that the action was really against the state, and therefore could not really be maintained. A subsequent statute had abolished the office of land commissioner, and turned over the papers and affairs of his office to the secretary of state. This case, like the New York case, was therefore one in which the title of the state was in reality the subject of attack.

264, 5 L. ed. 257; *Re Hoople*, 179 N. Y. 308, 72 N. E. 229), subject, of course, to the one qualification, found in the Federal Constitution, that an action may be maintained by one state against another state. But, though the state cannot be subjected to hostile litigation at the instance of the individual, that immunity is not possessed by its officers, who can be held responsible for illegal trespasses or torts on the rights of an individual, even though they act, or assume to act, under the authority and pursuant to the directions of the state. This principle was established at quite an early period in our history by the decision of the Supreme Court of the United States in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. There the taxing officers of the state of Ohio threatened to collect a tax imposed by the state on a bank chartered by the United States, and had already seized part of the specie held by the bank. It being determined that the state could not constitutionally impose the tax on the bank, it was further held that the officers of the state were properly restrained from collecting the tax, and compelled to restore the funds they had already taken. In *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447, it was held that a state officer might be enjoined from executing a state law in conflict with the Federal Constitution, and from encumbering, by patents to others, lands which had been contracted to a railroad company. In *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, it was held that, while the United States could not be sued without their consent, still an action might be brought in ejectment to recover lands in the possession of the officers and agents of the United States. These cases and others fully support the doctrine that the officers and agents of the United States and of the states may be sued for their illegal acts or to recover property illegally possessed by them, despite the immunity of their principal.

That doctrine, however, does not cover the case now before us. The defendants are not in possession of the plaintiff's property, nor have they been. They have not committed, nor do they threaten to commit, any trespass thereon, or any other illegal act by which the rights of the plaintiff may be jeopardized or impaired. The action is both in effect and in form to cancel and remove the deeds to the people of the state of New York as clouds upon the plaintiff's title. The grantee in such a deed is plainly a necessary party to such an action, as it is the title of that grantee that is to be passed upon, and it cannot be adjudged void unless he is brought in court. No one would ordinarily think of disputing this proposition. 1 L.R.A. (N.S.)

The only reason for omitting to make the state a party in this case is that it cannot be made a party, and for that reason it is sought to avoid the immunity that the state possesses by making its officers parties in its stead. But it is also settled by the decisions of the Supreme Court that "the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment." *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209; *United States v. Lee*, *supra*. Now, as the only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void, so that the plaintiff in possession may be forever afterwards free from any danger of the hostile claim, it would seem plain that, where the judgment in an action cannot conclude or bind a party claiming under the adverse title, the action must fail. It is true that in one of the earlier cases (*Davis v. Gray*, *supra*) it is said: "Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record." If these remarks are to be construed apart from the context of the opinion in which they are found, the proposition stated therein is far too broad, as it would entirely abrogate the immunity from suit which all the authorities concede the state possesses. But that the court intended to lay down no such rule is apparent from its subsequent decision in *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128. In that case the state passed a statute compromising the claims of its bondholders by the issue of a new consolidated bond in substitution of its former debt, and declaring that the statute should be deemed a contract between the state and its bondholders. Subsequently, by an amendment to the state Constitution, the amount authorized to be raised by taxation of property within the state was limited and the interest on the consolidated bonds reduced. The holders of the consolidated bonds presented their coupons for payment, which was refused, and thereupon brought an action in equity to restrain the state officers from applying the proceeds of the state taxes to other purposes than the payment of said coupons. The court held that the statute under which the bonds were issued constituted a contract between the state and the holders of the bonds within the protection of the Federal Constitution.

But it further held that in reality the suit was a suit against the state itself, and therefore could not be maintained. In the prevailing opinion there is an exhaustive review of all the earlier decisions of the subject. It is shown that in the *Osborn*, the *Davis*, and the *Lee* Cases the actions were to restrain the commission of unlawful acts by the state or government officers for which the command of their principal afforded no justification, or to recover possession of property held equally without warrant of right. The distinction between those cases and the one then before the court is clearly pointed out, in that in the latter case the moneys sought to be reached were the moneys of the state, in the state treasury, impressed with no trusts, and the relation existing between the state and the bondholder was merely that of debtor and creditor. Accordingly it was held that such an action was essentially one against the state itself and therefore could not be maintained.

The same principle governs the case now before us. The title now sought to be adjudged void is the title of the people of the state, the defense of which has not been committed to any officer by whose appearance the state could be concluded. Nor is the decision in *Louisiana v. Jumel* limited or qualified by the subsequent decision in *Rolston v. Missouri Fund Comrs.* (*Rolston v. Crittenden*) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599. The distinction between the two cases is stated in a few sentences in the opinion in the later case: "But this case is entirely different from that [*Jumel Case*]. There the effort was to compel a state officer to do what a state prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him." The property rights of the plaintiff are not infringed by this decision. He is in possession of the land. If anyone should assume to enter upon it by ousting him from possession, he might defend that possession not only physically, but by actions in the courts, and, if the title of the state is invalid, successfully in the courts. Even in the case of a deed to an individual purchaser on a tax sale, we have held that the legislature may restrict or abolish the right of the owner of the land to relief in equity against the deed as a cloud on his title, since such owner, if in possession, may maintain his possession, and, if out of possession, may recover it by ejectment. *Loomis v. Little Falls*, 176 N. Y. 31, 68 N. E. 105. As we have not been referred to any statute authorizing a suit against the state for the matter set forth in the complaint, we are of opinion that the action cannot be maintained.

The judgment of the Appellate Division 1 L.R.A.(N.S.)

and that of the Special Term should be reversed, and the complaint dismissed, with costs, in all the courts.

Gray, O'Brien, Bartlett, Haight, Vann, and Werner, JJ., concur.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Respt.,
v.

JAMES N. ABEEL, Appt.

(182 N. Y. 415.)

Forgery—commendatory letter.

Uttering a letter with a forged signature for the purpose of falsely representing the bearer to be a certain well-known person, friend of the writer, and giving him standing with persons to whom it may be presented, is forgery, under a statute declaring guilty of that offense any person who shall utter a letter purporting to have been signed by another in which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented or otherwise injuriously affected; the latter phrase referring to character, interests, etc., and not to sentiments and opinions.

(Cullen, Ch. J., and O'Brien and Vann, JJ., dissent.)

(October 3, 1905.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the court of General Sessions of the Peace for the City and County of New York, convicting him of forgery. Affirmed.

The facts are stated in the opinions.

Messrs. Jesse Stearns and Martin S. Lynch, for appellant:

The letter alleged to have been uttered is

Case Note.—The provisions of the New York Penal Code as to forgery of a letter or other instrument by which the sentiments, opinion, conduct, character, prospects, interests, or rights of the person whose name is signed thereto "shall be misrepresented or otherwise injuriously affected" make a distinct addition to the law of forgery. The question on which the courts divide is whether the misrepresentations referred to, which constitute forgery, must be injurious to the person whose name is forged. In addition to the opinions of the court of appeals, that of Recorder Goff is given herewith in a footnote, because of the analysis it makes of the different sections of the Code on the subject of forgery. If, to make the misrepresentations constitute forgery, they must be injurious to the person whose

neither defamatory upon its face, nor is it an instrument of legal validity by which the rights of Mr. Van Every or any other person were or could be prejudiced.

People v. Shall, 9 Cow. 778; Cunningham v. People, 4 Hun, 455; Mann v. People, 15 Hun, 155; People v. Savage, 5 N. Y. Crim. Rep. 541; People v. Drayton, 168 N. Y. 10, 60 N. E. 1048; Waterman v. People, 67 Ill. 91; Foulkes v. Com. 2 Rob. (Va.) 836.

Mr. Robert C. Taylor, with Mr. William Travers Jerome, for respondent:

It is the prerogative of the legislature to determine what acts shall or shall not be criminal, and to determine the amount and character of the punishment.

Barker v. People, 3 Cow. 704; People ex rel. Kemmler v. Durston, 7 N. Y. Crim. Rep. 350, 7 N. Y. Supp. 145, Affirmed in 55 Hun, 64, 7 N. Y. Supp. 813, Affirmed in 119 N. Y. 569, 7 L. R. A. 715, 16 Am. St. Rep. 859, 24 N. E. 6; Re Bayard, 25 Hun, 546.

The full meaning of a word is not to be cut down by subsequent ambiguous words.

Roseboom v. Roseboom, 81 N. Y. 356; Campbell v. Beaumont, 91 N. Y. 464; Byrnes v. Stilwell, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241; Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388; Benson v. Corbin, 145 N. Y. 351, 40 N. E. 11; Goodwin v. Coddington, 154 N. Y. 283, 48 N. E. 729.

The word "otherwise" is used in the section, not to qualify the verb "misrepresent,"

name is forged, and not simply to some other person who may be deceived by the false instrument, the provision in question would be narrower than the doctrine which has generally obtained in respect to forgery in other cases, as it has often been held that forgery of an instrument may be committed by signing a fictitious name to it. King v. Taft, 2 East, P. C. 959, 1 Leach, C. L. 172; State v. Hahn, 38 La. Ann. 169; State v. Givens, 5 Ala. 747; Wharton, Crim. Law, § 660.

Likewise, a will fraudulently made in the name of a person who does not exist has been held a forgery. Reg. v. Avery, 8 Car. & P. 596.

So, the signing of a fictitious name to a promissory note has been held a forgery. State v. Wheeler, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119, 25 Pac. 394.

And the same has been held in respect to the forgery of documents of other kinds.

The English cases cited in the opinion of Recorder Goff show that letters of recommendation have been held in England to be subjects of forgery, and this does not seem to have been held on the theory that such letters would create any legal liability on the part of the signers if they had been genuine. That opinion contains the most of the cases that are pertinent on this subject of letters of recommendation or introduction.

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but to indicate additional respects in which a forged letter may be indictable.

People v. Greenwall, 115 N. Y. 520, 22 N. E. 180; People v. Miles, 143 N. Y. 383, 38 N. E. 456.

Werner, J., delivered the opinion of the court:

In the month of October, 1903, a young woman named Eleanor Anderson was employed as a telegraph operator by the Western Union Telegraph Company at one of its branch offices in the Grand Hotel in the city of New York. The defendant saw her there, was attracted by her, and sought an introduction. For the purpose of creating a favorable impression, he falsely represented himself to be J. Ogden Goelet, the son of a wealthy resident of New York, and his first step in that direction was to send a telegram to James N. Abeel (himself), signed J. Ogden Goelet, making an appointment at the University Club, and asking for an answer at the Grand Hotel. This telegram was delivered to Miss Anderson and transmitted by her. This was followed on the same day by a note from the defendant, asking Miss Anderson for the honor of an introduction, and apologizing for the method employed to obtain it. Without waiting for a written reply to his note, the defendant went to the Grand Hotel and verbally repeated to Miss Anderson his desire to be-

Though, on the other side, another case holding that a letter of introduction is not the subject of forgery is Foulkes v. Com. 2 Rob. (Va.) 836. In this case the letter states that the bearer will perform whatever he undertakes to do, and that he will probably want a stated sum of money, to which he will undoubtedly be accommodated.

To the same effect a certificate of character given to a colored person, stating that he was freeborn and of good behavior, was held not to be a subject of forgery in State v. Smith, 8 Yerg. 150.

Also in Com. v. Chandler, Thacher, Crim. Cas. 187, the court held that a fabrication of a certificate of character, to wit: "This is to certify that Vinson Chandler is a good young man, attentive to his duties, and a good disposition young man as I wish to have in my family," which was used to obtain a lucrative position, did not constitute forgery. But the court said that if the indictment had alleged that the defendant had fabricated the false certificate with the evil intent to be retained in service, and that, being so retained, he might fraudulently convert his employer's goods to his own use, he would have been guilty of a misdemeanor and punishable for such an offense; but the indictment did not contain such allegation, and there was nothing to show that the defendant did not possess the qualities described in the writing.

come acquainted with her. In this conversation the defendant suggested that he would try to find someone to give him a letter of introduction. Several days later the defendant again called on Miss Anderson, stating that he had been so fortunate as to attend a dinner at which he had met Mr. Van Every, one of the vice presidents of the telegraph company, from whom he had obtained a letter of introduction, which was somewhat general and informal, because the defendant had desired not to compromise or embarrass Miss Anderson. The defendant then presented the letter, which reads as follows:

New York, October 31, 1903.

To Any Employee Western Union Telegraph Company:

This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favors shown him will be duly appreciated by the corporation and myself.

Yours truly,

J. B. Van Every,

. 2d Vice President.

The presentation of this letter was followed by a series of visits and attentions on the part of the defendant, in the course of which he artfully strengthened the deception that he was a member of the prominent Goelet family, with the result that he proposed marriage to Miss Anderson on the Monday following their first meeting, was accepted on Tuesday, and the wedding day set for the ensuing Thursday. Meanwhile arrangements were made for the consummation of the marriage. The defendant gave Miss Anderson a check for \$100,000, drawn on the Astor National Bank, signed "George B. De Witt, Cotrustee," and indorsed "J. Ogden Goelet." On the wedding day the defendant appeared at the home of Miss Anderson, gave her a marriage ring, and then, upon the pretext of going down stairs to attend an interview with newspaper reporters, he surreptitiously departed from the house, never to return. This is a bare outline of the events that led to the arrest, indictment, and conviction of the defendant upon the charge of forgery in the third degree.

The statute under which the defendant was indicted and convicted is subd. 3 of § 514 of the Penal Code, which, so far as pertinent to the case at bar, provides that "a person who . . . shall alter, or who shall cause, aid, abet, or otherwise connive at, or be a party to, the uttering of any letter, telegram, report, or other written communication, paper, or instrument purporting to have been written or signed by another person, . . . which said letter, tele-

gram, report, or other written communication, paper, or instrument . . . as aforesaid, the person uttering the same shall know to be false, forged, or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented or otherwise injuriously affected, . . . is guilty of forgery in the third degree." The case rests entirely upon the facts established by the prosecution, as the defendant introduced no evidence. Thus the broad question presented by this appeal is whether these uncontroverted facts constitute the crime of forgery as defined in the statute above quoted. The most obvious feature of this statute is that it adds to the list of forgeries several that were not known to the common law or to our statutes as they existed prior to 1884. And since it is beyond dispute that the act charged against the defendant is not one that would have constituted the crime of forgery under the common law or the earlier statutes, it is evident that it will not be profitable to discuss the cases decided under the law as it then stood.

The power of the legislature to designate as statutory offenses acts that were lawful and innocent at common law is not challenged by the defense, and, indeed, is too well established to permit of doubt or discussion at this late day. We proceed, therefore, directly to the discussion of the statute and its bearing upon the act charged against the defendant. And here we are confronted with the difficulty that always exists when the technicalities of legal reasoning are brought to bear upon simple English. The able and ingenious arguments of counsel admirably illustrate the possibilities in this direction; but when we get away from the briefs, and look at the letter of the statute, it seems so plainly designed to cover just such a case as the one before us that it is like carrying coals to Newcastle to demonstrate it. The act committed by the defendant, and charged in the indictment, was the uttering of a letter containing the false representation that the defendant was Mr. J. O. Goelet, a friend of the management of the Western Union Telegraph Company, and bespeaking for him the favors of its employees. This letter purported to have been signed by J. B. Van Every, one of the vice presidents of that company. It was used to deceive a young woman, one of the employees of the company, into believing that the defendant was a young man whose financial and social position made him a most desirable acquaintance, and the result of that belief was that he was permitted to become a most welcome suitor. The record does not clear-

ly disclose by what providential interference this insidious and dastardly attempt upon the honor and happiness of a young woman was intercepted just at the point of culmination; nor is it necessary that we should know, because the criminality of the defendant's act in uttering the letter in question depends wholly upon other considerations. That the letter was a falsehood from beginning to end, and that the use of Van Every's name thereon was unauthorized, is beyond dispute. That it thoroughly misrepresented any opinion or sentiment harbored by Van Every, or conduct indulged in by him towards the defendant, is clear; for it imputed to the supposed writer an acquaintance with the defendant as Mr. J. O. Goelet and a desire to introduce him in that capacity to the employees of the telegraph company, when in fact Van Every did not know him at all.

The statute declares a person guilty of forgery who knowingly utters a false or counterfeited letter, etc., by which the sentiments, opinions, conduct, character, prospects, interests, or rights of the person whose utterance the writing purports to be are misrepresented or otherwise injuriously affected. The coincidence between the act of the defendant and the declaration of the statute seems to be so complete that there would scarce be room for construction, if it were not for the technical suggestion that the word "misrepresented" is coupled with and qualified by the succeeding words "or otherwise injuriously affected." In our language there are frequently two or more possible constructions of sentences when their meaning may depend upon punctuation or upon the juxtaposition of certain words with others. The sentence under consideration is capable of a construction that will limit the forgeries punishable under subd. 3 of § 514 of the Penal Code to cases where the misrepresentation is literally injurious in its effect upon the person whose name is used. But that, we think, would be a strained and unnatural construction. The context of the subdivision in which it is placed seems to indicate that it was the purpose of the legislature to cover cases in which the mere misrepresentation is the gist of the offense, as well as other cases in which the act injuriously affects the person whose name is improperly used. When the sentence is thus construed, the word "otherwise" has a proper and natural meaning in connection with what precedes and follows it. It is perceivable that sentiments, opinions, conduct, and character may be misrepresented; but just how they may be injuriously affected is not so apparent. Prospects, interests, or rights, however, may be of such a material character as to be injuriously affected

by misrepresentation of sentiments, opinions, conduct, and character. Thus, we think, the phrase "or otherwise injuriously affected" may properly be referred to prospects, interests, and rights, as distinguished from sentiments, opinions, etc., and in that view of the statute the crime of forgery in the third degree is committed whenever a person wilfully—that is, knowingly—misrepresents the sentiments, opinions, conduct, or character of another by means of a false, forged, or counterfeit writing, just as it may be committed in other cases through the injurious effect of such writing upon the prospects, interests, or rights of the person misrepresented.

In construing this statute several things are to be remembered. We are living in an age when the wisdom of legislatures and the learning of courts are put to the severest tests by the cunning and skill of the unscrupulous adventurer and the professional criminal. Statutes are rarely the precursors of crime. They usually follow in their wake. Our centers of population are infested with persons whose highest aim in life seems to be the circumvention of the criminal law by the invention of new crimes. The grosser crimes, such as murder, arson, and larceny, are easily defined and classified. The same is true of the more common forms of forgery and of many purely statutory crimes. Experience has shown, however, that no generic definition of forgery can be comprehensive enough to include all the crimes that may be committed by the simple use of pen and ink. And that is why the legislature has found it necessary to frame statutes so broad as to include in the category of forgeries many acts which are criminal in their tendency and effect, but do not fall within the earlier definitions of that crime. One needs only to glance over the chapter on forgeries in the Penal Code to appreciate how manifold are the methods by which the crime of forgery may be committed. In one class of cases the intent to defraud is of the essence of the crime. In another class the commission of the act presupposes criminal intent. In still another class the mere commission of the act constitutes the crime, without reference to criminal intent. The section under discussion (514) is fairly illustrative of this condition. Its first subdivision deals with the corrupt falsification, alteration, erasure, obliteration, and destruction of corporate, co-partnership, and individual books of account. Subdivision 2 relates to the forging, alteration, or counterfeiting of letters, telegrams, etc., with intent to injure or defraud, when the act injures any other person in his good name, standing, position, or general reputation. The third subdivision is the

one relied upon by the prosecution, and the fourth deals with the forgery of tickets of admission and the like, in which the element of fraud is also an essential ingredient. As is clearly shown in the very lucid and exhaustive opinion of the learned recorder, written upon the motion in arrest of judgment, that portion of the Penal Code which includes § 514 deals with acts which an enlightened public policy finds it necessary to place in the category of crimes, but which, on account of the difficulty inherent in the subject, it is impossible to classify or define with precise accuracy; for they spring from a great variety of motives and purposes and are multifarious in their effect upon those against whom or in whose name they are committed. The legislature, in the exercise of its undoubted power, has chosen to classify as a forgery the act charged against the defendant. It is true that this act would not have been a forgery as that term was understood under the common law. It may be equally true that the same act might be punished with even greater effectiveness under a different name; but it is not the province of courts to legislate or to nullify statutes by overstrict construction. That is particularly true when the legislature has ordained a rule of construction. Section 11 of the Penal Code provides that "the rule that a penal statute is to be strictly construed does not apply to this Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law." Tested by that simple rule, we think the indictment herein charges a crime which was established by ample evidence.

Some of the exceptions taken at the trial are covered by the general discussion upon the merits; and as to the others it is enough to say that we think no error was committed that requires a reversal of the judgment.

The judgment of the Appellate Division should therefore be affirmed.

Gray, Bartlett, and Haight, JJ., concur.

Cullen, Ch. J., dissenting:

I dissent from the affirmance of the conviction of the appellant in the courts below because, first, in my judgment, the statute under which he has been indicted does not include the offense proved against him, and, second, under any construction of the statute, the greater part of the evidence against the appellant was incompetent and immaterial; in other words, he has been indicted for one offense, and tried, convicted, and punished for a totally different offense. The section of the Penal Code (§ 514, subd. 3) 1 L.R.A. (N.S.)

was enacted in 1884 as a new and original provision of the criminal law. It has no predecessor in either the statute or the common law, and I know of no similar legislation; but the meaning of the very words of the statute seems to me reasonably plain. The vital point of difference between the majority of the court and myself is the question whether, to constitute the offense, the misrepresentation of the sentiments, opinions, or conduct of the person whose name is unauthorizedly used must be injurious to such person, or whether mere misrepresentation, whether injurious or harmless, falls within the statute. I agree with the prevailing opinion that intent is not a necessary ingredient of the offense, except the intent to commit the prohibited act. I also agree with the proposition that the statute is not in any respect limited to obligations for the payment of money or affecting rights of property, which alone would be the subject of forgery at common law. In fact, I doubt whether the statute was primarily directed against offenses of that character. But I insist that the misrepresentation which this statute constitutes a felony must be injurious to the person whose name is forged. To this the majority of my brethren say, "No." In the learned prevailing opinion it is said, referring to the statute: "The sentence under consideration is capable of a construction that will limit the forgeries punishable under subd. 3 of § 514 of the Penal Code to cases where the misrepresentation is literally injurious in effect upon the person whose name is used. But that, we think, would be a strained and unnatural construction. The context of the subdivision in which it is placed seems to indicate that it was the purpose of the legislature to cover cases in which the mere misrepresentation is the gist of the offense." The best test I know of to determine whether a particular construction is natural and reasonable is to consider the results that follow from the particular construction. If those results are unreasonable, it is strong proof that the construction which leads to them is unnatural and unreasonable.

The doctrine about to be declared is that the fabrication of a letter misrepresenting the sentiments of another, regardless of the intent (which I concede), and regardless of the character or effect of the misrepresentation (which I deny), constitutes the perpetrator of the act a felon and a forger. I am entirely willing to admit that probably in all cases the fabrication of a letter is reprehensible; but one must be dead to all sense of proportion who does not appreciate that there are infinite differences in the moral culpability of such acts, from the com-

paratively harmless, though intensely silly, fabrication of an invitation to dinner, as a practical joke, to the utterance of a declaration which, if credited, might destroy a man's reputation or be injurious to his property and pecuniary interest. Assuming, in the case of a practical joker (always detestable), that the offender should be punished; should he be declared a felon? Our provisions for criminal punishment are far different from the old English Penal Code, which inflicted the same penalty on practically all offenses, from the theft of a handkerchief in a shop to the most atrocious of murders, to wit, death. If the character or effect of the misrepresentation is no element of the offense, then it is just as felonious to impute, by a fabricated letter, to the keeper of a brothel a belief in the moral obligation of chastity as to impute to an eminent divine or statesman the most degrading and infamous sentiments. The effect of this doctrine, which I combat, goes much further. The statute is general. It includes all misrepresentations of a person's sentiments, opinions, or conduct. It no way limits the subject as to which the sentiments or opinions relate, but, on the contrary, includes the infinite number of subjects on which it is possible for human beings to have sentiments or opinions,—religion, politics, law, ethics, esthetics, and so on indefinitely. If it be true that mere misrepresentation is sufficient to constitute the crime, and that injury, at least to someone, is not a necessary element of it, then it is a felony to misrepresent by a fabricated letter the sentiments or opinions of another upon the most academic question,—on the identity of the Man in the Iron Mask, on the authorship of the Junius Letters, on the relative merits of Austen and of the "Sweet Singer of Michigan," on the relative prowess of the two combatants at the last national prize fight, and on the superiority of the various entries for the next great horse race. In the case before us the only charge in the indictment is that the defendant uttered a false letter, purporting to bear Mr. Van Every's signature, stating, "Any favors shown him [the defendant] will be duly appreciated by the corporation and myself," thus representing that the writer desired the extension of favors to the defendant, when in fact he did not. Not a word is to be found in the indictment relating to the conduct of the defendant towards Miss Anderson (the real offense for which he was tried and convicted); indeed, her name is not mentioned in it, nor is there any charge in the indictment that the letter tended to injure, or was used to injure, Mr. Van Every or any other person.

The learned district attorney in his brief
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suggests that the object of the statute was to prevent fraud or imposition on third parties by the production of forged letters. In reply to this it may be stated that such frauds upon third parties are very thoroughly covered by other provisions of the Penal Code, which punish obtaining money or property under false pretenses and procuring employment under forged letters of recommendation. But the conclusive evidence that the statute had no such object is that only misrepresentations of the sentiments, opinions, or conduct of the purported writer fall within the statute, which in no way includes false statements of facts, except facts constituting part of the conduct of the writer, nor misrepresentation of the sentiments or opinions of others than such writer. Such statements, to say the least, would be as apt to injure third parties as any statement of opinion. Thus the uttering of a fabricated letter asserting that A. was the president of some great financial institution and the owner of some specific piece of property of great value would constitute no offense, unless the utterer obtained, or sought to obtain, money or property on the strength of such letter, in which case, under another statute, the gist of the offense would be the obtaining of the money or property, or the attempt so to do; not the utterance of the letter; while if the letter were cast in the following form, "I regard A. as a very rich man," the offense would be complete at the time of its utterance, even though the sole object of A. was to pose as a man of great wealth and excite the admiration of the vulgar. If a boy over twelve (under twelve he would be presumed incapable of crime), desirous of attending a ball game, should present to his teacher a fabricated excuse purporting to be signed by his mother, "Please excuse Johnny from school to-morrow, as I wish to have his services at home," he would certainly fall within the provision of this statute as it is about to be construed, for the excuse would misrepresent the sentiments and opinions of his mother. That the boy should be soundly flogged I am entirely willing to concede, but I deny that he would be a felon, or that the legislature intended to declare him such. But a more incongruous result from the doctrine asserted remains. If the boy, having taken legal advice, should present as his excuse, "Johnny's aunt died yesterday, the funeral has been fixed for to-morrow," while in truth he had no aunt, or, if one, she was still living, these being merely statements of fact, Johnny, though a very bad boy, would not break any penal law of the state, but he would, or certainly should, be subjected to the flogging to which I have alluded. Equally true would this be of an

excuse, purporting to be signed by the mother, which stated, "Johnny's father wishes you to excuse him from attendance at school to-morrow," because, under the statute, to constitute the offense the misrepresentation must be of the sentiments of the ostensible writer, not those of other persons.

The learned district attorney has appreciated the remarkable results that would follow from the doctrine that under this statute neither the subject-matter nor the effect of the misrepresentations is an element of the offense, and says that in the cases suggested no jury would convict. I think that ordinarily this would be so, but I had supposed that our Penal Code was not such as to require jurors to violate their oaths to avoid the perpetration of a great wrong,—not like the old English criminal law, where a jury at times found five guineas to be less in value than five shillings, to avoid the infliction of death for a petty crime.

The learned district attorney seems somewhat perplexed in ascertaining what was the real evil which this statute was intended to prevent or punish, at one time suggesting, as already stated, that it was to prevent fraud on third parties, and at another to punish libels that imputed to the ostensible writer of the letter degrading or infamous sentiments. The inquiry is important; for it is settled law that in the construction of a statute there must be considered the mischief intended to be remedied and the object to be attained by its enactment. *Pierson v. People*, 79 N. Y. 433, 35 Am. Rep. 524. So, also: "The circumstances existing at the time of the passage of the act, and which led to its passage, may be regarded for the purpose of furnishing something in the nature of a guide to its proper construction and interpretation." *O'Brien v. New York*, 139 N. Y. 548, 588, 35 N. E. 323, 337. In the case before us, though the statute has no predecessor, there is no mystery as to the mischief it was intended to prevent, nor as to the occurrence which led to its enactment. In the presidential campaign of 1880 there was attributed to one of the candidates a letter, asserted to be a forgery, which imputed to him the utterance of sentiments in no respect morally or intellectually discreditable, but which were deemed to be most injurious to his prospects of election. It was believed by a large number of our citizens that through this letter the candidate lost the votes of the Pacific states. The utterance of this letter, if forged, was a grievous offense, both against the individual and the public, and justly the subject of severe punishment. In 1884, to prevent a repetition of the offense at the presidential election then approaching, this statute was

passed. It enacts that the utterance of a fabricated letter shall be a felony when by such letter the sentiments, opinions, or conduct of the supposititious author are misrepresented or otherwise injuriously affected. The use of the word "otherwise" in connection with "injuriously affected," clearly imports that the misrepresentation must be injurious, or the word "otherwise" has no meaning or application whatever. It is true the statute is carelessly drawn. Nevertheless, its meaning is to me perfectly clear. The misrepresentation must be injurious to the supposed writer. The statute was also properly drawn, so as not to limit the subject-matter on which the sentiments of the writer might be misrepresented. For a subject concerning which the misrepresentation of his opinions or sentiments might be of absolutely no importance to one man might be of vital consequence to another. Surely he must be an extreme partisan who would assert that the declaration of a belief in the doctrine of free trade or in that of protection reflects any discredit upon the person professing such belief. To the writer of this opinion it would be of no moment that his views on the tariff were misrepresented; but it would probably be fatal to the success of a candidate for Congress in the Pittsburg district to attribute to him the advocacy of free trade. The statute, of course, is not confined to misrepresentation of political opinions. There are many subjects as to which the misrepresentation of one's opinions might cause him great injury. To misrepresent one's sentiments towards his employers, or towards those from whom he was seeking employment, might lead to his discharge or prevent employment. To the great mass of people a misrepresentation of their sympathies in the present war between Russia and Japan would be of no possible consequence; but in the case of a party dealing with either belligerent such misrepresentation would be disastrous. It seems to me unreasonable that a man should be declared a felon for attributing to another a letter in which was expressed the opinion that Julia was more beautiful in person and more attractive in character than Alice, when the supposed writer had no acquaintance with either, and the only relation existing between them was the admiration of an occupant of a stall in a theater for the artist on the stage. But if the circumstances were different, and the writer were engaged to Alice, and the forged letter were used to break the engagement, then the perpetrator of the act would be properly convicted under the statute before us, and justly punished. If we construe the statute as, in my opinion, it is written,—that is to say, that the mis-

representation, to constitute a crime, must be injurious to the supposed author,—we eliminate all of what seem to me the extravagant and unreasonable results of a contrary doctrine. We are brought down to a simple and clear test of criminality. Was the misrepresentation injurious, or did it tend to injure the apparent writer? If it was, or did, the crime was committed, no matter to what subject the sentiments misrepresented related, whether politics, religion, or love. If the fabricated letter had no such tendency or effect, then it was not within the statute.

I may here add another consideration which I think should attract the attention of anyone seeking to elucidate the statute. By it not only is the utterance of a forged letter made a crime, but the utterance of anything that purports to be a copy of such letter, when no letter exists. No similar provision is found elsewhere in the law, either common or statute. This clearly shows that, as I have stated, it was the so-called Morey letter that led to the enactment of the law. In that case the publication of what was asserted to be a copy of the letter written by the candidate was just as injurious to the candidate as the production of the forged letter itself. In fact, not one in a thousand, and probably not a single one, of those whose votes are supposed to have been influenced by it, ever saw or could have seen the original letter.

But, even if the doctrine of the prevailing opinion be adopted, there was a fatal error in the admission of evidence on the trial. The so-called letter of introduction, which is the subject of the indictment, was presented to Miss Anderson, and from that time forward no further allusion was made to it. Then the offense was complete. Despite this, the prosecution was allowed to prove, under objection and exception, that after the introduction to Miss Anderson the defendant paid her the attentions of a suitor, and finally, after the lapse of some time, became engaged to be married to her. On the day fixed for the marriage, either through baseness or through fear of exposure, the defendant absconded. The prosecution was allowed to prove that during the period of his attentions to Miss Anderson the defendant gave to her a check for \$100,000 purporting to be signed by the executor of a deceased Mr. Goelet. That the conduct of the defendant towards this young lady was base and despicable to the last degree is certain, but, under the doctrine of the prevailing opinion, that the effect of the misrepresentation is no ingredient of the offense, what possible materiality had his subsequent conduct on the trial of this indictment? The defendant, under the guise of a member of

a family of wealth and social position, sought by imposture to obtain the hand of the lady. But, under the law about to be declared, he would have been equally criminal had the deception been of an opposite character, and he had really been Prince Charming masquerading as a peasant. This defendant has been indicted simply for uttering the false letter of Mr. Van Every. He has been tried, convicted, and punished for an imposture practised on Miss Anderson, to which no reference of any character is to be found in the indictment. Such a practice is to be deprecated; especially so when, as in this case, it is by no means clear that the real offense of the defendant cannot be punished under other statutes.

The judgment appealed from should be reversed, and the defendant discharged, unless a new indictment is presented against him at the next term of the court in which he was convicted.

O'Brien and Vann, JJ., concur with Cullen, Ch. J.

The opinion of Recorder Goff, mentioned in the prevailing opinion, was as follows:

On the 21st day of April, 1904, the defendant was, by verdict of a jury, convicted of forgery in the third degree, and, on being arraigned for judgment, moved in arrest thereof on various grounds.

A motion in arrest of judgment can be founded only on an objection to the jurisdiction of the court, or on the ground that the facts stated in the indictment do not constitute a crime. Crim. Code, §§ 331, 467; People v. Buddensieck, 103 N. Y. 496, 57 Am. Rep. 766, 9 N. E. 44; People v. Menken, 36 Hun, 99; People v. Kelly, 94 N. Y. 526. There being no question as to the jurisdiction of the court, the motion, therefore, will be considered only as resting upon the ground that the facts stated in the indictment do not constitute a crime.

In substance, the indictment alleges that the defendant did feloniously utter a certain false and forged letter purporting to have been written and signed by one John B. Van Every, the second vice president of the Western Union Telegraph Company, as follows:

New York, October 31, 1903.

To Any Employee, Western Union Telegraph Company.

This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favors shown him will be duly appreciated by the corporation and myself.

Very truly,

J. B. Van Every,

2d Vice President.

Which said letter the defendant knew to be false, and by the uttering of which the sentiments, opinions, conduct, and rights of said John B. Van Every were misrepresented.

On this motion all of the essential allegations contained in the indictment must, by the verdict of the jury, be deemed proven; and, assuming them to be so proven, the question arises whether the acts of the defendant constitute the crime of forgery. If the general rule at common law, that, to be the subject of forgery, a writing must be false and in such form as to be the means of defrauding another, and which, if genuine, would operate as the foundation of another's liability, be applied to the writing set out in the indictment, it must manifestly be held that such writing is not the subject of forgery. Of these three essentials it contains but one,—falsity,—while from its language, either in parts or as a whole, it cannot be construed as a means by which another could be defrauded, or by which a pecuniary liability could be created. There is at common law another essential of forgery, and that is the intent to defraud; but that is an attribute of the person who forges or utters, and is a question of fact, independent of the elements which the writing itself must contain. Therefore, since forgery, as defined at common law, cannot be predicated upon the writing made or uttered by the defendant, the conviction cannot be sustained unless, by recourse to statute law, authority be found which declares such writing to be forgery. If the statute in terms declares such writing to be a forgery, though devoid of some of the elements essential at common law, it is of little avail to either consider or cite authorities based on that system, or authorities from other jurisdictions where the law is not analogous to our own, and my attention has not been called to any case in any jurisdiction which has been decided under a statute similar or substantially so to the statute under which this indictment was drawn.

In order to correctly ascertain the meaning of the statute, it is necessary that it be examined in the light of the following rules: (a) that the legislative intent must be taken as expressed by the words which the legislature has used; (b) that those words must be taken in their natural sense, and to intend what they mean; and (c) that, where such meaning is plain, there is no room for construction. *Story, J.*, in *Martin v. Hunter*, 1 Wheat. 326, 4 L. ed. 102; *Bronson, J.*, in *Waller v. Harris*, 20 Wend. 555, 32 Am. Dec. 590; *Forrest v. Forrest*, 10 Barb. 46; *Jones v. Harrison*, 6 Exch. 328.

The Penal Code, while consisting of many hundreds of sections, is, so far as its object and purpose are concerned, to be construed as a single statute; and it was enacted for the purpose of embodying in a single statute the system of criminal law applicable to the state. *People v. Jaehne*, 4 N. Y. Crim. Rep. 478, 103 N. Y. 193, 8 N. E. 374. One of its objects, as expressed in § 7, is to define the nature of the various crimes; and in § 3 it defines a crime to be an act or omission forbidden by law. In § 11 it is declared that: "The rule that a penal statute is to be strictly construed does not apply to this 1 L.R.A. (N.S.)

Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law."

The old rule of strict construction of a penal statute, therefore, does not apply; and in any event the construction of a penal statute must not be so strict as to defeat its plain intent (*State v. Main*, 31 Conn. 572), but it must be so construed as fairly to suppress the mischief and advance the remedy (*Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522).

It must be borne in mind that the Code does not in general terms define forgery, while it does define other crimes, such as homicide, robbery, larceny, extortion, etc.; and, in order to ascertain what act or acts constitute forgery, the several sections which treat of the subject, and their subdivisions, must be examined; and from such an examination it is clearly apparent that all of the sections, and the subdivisions thereof, are not interdependent or governed by a general definition. Thus §§ 509 and 511 severally declare that certain acts described and enumerated, when done with intent to defraud, shall constitute forgery. Section 510 declares that falsely certifying to an acknowledgment is forgery, but there is no mention of an intent to defraud. Section 514, in the first subdivision, declares that a person who falsifies or unlawfully and corruptly alters or destroys, etc., or (in the second) who, with intent to injure or defraud, shall falsely make any letter by which any person shall be injured in his good name or reputation, or (in the third) who shall utter any letter which he knows to be false, by which the sentiments of another person shall be misrepresented, or (in the fourth) who, with intent to defraud, shall forge a ticket of admission, etc., is guilty of forgery. Section 515 declares that a person who, with intent to defraud, or to conceal any larceny by any person, either alters or destroys an account, or makes a false entry, or wilfully omits to make a true entry, is guilty of forgery. Section 516 declares that a person who, with intent to defraud, forges a railroad ticket, or who sells, or who, with knowledge, receives, is guilty of forgery. Section 517 declares a person who forges or counterfeits a stamp of the government, or who sells it with knowledge, is guilty of forgery. An analysis of those sections and their subdivisions shows that the essential of forgery is, in two sections and one subdivision of another, an intent to defraud; in another section, an intent to defraud or conceal; in another section, an intent to defraud or knowledge of the falsity; in one subdivision of another section, the doing of the act falsely or unlawfully or corruptly; in another subdivision of the same section, an intent to injure or defraud; in another subdivision of the same section, knowledge of the falsity; and in two different sections, the doing of the act without an intent to defraud. If all

forgeries were predicated on an intent to defraud, may it not be correctly assumed that the legislature would have grouped all of the things enumerated, and made their criminality depend on an intent to defraud, as in larceny, for instance, where the criminality of all the acts prohibited is predicated on an intent to deprive or defraud? Evidently the legislature did not intend such a general classification, for, while it describes a variety of acts as being subjects of forgery, it carefully discriminates in different sections and subdivisions those acts which depend for their criminality on what Sir James Fitzjames Stephens, in *Reg. v. Tolson*, L. R. 23 Q. B. Div. 168, calls the "mental element" of crime, from those acts which *ipso facto* constitute the crime. In other words, if a crime be fully defined, whatever satisfies that definition amounts to a crime. Can the power of the legislature be questioned to declare an act, otherwise indifferent, criminal either with or without a particular intent? Thus, the sale of liquor within prohibited hours is made a crime, without regard to any particular intent; so the false certification of an acknowledgment, or the counterfeiting of a postage stamp, is declared to be forgery, irrespective of any particular intent; and "intent" here is used in the sense of a necessary ingredient of the crime, which must be alleged and proved.

By chapter 53, p. 75, of the Laws of 1874 (since repealed and its sense incorporated in an amendment to the Penal Code), the legislature declared a person who presented a forged letter of recommendation, and thereupon obtained employment, to be guilty of a misdemeanor, and such crime was not made to depend on an intent to injure or defraud.

In no act of the legislature is the intent made more plain to differentiate acts which are declared forgeries, because of the different mental elements necessary to each, than in § 514 of the Penal Code, defining forgery in the third degree. In the first subdivision it is necessary that the acts described be done corruptly and unlawfully; in the second, that the acts be done with intent to injure or defraud; in the third, that the acts be done with knowledge of their falsity; and in the fourth, that the acts be done with intent to defraud. These subdivisions were inserted in the Code by different enactments. See 3 Laws 1881, chap. 676, p. 130; Laws 1884, chap. 378, p. 462; Laws 1892, chap. 692, p. 1417. Each subdivision contains a complete summation of the acts which constitute the crime, and may therefore be considered as an independent statute. The disjunctive form of phraseology used throughout the section shows that forgery may be committed in any one of the various ways specified in the four subdivisions, each one of which is independent of the others and not in any way correlative. "Provisions in the alternative are common in legislation, and the rule is that whatever is within any one of the dis-

junctively connected clauses is within the statute." Bishop, *Written Laws*, § 244. And from the inclusion of the terms which constitute the gravamen of the crime in one subdivision, and the exclusion of those same terms in defining the gravamen of the crime in another subdivision, it is clear that the legislature intended that the different groups of acts in each subdivision should depend for their criminality upon different mental elements of crime, and not, as in §§ 509 and 511, where all forgeries in the first and second degrees are made to depend upon the one mental element of crime,—the intent to defraud. And it is also clear that the framers of those subdivisions had in mind the difference between the things objective, as applied to property, and the things subjective, as applied to personalty. Thus the acts enumerated in subdivisions 2 and 4 depend for their criminality on an intent to defraud,—that is, to defraud some person of property,—while the acts enumerated in subdivisions 1 and 3 depend for their criminality upon a mental element attributable to the person, and not necessarily affecting property. The distinction between a prohibited act, the commission of which of itself constitutes the crime, and an act which depends for its criminality on an intent to defraud, was pointed out in *People v. Wiman*, 85 Hun, 320, 32 N. Y. Supp. 1037. Subdivision 3, under which the indictment was drawn, reads: "[A person] who shall utter [utter], . . . or be a party to the uttering of any letter, . . . or other written communication, paper, or instrument, purporting to have been written or signed by another person, . . . which said letter . . . or other written communication, paper, or instrument . . . the person uttering the same shall know to be false, forged, or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented, or otherwise injuriously affected,"—is guilty of forgery in the third degree.

There are three component parts of the crime defined in this subdivision: (a) The uttering of a forged or false writing, (b) the knowledge of its falsity, and (c) the misrepresentation by the false writing of the sentiments, opinions, conduct, or rights of another person. The uttering of the false writing is a fact, the knowledge of its falsity is a fact, and the misrepresentation is a fact which may be inferred from the false writing itself. Did the writing in question misrepresent? The first clause of the letter, "This will introduce Mr. Goelet," misrepresented conduct; for conduct consists in behavior, action; and an introduction is an act. "A personal friend of the management of this company," misrepresented sentiment; for friendship is a feeling, an opinion, expressed by a sentiment. "Any favors shown him will be duly appreciated," misrepresented both sentiment and opinion; and "Very truly, J. B. Van Every," as a signature, misrepresented the right of Mr. Van Every to

APPEAL by plaintiff from a decree of the Circuit Court for Ford County in favor of defendants in an action brought for the assignment of dower. Affirmed.

The facts are stated in the opinion.

Messrs. **Schneider & Schneider** and **W. N. Carpenter**, for appellant:

The records and judicial proceedings, authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from whence the said records are, or shall be, taken.

U. S. Const. art. 4, § 1; 2 Black. Judgm. p. 917; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564; *Hanley v. Donoghue*, 116

U. S. 1, 4, 29 L. ed. 535, 536, 6 Sup. Ct. Rep. 242; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304; *Bermudez Asphalt Paving Co. v. Gibson*, 106 Ill. App. 6; 2 Bishop, Mar. Div. & Sep; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761; *Lawrence v. Nelson*, 113 Iowa, 277, 57 L. R. A. 601, 85 N. E. 84.

The question of the jurisdiction of the court to render the decree was necessarily before the court in the latter proceeding, and must have been determined.

Van Matre v. Sankey, 148 Ill. 556, 23 L. R. A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; *Knowlton v. Knowlton*, 155 Ill. 161, 39 N. E. 595.

The presumption is that the notice was sufficient.

necessary to support the decision in the **FORREST CASE**; but, since the court, in the latter case, in effect disavows the strict rule of the *Galpin Case*, the question before it was a very narrow one, being merely whether the fact that the record disclosed a paper purporting to be an affidavit of nonresidence, but not signed or sworn to, upon which the warning order appears to have been issued, was sufficient to displace the presumption which would otherwise have been indulged in support of the jurisdiction. Its decision upon this narrow question finds support in earlier decisions in the same state, and in other states, that are quite closely in point.

Thus, in *Tucker v. People*, 122 Ill. 583, 13 N. E. 809 (cited in the opinion), a decree of divorce rendered in Utah upon publication was held subject to collateral attack, because the first publication, as shown by the record, was only thirty-five days before the date of the decree, while the law of the territory, given in evidence, required that forty days should intervene. It does not, however, expressly appear that the foreign decree, like that involved in the **FORREST CASE**, contained a general recital of due service.

In *Werner v. Werner*, 30 Ill. App. 159, it was held that a decree of divorce rendered in Indiana on publication was void on the face of the record, the decree merely reciting notice and affidavit of publication, and that it appeared to the satisfaction of the court that the defendant had been duly notified; there being nothing in the record to show compliance with the provision of the statute which made it the duty of the clerk of the court to forward to the defendant by mail a paper with a marked notice.

In *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457 (cited in the opinion), it was held that a domestic decree for an administrator's sale of real estate was subject to collateral attack; the record merely showing that service for minor heirs was acknowledged by their guardian, and failing to disclose any other attempt to comply with the statute, which provided, in the alternative, for service by publication of notice for the prescribed period, or personal service of a

notice with a copy of the petition and account of the administration.

In *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161, it was held that a general finding or recital, in a domestic judgment or order, of "due service," would not avail to support the judgment or order upon collateral attack, where the actual service shown by the record was not in compliance with the statute. (*Brewer, J.*, intimated that he was of a different opinion.)

In *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559, the court held that a domestic judgment rendered on service by publication was subject to collateral attack, because it appeared from the record that the affidavit of nonresidence prescribed by the statute was filed after, and not before, the service as required by the statute, notwithstanding the recital in the judgment that the summons had been duly served. The court held (overruling *Gemmell v. Rice*, 13 Minn. 400, Gil. 371) that, where the record sets forth the manner in which the summons was served, and that is ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way.

So, where a journal entry of a finding recites due service "as shown by the return of the sheriff," if such return is insufficient, the finding is not conclusive in a collateral attack upon the judgment entered thereon. *Harris v. Sargeant*, 37 Or. 41, 60 Pac. 608.

In *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585, domestic judgments purporting to have been rendered upon service by publication were held subject to collateral attack, because the record did not contain an affidavit of nonresidence and an order for publication, which were required by statute as conditions of service by publication. This case on its facts is quite similar to the **FORREST CASE**, but, unlike the latter case, was decided under the strict rule declared in the *Galpin Case* already referred to.

Upon the other hand, the decision in the **FORREST CASE** is opposed by some decisions closely in point. Thus, in *Matthews v. Hoff*, 113 Ill. 90, where the record of a domestic decree rendered at the August term

Hannas v. Hannas, 110 Ill. 62; *Millett v. Pease*, 31 Ill. 377; *Tibbs v. Allen*, 27 Ill. 119; *Prout v. People*, 83 Ill. 154; *Miller v. Handy*, 40 Ill. 448; *Reddick v. State Bank*, 27 Ill. 145; *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824; *Burke v. Donovan*, 60 Ill. App. 241.

The recitals of the record show the jurisdiction.

Reddick v. State Bank, *supra*; *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303; *Miller v. Handy*, *supra*; *Donlin v. Hettinger*, 57 Ill. 348; *Hobson v. Ewan*, 62 Ill. 146; *Bowen v. Bond*, 80 Ill. 351; *Swift v. Yanaway*, 153

Ill. 197, 38 N. E. 589; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Williams v. Ewing*, 31 Ark. 229; *McLain v. Duncan*, 57 Ark. 49, 20 S. W. 597; *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704; *Baskins v. Wylds*, 39 Ark. 351; *Huggins v. Dabbs*, 57 Ark. 628, 22 S. W. 563; *McCarter v. Neil*, 50 Ark. 188, 6 S. W. 731; *Porter v. Dooley*, 66 Ark. 1, 49 S. W. 1083; *Porter v. Tallman*, 68 Ark. 211, 56 S. W. 1071.

Messrs. Cloud & Thompson and Welty, Sterling, & Whitmore, for appellees:

Where an affidavit is required before a

of court disclosed a summons returnable to the July term, but did not show any summons issued after that term, and none could be found upon diligent search, the court, nevertheless, indulged the presumption, in support of the jurisdiction and of the recital of the decree that the "defendant had due legal notice," that another summons had been issued and served.

So, where a domestic decree finds there was due service of process upon a defendant, although the summons issued three terms before showed a defective service, it will be presumed, in favor of the finding, that another summons was issued and served properly. *Mulvey v. Gibbons*, 87 Ill. 367.

The record of a domestic judgment collaterally attacked in *Hardy v. Beaty*, 84 Tex. 362, 31 Am. St. Rep. 80, 19 S. W. 778, disclosed a paper purporting to be an affidavit for publication, but it was not sworn to, and, concededly, could not be regarded as an affidavit at all. The court nevertheless indulged the presumption that a proper and sufficient affidavit had been made, the contrary not being otherwise affirmatively shown by the record. So, in *Iiams v. Root*, 22 Tex. Civ. App. 413, 55 S. W. 411, where the record disclosed an affidavit of publication, not in accordance with the recitals in the petition, it was presumed, upon a collateral attack, that another and sufficient affidavit had been made.

In *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, it was held that the absence of an affidavit for a warning order from the record of a domestic decree of divorce rendered on constructive service did not subject it to collateral attack, as it would be presumed that the warning order was entered by the court as required by the Code. This, however, was merely a case of a failure of the record to show a step essential to jurisdiction, and in that respect is unlike the *FORREST CASE* where the record disclosed an apparent, but unsuccessful, attempt to comply with the statutory requisites of jurisdiction.

The recital in a judgment that the default of the defendant had been regularly entered is not overcome on collateral attack by the fact that the only affidavit of publication of summons contained in the judgment roll was filed after the expiration of the time required by statute for the serv-

ice and return of summons. *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 138. The court said that the recital may have been based upon another affidavit, which had been lost or omitted from the record.

In *Hilbish v. Hattle*, 145 Ind. 59, 33 L. R. A. 783, 44 N. E. 20, it was held that the recital in a decree of divorce rendered in Missouri, that the defendant was duly summoned as the law directs, in connection with the fact that the summons was served outside the state as required by the Missouri statute in case of nonresidence, was quite sufficient to defeat a collateral attack upon the decree, upon the ground that it did not appear from the record that an affidavit of nonresidence was ever filed, as required by the Missouri statute in case of publication of notice or personal service outside the state.

It was held in *Adams v. Cowles*, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711, that the failure to find an affidavit of nonresidence among the files was not sufficient to overthrow a decree rendered upon service by publication, where the order of publication recited that the action was "commenced by petition and affidavit," and there was nothing in the record specifically contradicting the recital of due service in the decree, and no extrinsic evidence sufficient to overcome the presumption of jurisdiction. The inference from the opinion, however, is that, if the record had, as in the *FORREST CASE*, contained a defective affidavit, or a paper purporting to be an affidavit which was not in fact such, the judgment would have been held subject to collateral attack.

When, as in the *FORREST CASE*, the question is simply whether the general presumption in favor of jurisdiction—which obtains when the record contains a general recital on the point, and there is no affirmative disclosure by the record inconsistent with that general recital—is overcome by an affirmative showing on the face of the record, the decision necessarily turns upon the strength of that showing, and may be affected by comparatively very slight variations in the record; so that each case depends very largely upon its own facts, and a decision in one case is of comparatively slight value as a precedent for another, unless there is a very close resemblance between the records involved in the two cases.

warning order, or before making publication, the absence of the affidavit is fatal to jurisdiction.

Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Beckett v. Cuenin, 15 Colo. 281, 22 Am. St. Rep. 399, 25 Pac. 167; Oelberman v. Ide, 93 Wis. 669, 57 Am. St. Rep. 947, 68 N. W. 393; Memphis Land & Timber Co. v. St. Francis Levee District, 70 Ark. 409, 68 S. W. 242.

Judgments entered without jurisdiction are void.

Dickey v. Chicago, 152 Ill. 468, 38 N. E. 932; Miller v. Handy, 40 Ill. 448.

Foreign judgments may be attacked collaterally for want of jurisdiction.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Tucker v. People, 122 Ill. 583, 13 N. E. 809.

Findings of a court as to jurisdiction are not conclusive where the record on its face shows want of jurisdiction.

Goudy v. Hall, 30 Ill. 109; Law v. Grommes, 158 Ill. 492, 41 N. E. 1080; Hemmer v. Wolfer, 124 Ill. 435, 16 N. E. 652; Payson v. People, 175 Ill. 267, 51 N. E. 588.

A record must affirmatively show jurisdiction where it is based upon publication, or it is void collaterally.

Baldwin v. Ferguson, 35 Ill. App. 393.

Cartwright, Ch. J., delivered the opinion of the court:

Appellant filed in the circuit court of Ford county her petition for the assignment to her of dower in 120 acres of land in said county, alleging that she was the widow of Frederick Fey, to whom she was married in Arkansas, and making the appellees, Anna K. Fey, from whom she alleged that Frederick Fey had been divorced before his marriage to her, and the heirs of Frederick Fey and John A. Montelius, defendants. The answers to the petition raised an issue as to the validity of the divorce obtained by Frederick Fey in the chancery court of Arkansas county, Arkansas, and alleged that it was void for want of jurisdiction in said court. The cause was referred to a special master to take and report the evidence, and upon a hearing of the evidence so taken the petition for dower was dismissed and this appeal was prosecuted.

Frederick Fey was the owner of 200 acres of land in Ford county, in this state, and lived upon it with his wife, Anna K. Fey, and their children. In the spring of 1897 he went to Arkansas, and bought a piece of land and remained there a few weeks. He returned and remained at home with his wife and children until the spring of 1899, when he again went to Arkansas, and came back in the fall of that year. He remained 1 L.R.A. (N.S.)

at home with his wife and family for about three weeks, and again left for Arkansas on November 4, 1899. While at home he and his wife, Anna K. Fey, conveyed the farm to John A. Montelius, who gave back the following contracts, one to Frederick Fey, agreeing to convey to him 120 acres upon his obtaining a divorce from his wife and paying her \$1,000, and the other agreeing to convey 80 acres to Anna K. Fey when her husband obtained a legal divorce from her:

Piper City, Illinois, Nov. 1, 1899.

Whereas, Fred Fey and wife have this day deeded to me their farm upon this condition, that in order to settle their differences I am to hold the title to said land until Fred Fey procures a legal divorce from his wife and pays to said Anna K. Fey the sum of one thousand dollars as a settlement in full for her dower interest in the east half of the southeast quarter and the southwest quarter of the southeast quarter of section twenty-two (22), town twenty-six (26) north, range nine (9) east of the third principal meridian. When this is done said party of second part agrees to deed this part of the farm to said Fred Fey.

his
Fred X Fey.
mark.

John A. Montelius.

Witness: George D. Montelius.

Piper City, Illinois, Nov. 1, 1899.

Whereas, Fred Fey and Anna K. Fey have deeded to me their farm in settlement of their differences, as soon as Fred Fey procures a legal divorce party of the second part agrees to reconvey the east half of the northeast quarter of section twenty-two (22), town twenty-six (26) north, range nine (9) east of the third principal meridian.

Anna K. Fey.
John A. Montelius.

On April 24, 1900, Frederick Fey filed in the chancery court of Arkansas county, Arkansas, his bill for divorce from his wife, Anna K. Fey, and on August 9, 1900, a decree of divorce was entered, finding that said Anna K. Fey abandoned said Frederick Fey in March, 1898, and annulling their marriage. On August 14, 1900, Frederick Fey was married to appellant, Mrs. Lou Walker. In October, 1900, Frederick Fey died, and appellant was afterwards married to Morgan Forrest.

The only question which will be considered is whether the chancery court of Arkansas county, Arkansas, acquired jurisdiction to hear and determine the suit for divorce

of Frederick Fey against Catarina Fey, as Anna K. Fey was styled in that proceeding, and all other questions raised and argued by counsel will be ignored. The defendant Anna K. Fey resided in this state and did not appear in the suit. The service upon her was by publication of a warning order. The statute of Arkansas provides that when it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of an action, that the defendant is a nonresident of the state, the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order. The affidavit required by the statute before a warning order is made and publication thereof, is jurisdictional, and if the affidavit is not made it is fatal to the jurisdiction. *Memphis Land & Timber Co. v. St. Francis Levee District*, 70 Ark. 409, 68 S. W. 242. No affidavit was found in the files or of record in the cause, and there was no finding by the court that such an affidavit was ever filed, but there was attached to the bill of complaint a draft of an affidavit, not signed or sworn to, as follows:

Now on this day comes the complainant, Frederick Fey, who on his oath says that the foregoing complaint is true. And he further states that the defendant, Catarina Fey, is a nonresident of the state of Arkansas, and asks that a warning order be issued.

Subscribed and sworn to before me this
— day of April, A. D. 1900.

No. 400.—Frederick Fey vs. Catarina Fey.

Indorsed:

Filed in my office and L. C. Smith appointed atty. *ad litem*, and warning order issued, April 24, 1900.

L. C. Gibson, Clerk.

H. B. Dudley, D. C.

William Carpenter, for Plaintiff.

The warning order so issued, dated April 24, 1900, and signed by the clerk, was published in a newspaper for four successive weeks. In the decree for divorce the court found that the defendant had been properly served by a warning order published in fit and ample time, but found nothing as to the affidavit.

One of the grounds upon which it is contended that the decree of divorce was void is that Frederick Fey had no legal ground for a divorce and that the decree was obtained by fraudulent averments and proof. Whether he had any legal ground for a divorce, or whether the allegations or his bill of complaint, or the proofs to sustain them, 1 L.R.A. (N.S.)

were true or false, does not affect the validity of the decree if the court had jurisdiction to enter it. Where a transcript of a decree entered by a court of another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except questions of jurisdiction (*McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 772), including fraud affecting the jurisdiction or the discretion of the court to exercise such jurisdiction (*Dunham v. Dunham*, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841). After a court has acquired jurisdiction its findings are conclusive in all collateral proceedings, and a decree rendered by the chancery court of Arkansas, if it had jurisdiction, has the same effect in every other state as in the state where it was rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened. *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841. In the absence of jurisdiction to pronounce a decree it is absolutely void, and may be attacked either directly or collaterally. Where a court of general jurisdiction proceeds to adjudicate a cause there is a presumption of jurisdiction; but this presumption applies only when the record is silent upon the question, and, if there is an affirmative showing in the record that there was no jurisdiction, the judgment or decree will be void. Where the decree is silent as to the jurisdiction of the court over the defendants, if there is no evidence showing that the jurisdiction was not acquired, it will be presumed that the court had jurisdiction. *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634. Where a decree is silent as to the service of process, and the summons in the case shows want of or insufficient service, the presumption of jurisdiction is overcome. *Swearngen v. Gulick*, 67 Ill. 208. If it appears from the whole record in a case that the court did not have jurisdiction, the presumption in favor of jurisdiction is overcome. *Osgood v. Blackmore*, 59 Ill. 261. When the record itself shows a service which is insufficient, and there is no finding from which it may be presumed that there is another service, the presumption in favor of jurisdiction is rebutted. *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. Where the record itself shows that notice was not given as required by law, the jurisdiction does not attach; and, where it shows that the finding of jurisdiction upon which the court acted was insufficient, the finding of the court as to its jurisdiction is not conclusive, and the recital of proper service on the face of the decree makes no difference. *Whitney v. Porter*, 23 Ill. 445; *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652.

Jurisdiction over the defendant in the di-

voice suit could be obtained by publication in accordance with the statute of Arkansas; but, if process was not served or notice given as required by law, the court did not acquire jurisdiction, and its decree was void. *Goudy v. Hall*, 30 Ill. 109. Where the facts appearing on the face of the record show that the court of another state rendering a decree of divorce had no jurisdiction of the person of the defendant, the decree is void. *Tucker v. People*, 122 Ill. 583, 13 N. E. 809. In this case it appears on the face of the record that there was no affidavit of non-residence as required by the statute of Arkansas. A paper intended to be sworn to, annexed to the bill of complaint, and upon which the filing and notation of the clerk that a warning order was issued appeared, was neither signed nor sworn to. There was no finding by the court that any affidavit was made or filed, and there is nothing from which any presumption can arise that there was any other paper filed as an affidavit. The complaint with that paper attached was filed and the warning order was issued on April 24, 1900, and it is manifest that the unsworn paper was acted upon by the clerk as a basis for the warning order. It follows that the chancery court in Arkansas had no jurisdiction to enter the decree of divorce, and the decree was void. For that reason, the court did not err in dismissing the petition.

The decree of the Circuit Court is affirmed.

Petition for rehearing denied December 7, 1905.

WASHINGTON SUPREME COURT.

W. H. KNEELAND et al., Appts.,

v.

HARRIET KORTER.

(.... Wash.)

1. Tide land—grant by Congress.

Prior to the admission of a state into the Union Congress has power to grant tide land lying between high and low water mark within its boundaries.

2. Same—disclaimer by state.

Land to which a right to a patent has attached, as well as that actually patented at the time of the admission of a state into

the Union, is included in a constitutional provision disclaiming title to tide land which has been patented by the Federal government.

3. Public land—effect of official survey.

The official survey of government land will be presumed to be correct after the lapse of many years, where its disturbance would upset titles and destroy rights of those who have in good faith relied on it.

(Mount, Ch. J., and Rudkin and Fullerton, JJ., dissent.)

(October 10, 1905.)

APPEAL by plaintiffs from a judgment of the Superior Court for Thurston County in favor of defendant in an action brought to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Israel & Mackay, with Messrs. Vance & Mitchell, for appellants:

Courts incline to carry out the intention of Congress as fully as possible, especially as to the time of vesting title.

9 Am. & Eng. Enc. Law, p. 56; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095; *St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 Fed. 563; *Johnson v. Ballou*, 23 Mich. 379; *Northern P. R. Co. v. Majors*, 5 Mont. 111, 2 Pac. 322; *United States v. Curtner*, 38 Fed. 1; *United States v. McLaughlin*, 30 Fed. 147; *Buttz v. Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100.

Where a proper grant is made no other act is necessary.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Strother v. Lucas*, 12 Pet. 410, 454, 9 L. ed. 1137, 1155; *Courtright v. Cedar Rapids, & M. River R. Co.* 35 Iowa, 386; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Whitney v. Morrow*, 112 U. S. 693, 28 L. ed. 871, 5 Sup. Ct. Rep. 333; *Wright v. Gish*, 94 Mo. 110, 6 S. W. 704.

Congress could grant tide lands.

Shively v. Bowlby, 152 U. S. 58, 38 L. ed. 352, 14 Sup. Ct. Rep. 548; *Prosser v. Northern P. R. Co.* 152 U. S. 64, 38 L. ed. 355, 14 Sup. Ct. Rep. 528.

Case Note.—That the United States government had no authority to grant to private individuals land under navigable water in the territories under its control is a doctrine so strange, when viewed in the light of fundamental principles, that it would seem that no court would have contended for its adoption; and yet such doctrine is advanced in *Hinman v. Warren*, 6 L.R.A. (N.S.)

Or. 409; and *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402. The Federal courts, however, notwithstanding some *dicta* to that effect, did not give their sanction to the doctrine. As shown in *KNEELAND v. KORTER*, the Supreme Court of the United States has distinctly asserted the power to make such grants; and the lower Federal

Messrs. H. J. Snively and Troy & Falknor for respondent.

Root, J., delivered the opinion of the court:

Appellants brought this action to recover possession of 11 acres of tide land, constituting a portion of a 51.31-acre tract of land surveyed, platted, and designated by the United States government as lot 3, section 13, township 19 N., range 3, W., Willamette meridian, in Thurston county, Washington. They claim title through various mesne conveyances from the Northern Pacific Railroad Company, which received a patent to said lot 3 in December, 1894, pursuant to an act of Congress, passed in 1864, granting to said railroad company the odd-numbered sections of public land within a certain distance from the line of railway to be constructed by said company. It is conceded that the railroad company completed the construction of that portion of the road affecting this locality in 1884. The filing of the map of definite location was, of course, prior thereto. Respondent having taken possession of said tide lands, this action was commenced, and a complaint setting forth the foregoing facts served and filed. A general demurrer was interposed by respondent and sustained by the trial court. Appellants electing to stand upon their complaint, the action was dismissed. From this judgment of dismissal, appeal is taken to this court.

It is conceded that the only question involved is as to the validity of appellants' title to the said premises, which lie between the lines or ordinary high and ordinary low water marks. Respondent contends that, as the tract in controversy is situated below "high-tide line" on the shores of Puget

sound, an arm of the sea, the United States government had no power to dispose of it to the railway company, or at all, but could, and did, hold said tide land in trust for the state of Washington. Appellants assert the right of the United States government to grant such lands prior to the time Washington became a state. Appellants further contend that, if the United States government had no authority to grant these lands, yet, having assumed to do so, its grantees and their successors in interest therein can hold the same by virtue of § 2, art. 17, of the state Constitution, which reads as follows, to wit: "The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud." Respondent answers this contention by the claim that this section of the Constitution does not apply to this character of lands, or, if it does, that it can apply only to lands for which patent had already issued at the time of the adoption of the state Constitution. Appellants urge that the virtue of a patent dates from the time of the inception of the grantee's rights in the land, and not merely from the time of the patent's issuance.

We think the complaint shows appellants to have a good title to the tide lands in question. Congress has power, at least for some purposes, to grant lands below high-water mark, where the same are situated within the geographical limits of a territory, although that power be no longer retained when such territory becomes a state. The Supreme Court of the United States, in an elaborate and carefully considered opinion by Mr. Justice Gray, in *Shively v. Bowlby*,

courts took the same position in *Case v. Loftus*, 5 L. R. A. 684, 14 Sawy. 213, 39 Fed. 730; *Carroll v. Price*, 81 Fed. 137, and *Heckman v. Sutter*, 55 C. C. A. 635, 119 Fed. 83. The matter must, therefore, be considered as at rest. *Farnham, Waters*, p. 48, says: "While the territorial form of government exists, the United States government, as sovereign and proprietor, may dispose, absolutely, of all the public lands therein, whether above or below high-water mark. As sovereign, it has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land; while, as proprietor, it has the *jus privatum*, or right of private property, which it can grant to private individuals subject to the *jus publicum*."

But the trust doctrine seems to have worked some confusion, and to have been carried beyond its true limits, in some of the cases. In England the King held title to the tide land simply because it was part of the sea, and the sea was part of his waste and demesne. *Hale, De Jure Maris*, 1 L.R.A. (N.S.)

chap. 4. Until he parted with this waste, and surrendered the dominion over it to Parliament, he had a perfect right to grant it to individuals the same as he had to grant any other property owned by him. This grant, however, was subject to the paramount right of the public to navigate the water and fish in it; so that it came to be regarded as a fact that he held the sea, and could grant it subject to the public right of navigation and fishery, which imposed a trust upon the property. When the United States succeeded to the rights of the English Crown in this country, or acquired other property under the common-law doctrine, it held the absolute sovereignty over the tide land, subject to the same trust; that is, a trust of navigation and fishery in favor of the public, and not a trust to preserve title to the tide land for the benefit of the public, as has sometimes been asserted. This distinction, if kept in mind, will solve the difficulties in all cases, but has frequently been lost sight of. See *Farnham, Waters*, p. 194.

152 U. S. 1, 47, 48, 58, 38 L. ed. 331, 349, 352, 14 Sup. Ct. Rep. 548, 565, among other things said: "Notwithstanding the *dicta* contained in some of the opinions of this court already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true. Chief Justice Taney, in delivering an opinion already cited, after the subject had been much considered in the cases from Alabama, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state.' *Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 471, 478, 13 L. ed. 220, 223. . . . By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories so long as they remain in a territorial condition. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 243, 255, Fed. Cas. No. 302a; *Benner v. Porter*, 9 How. 235, 242, 13 L. ed. 119, 123; *Cross v. Harrison*, 16 How. 164, 193, 14 L. ed. 889, 901; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. ed. 1046, 1047; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 42, 43, 34 L. ed. 478, 491, 10 Sup. Ct. Rep. 792; *McAllister v. United States*, 141 U. S. 174, 181, 35 L. ed. 693, 695, 11 Sup. Ct. Rep. 949. . . . The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters." In the case of *Prosser v. Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528, the same court, in passing upon the identical land grant now under consideration, said: "It may be admitted that the Congress of the United States, while the present state of Washington was a territory, had the power, in chartering a corporation to construct and maintain a railroad from Lake Superior to the Pacific coast, to grant to the corporation such title or rights in lands below highwater mark of tide waters of the territory as might be necessary or convenient for the building, maintenance, use, and enjoyment of such structures as might be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and seagoing vessels. *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Re New York* 1 L.R.A. (N.S.)

C. & H. R. R. Co. 77 N. Y. 248; *Re Staten Island Rapid Transit Co.* 103 N. Y. 251, 8 N. E. 548." Under these decisions, we cannot hold the grant of these lands void, and no facts are now shown which render it voidable.

But, as to whether or not the United States government had power to, or as a matter of law did, grant and convey the particular tide land in controversy here, it is not necessary now to decide, as this case can be determined upon another ground. It is admitted that the United States government did issue to the railroad company a patent covering this land. It was not so issued until 1894; but the consideration on account of which it was issued had been furnished many years before Washington became a state, and the railroad company had been entitled to a patent ever since said time. When our state Constitution was adopted, and we became a state, it was known that the United States had in some instances granted, or assumed to grant, certain tide lands lying below high-water mark. In order to prevent any controversy over said lands, and to avoid disturbing rights claimed under such conveyances, § 2, art. 17, of the state Constitution was adopted. While this section is in terms a disclaimer merely, yet it has been held by this court to be in effect a conveyance of the state's interest in these lands and confirmatory of the government's grant thereof. In *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726, this court, speaking by Hoyt, J., used the following language: "The language of § 2 of article 17 is that 'the state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud,' and, fairly construed, we think it must be held to have in effect confirmed the patents which covered such lands; for, while it is true that the language used is not in form confirmatory, yet, when we take into consideration the situation of affairs, and the object to be accomplished by such disclaimer, we do not see how this object can be given force without construing the language used as substantially a grant to the patentees of the interest of the state in the land so situated. Under the law, as conceded by both parties, the lands had passed absolutely to the state, subject only to such clouds thereon as were caused by the same having been assumed to have been granted to private individuals by the United States. Under such circumstances, if the state disclaims all of its title to such lands, where the patents have been obtained without fraud, it certainly was for the benefit of someone, and it clearly could not have been for the benefit of the United States. . . . In our opin-

ion, the interest of the state passed as fully to the grantees in such patents, or to those holding under them, as it would have done had there been express words of grant used in the Constitution. Any other interpretation of the language used would deprive it of any beneficial force whatever." In *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098, this court, speaking by Dunbar, J., said: "This is tide land patented by the United States, and it is not impeached for fraud, and no matter whether the meander line or the body of water along which the meander line runs is the true boundary. The boundaries of this particular tract of land are settled by the grant in the plat and field notes. The land was granted according to the official grant of the survey of such lands, and the plat itself, and its notes, lines, and descriptions, become a part of the grant or deed by which they are conveyed as much as if the description was written out on the face of the deed itself. See *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203. The constitutional convention of this state, with a commendable sense of honor, thought it but simple justice to disclaim title to all tide lands patented by the United States, without regard to the technical right of the general government to convey the same; and there is nothing in the language of the Constitution that would indicate that the convention intended to make any distinction between lands which had been patented through the medium of the donation act and those which had been patented under the pre-emption or commutation acts, or even of private entry. The principle involved in this case, we think, was identical with the principle involved in *Scurry v. Jones*, *supra*, and the judgment will therefore in all respects be affirmed."

To the contention that this section of the Constitution applies only to lands patented at the time of its adoption, it may be answered that such a construction would sacrifice the spirit of the section. Can it be supposed that the Constitution makers intended to discriminate between two persons who had, in good faith and for value, become entitled to all of the government's property rights in certain portions of such lands—one of whom had already received his evidence thereof (the patent), and the other of whom had not, although equally entitled thereto? It seems to us that this would be to give consideration to form rather than substance, and to make a distinction justified neither in law nor in right. It has been the holding of the courts that the virtue of a patent dates from the time the patentee became entitled to it, and not merely from the date of its issuance. In the case of *Stark v. Starr*, 6 Wall. 402-418, 18 L. ed 925-930, 1 L.R.A. (N.S.)

the United States Supreme Court, speaking by Mr. Justice Field, used the following language: "The right to a patent, once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants." In the case of *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491-497, 24 L. ed. 1095-1097, in discussing a railroad grant, the United States Supreme Court said: "As to the intent of Congress in the grant to the plaintiff there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned, the location of the route being left within certain general limits to the action of the plaintiff. When the location was made, and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned: the act having the same operation upon the sections as if they had been specifically described in it. . . . The construction thus given to the grant in this case is, of course, applicable to all similar congressional grants." The railroad became entitled, in 1884, to whatever patent the government could, under its grant, issue to these lands. It was at that time entitled to, and was the owner of, every property interest in said land which the United States government could, by virtue of said grant, convey. It was such owner, and so entitled by reason of having fully complied with the conditions subsequent of the grant; the statute constituting a grant in *præsentia*, with conditions subsequent. *Buttz v. Northern P. R. Co.* 119 U. S. 55. 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578.

This case is readily distinguishable from that of *Mann v. Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820. In that case an attempt was made to locate Valentine scrip upon tide lands, no part of which was subject to such scrip. The would-be locator had no rights whatever to the tide lands he was seeking to file upon with the scrip, and there was no legal authority by which he ever could, with said scrip, acquire any rights in or to any portion of such lands. In the case at bar there is no question as to the railway company's right to a patent to the principal part of lot 3; but it is contended that said lot, as surveyed, contains certain lands it should not, and that the patent is invalid as to such portion. In other words, the survey is claimed to have been erroneous. It may sometimes be diffi-

cult to definitely and accurately locate the line of ordinary high tide. Physical changes going on for a number of years may alter the location of said line. There must be, touching a survey, some authority recognized, for legal purposes, as correct. It would seem that the survey made by the United States surveyors, after standing forty years or more, as has this, should constitute such authority. It should be presumed as correct in a case where its disturbance would upset titles and destroy the rights of those who have in good faith relied upon it for many years. "The official surveys made by the government are not open to collateral attack in an action at law between private parties." *Whitaker v. McBride*, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530, and cases cited; *Stoneroad v. Stoneroad*, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988. In *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, the Supreme Court said: "In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie." In speaking of the effect of a patent, the United States Supreme Court, in *Whitney v. Morrow*, 112 U. S. 693-695, 28 L. ed. 871, 872, 5 Sup. Ct. Rep. 333, 334, said: "If by a legislative declaration a specific tract is confirmed to anyone, his title is not strengthened by a subsequent patent from the government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress. *Langdeau v. Hanes*, 21 Wall. 521, 22 L. ed. 606; *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807; *Riyp v. Spring*, 5 Sawy. 209, 216, Fed. Cas. No. 14,180." See also, upon this and other points, the case of *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158. As the railroad company had been entitled to its patent long before the adoption of the state Constitution, we think it was as much entitled to the benefit of the disclaimer of § 2 as if it had already received its patent at the time. We can see no reason for discrimination, and cannot hold that the people intended any.

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It is urged by the respondent that the action of the United States government in issuing the patent for these tide lands was a mistake on the part of some of its officers or servants; that the government did not intend to grant or convey any land below high-water mark. Ordinarily it is not to be presumed that public officers or servants have made a mistake in a given matter. The presumption is usually the other way. But, suppose it was a mistake; is it not one of the very "mistakes" or circumstances which the people had in mind at the time they adopted the disclaimer section, *supra*? When Congress passed the statute making the land grant to this railway company, it did not assume to grant a certain number of acres, or a certain number of sections, or any definite quantity; but it undertook to grant a certain class of sections of land, and their identity was defined by reference to the system of government survey. In other words, the railway company was granted every alternate section located within 40 miles of the line established by the definite location of its railway line. These sections were not defined as so many acres surveyed or platted by the railway company, or the county surveyor, or state surveyor; but they were the sections as shown, and to be shown, by the maps and plats prepared by the government from the field notes and surveys of its own surveyors. In *Cragin v. Powell*, 128 U. S. 691, 696, 32 L. ed. 566, 568, 9 Sup. Ct. Rep. 203, 205, the United States Supreme Court said: "It is a well-settled principle that, when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." The land in question was surveyed years prior to the time of the admission of this state into the Union, and prior to the filing of the map of definite location of route by the railway company. The enactment of the statute, the filing of the map of definite location, and the survey and platting of these lands, all having taken place years before Washington attained statehood, it must be presumed that the railway company was holding and claiming all of said lot 3, including these tide lands, in accordance with said government survey, and that the Constitution makers had in mind all such grantees when they adopted the disclaimer *aforesaid*. The mere fact that the patent, which is but an evidence of a right earned before

its issuance, was not actually issued until after the adoption of the Constitution, can in our opinion constitute no good reason for depriving the grantees of the benefits sought to be conferred by this section of the Constitution. If, as respondent claims, a mistake was made, it first occurred at the time the lands were surveyed. As no attempt has been made during these many years to correct said mistake, and as the government itself, in issuing the patent, recognized the same boundaries established long before by its surveyors, we are unable to see wherein the ends of justice would be subserved by this court at this time overturning appellants' title upon the theory that the government officials made a mistake. This lot 3, including said tide land, has been sold and conveyed several times; all grantees evidently assuming the description to be correct and the title good. To hold that neither appellants nor any of their predecessors in interest ever had any title to these lands would in our opinion be to permit the very result which the disclaimer clause in the state Constitution was intended to avoid. We conceive the facts set forth in appellants' complaint sufficient to constitute a cause of action.

The judgment of the honorable Superior Court is reversed, and the cause remanded for further proceedings.

Crow, Hadley, and Dunbar, JJ., concur.

Rudkin, J., dissenting:

It seems to me the majority opinion assumes the very question in controversy in this case. It assumes that the United States granted, or attempted to grant, this 11 acres below ordinary high tide, covered and uncovered by the flow and ebb of the tide, to the Northern Pacific Railroad Company by the act of July 2, 1864, and then concludes that this grant was confirmed by § 2 of article 17 of the state Constitution, which provides as follows: "The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud." In my opinion the assumption on which the majority bases its conclusion has no foundation in law or in fact. The defendant contends that Congress could not make a valid grant of the tide lands within the territory of Washington, as the United States held such lands in trust for the future state. The plaintiffs contend the contrary. I do not think that that question is involved in this case. If any proposition is settled by the decisions of the Federal courts, it is this: That 1 L.R.A. (N.S.)

general grants of land, such as the homestead laws, the pre-emption laws, the donation acts, the grant to the Northern Pacific Railroad Company, and all similar acts and grants, do not extend to or include tide lands. In *Mann v. Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820, Justice Brewer, in delivering the opinion of the court, said: "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands." The grant to the Northern Pacific Railroad Company stopped at ordinary high tide on Puget sound. There is no more pretense for claiming that it extended beyond this than there would be for claiming that it extended beyond the 40-mile limit. The only effect of the extension of the public surveys, the filing of the map of definite location, and the construction of the road, was to locate the grant. It will scarcely be contended that the ministerial officers of the United States, in erroneously extending the public surveys below ordinary high tide, carried land grants with them. Had the plaintiffs in this action no other right or title than that conferred by the act of July 2, 1864, and were they relying upon such title alone, I have little doubt that a showing that the land was below ordinary high tide, and was therefore not included within the grant, would be a full and complete defense to the action.

Was the claim of plaintiffs, or their predecessor in interest, confirmed by the constitutional provision above quoted? I cannot believe that it was. In *Mann v. Tacoma Land Co.* *supra*, the court said that the state "excluded from its claim of title lands which the government had, in the due administration of its Land Department, disposed of by a patent." Let us look for a moment at the conditions which confronted the framers of the Constitution. The state to be asserted "its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." Const. art. 17, § 1. With in the knowledge of the framers of that instrument, patents had already issued for portions of these tide lands, and in justice to these patentees the next section disclaimed all title in and claim to all tide, swamp, and overflowed lands patented by the United States. The disclaimer only extended to such tide lands as had already been patented. It cannot be maintained that the state commissioned the general government to patent tide lands in the future, and I do not understand that the majority so hold.

As heretofore stated, the general land laws and general land grants did not extend to or include tide lands. Therefore all existing patents issued under the general land laws for tide lands were issued without authority of law, and were void. This constitutional provision was in effect a grant of these lands from the state, and this court so held in *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726. As a grant from a sovereign state, it should be strictly construed. Nothing passed by implication or by intentment. A constitution is framed with much greater care and deliberation than an ordinary statute, and greater effect is always given to the language used in the former. If I concede that the disclaimer should not be confined to lands patented, which I do not, it should not be extended beyond the lands which were the equivalent of patented at most; and these lands were not. The addition of the proviso, "provided the same is not impeached for fraud," affords conclusive evidence to my mind that the framers of the Constitution had in mind the claims of individuals patented under the general land laws in due course of administration, and not cases like the present; for how could a grant by Congress be impeached for fraud?

Let us confront the constitutional convention with the facts in this case as they stood at the time of its deliberations. The Northern Pacific Railroad Company had no legal or moral claim to this land. It was not within its grant, and no patent had issued. The utmost that could be claimed was that the public surveys had been inadvertently or erroneously extended below ordinary high tide; for, as said by the court in *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224: "The United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." Would the convention have confirmed the title of the railroad company to this land, and to all lands similarly situated under such circumstances? I can conceive of but one answer to this question, and that answer is not found in the majority opinion. It seems to me that the decision of the Supreme Court of the United States in *Mann v. Tacoma Land Co.*, *supra*, if followed, disposes of every question involved in this appeal. The plaintiff in error in that case, prior to the adoption of the state Constitution, had selected and scripped certain tide lands in Elliott bay, and the selection had been approved by the local land office. He had received a certificate from the local land office, certifying that he was entitled to a patent for the land selected as soon as the lands were surveyed by the general government. It was contended in his behalf

that his title was confirmed by the constitutional provision relied on by the plaintiffs in this case. In answer to that contention the Supreme Court of the United States said: "Reliance is also placed on article 17, § 2, of the Constitution of the state of Washington, which reads: 'The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud.' In respect to this it is enough to say that these lands were not patented. It is doubtless true, as said by this court in *Stark v. Starr*, 6 Wall. 418, 18 L. ed. 930, that 'the right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.' But here there was no right to a patent. The entry in the local land office and the receipt issued by the local land officers were unauthorized acts, and gave no right to a patent; and it cannot be supposed that the state of Washington, when it excluded from its claim of title lands which the government had in the due administration of its Land Department disposed of by a patent, meant thereby to exclude every tract for which a local land officer might wrongfully issue a receiver's receipt." To this we might well add, "nor to exclude every tract over which the ministerial officers of the government had wrongfully extended the public surveys." The above decision also disposes of what is said in the majority opinion about the doctrine of relation.

In conclusion, the opinion of the majority rests upon the following statement contained therein: "The railroad became entitled, in 1884, to whatever patent the government could issue to these lands. It was at that time entitled to, and was the owner of, every property interest in said land which the United States government could, by virtue of said grant, convey. It was such owner and so entitled by reason of having fully complied with the conditions subsequent of the grant; the statute constituting a grant *in præsenti*, with conditions subsequent." What I have said sufficiently shows that this declaration is entirely inconsistent with the decisions of the Supreme Court of the United States. The Northern Pacific Railroad Company acquired no interest whatever in this land in 1884, or prior thereto, or at any time, until a patent was wrongfully issued years after the adoption of the state Constitution.

For these reasons I dissent from the majority opinion.

Mount, Ch. J., and Fullerton, J., concur in the dissenting opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS

v.

HENRY D. SISSON.

SAME

v.

FRANK SISSON.

(.... Mass.)

1. Legislative regulations—hearing.

That the act of public authorities in forbidding the casting of sawdust from a particular mill into a particular stream is not a general regulation does not make it a judicial act, which will entitle the mill owner to a hearing.

2. Water course—protection from pollution.

The legislature may forbid the casting of sawdust into streams, for the preservation of the edible fish.

3. Pollution of water course—prescriptive right against public.

The unrestrained exercise for thirty years of the right to cast sawdust into a stream gives no prescriptive rights which will interfere with the public right to regulate such use for the preservation of food fishes.

4. Legislative delegation of regulation of stream.

The legislature may delegate to a board having peculiar knowledge upon the subject the selection of the streams in which fish are of sufficient value to warrant the prohibition of the casting of sawdust into the stream.

Case Note.—There is no doubt that the state has a right to regulate fisheries either in public or private streams, and to adopt appropriate means for the preservation of food fishes for the benefit of the people. *Farnham, Waters*, p. 1393. For this purpose the legislature has the power to forbid the casting into streams or water ways of substances which will destroy fish or drive them from the stream. *Cartwright v. Canandaigua Gaslight Co.* 32 Hun, 403; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 876; *State v. American Forcite Powder Mfg. Co.* 50 N. J. L. 75, 11 Atl. 127; *Blydenburgh v. Miles*, 39 Conn. 484.

And the pollution of the water of a river by means of refuse from a sawmill so as to destroy the fish therein is a nuisance. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374. It being a public nuisance, the rule applicable to such nuisances generally applies, and a right to maintain the nuisance cannot be acquired by prescription or lapse of time. As shown by the cases cited in the note to *Leahan v. Cochrane*, 53 L. R. A. 891, the cases are uniform to this effect, and of those especially in point attention may be called to *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177, which held that no length of time 1 L.R.A. (N.S.)

5. Legislative commission—action without sworn evidence.

A board of commissioners having authority to determine what streams contain fish of sufficient value to warrant the prohibition of casting sawdust into the stream for their preservation are not bound to act on sworn evidence.

6. Nuisance—declaration without hearing.

A hearing is not necessary to enable the legislature, on a particular state of facts, to declare a thing to be a nuisance *per se*.

7. Same—abatement—compensation.

Where, under the police power, a legislature declares a thing to be a nuisance *per se*, and orders it to be abated, no compensation is due.

(October 17, 1905.)

EXCEPTIONS by defendants to a ruling of the Superior Court for Berkshire County, made during the trial of an action against defendants for violation of an order of fish commissioners prohibiting the discharge of sawdust into a river, which directed a verdict in favor of the commonwealth. Overruled.

The facts are stated in the opinion.

Messrs. Herbert C. Joyner, and H. M. Whiting, for defendants:

Defendants were entitled to a hearing.

Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; *Belcher v. Farrar*, 8 Allen, 325; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 255; *Sawyer v. State Bd. of Health*, 125 Mass. 182.

would exempt a person from a penalty for allowing sawdust to fall into a creek, thereby impairing the quality of the water; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607, 52 Pac. 168, holding that the right to foul waters of a canal from which a number of persons obtain water for irrigation and domestic purposes could not be secured by lapse of time.

So a prescriptive right to use a stream as a place for depositing offal from a slaughterhouse cannot be secured by prescription. *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149. To the same effect is *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419. Nor can the right to pollute it with sewage. *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Platt Bros. v. Waterbury*, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Bloomington v. Costello*, 65 Ill. App. 407; *Kelley v. New York*, 6 Misc. 516, 27 N. Y. Supp. 164; *Com. v. Yost*, 11 Pa. Super. Ct. 323, reversed on the facts in 197 Pa. 171, 46 Atl. 845.

The rule is stated generally in *Farnham on Waters*, p. 1534, that the right to maintain a public nuisance of this character cannot be acquired by prescription, citing a large number of cases.

The defendants could acquire by prescription rights in the river above and below their own premises.

Bolivar Mfg. Co. v. Neponset Mfg. Co. 16 Pick. 241; *White v. Chapin*, 12 Allen, 516; *Middlesex Co. v. Lowell*, 149 Mass. 509, 21 N. E. 872.

The prescriptive right can be acquired against the public and the commonwealth.

Atty. Gen. v. Revere Copper Co. 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605.

The laws and orders passed by virtue of the police power are to be "wholesome" and "reasonable" and necessary for the purposes of safety, health, and morals.

Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Hollingsworth v. Tensas*, 4 Woods, 280, 17 Fed. 109.

Removing the sawdust in some other way than with a blower is so expensive as to entirely destroy the value of the property for sawmill purposes. These facts are sufficient to show that the orders constitute a taking of defendants' property and rights.

Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 73 N. E. 530; *Atty. Gen. v. Old Colony R. Co.* *supra*; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421.

Mr. John F. Noxon, for the Commonwealth:

Whether, in a particular case, the damage done was sufficient to warrant the prohibition or regulation of the discharge of sawdust into the stream, is properly left to the determination of the commissioners.

Heland v. Lowell, 3 Allen, 407, 81 Am. Dec. 670; *Taunton v. Taylor*, 116 Mass. 254; *Sawyer v. State Bd. of Health*, 125 Mass. 182; *Com. v. Young*, 135 Mass. 526; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; 1 Dill. Mun. Corp. 3d ed. § 308; *Cooley*, Const. Lim. 3d ed. 118, 204; *Brooklyn v. Breslin*, 57 N. Y. 591; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *State*, *Danforth*, *Prosecutor*, *v. Paterson*, 34 N. J. L. 163.

The statute is a legitimate exercise of the police power.

4 Bl. Com. 162; *Mugler v. Kansas*, 123 U. S. 623-657, 31 L. ed. 205-209, 8 Sup. Ct. Rep. 273; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 23 Am. St. Rep. 641, 24 N. E. 758; *Allen v. Wyckoff*, 48 N. J. L. 90, 57 Am. Rep. 543, 2 Atl. 659; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380, 66 N. W. 805; *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860; *Stoughton v. Baker*, 4 Mass. 521, 3 Am. Dec. 236; *Burnham v. 1 L.R.A. (N.S.)*

Webster, 5 Mass. 266; *Com. v. McCurdy*, 5 Mass. 324; *Com. v. Chapin*, 5 Pick. 190, 16 Am. Dec. 386; *Vinton v. Welsh*, 9 Pick. 87; *Com. v. Alger*, 7 Cush. 53; *Com. v. Essex Co.* 13 Gray, 239; *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454.

The rights of riparian proprietors on un-navigable streams are subject to this control.

Com. v. Look, 108 Mass. 452; *Howes v. Grush*, 131 Mass. 207; *Com. v. Follett*, 164 Mass. 477, 41 N. E. 676; *State v. American Forcite Powder Mfg. Co.* 50 N. J. L. 75, 11 Atl. 127; *Cartwright v. Canandaigua Gas-light Co.* 32 Hun, 403; *Blydenburgh v. Miles*, 39 Conn. 484; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 876.

It is not an appropriation of property to a public use.

Com. v. Alger, *supra*; *Com. v. Tewksbury*, 11 Met. 55; *Com. v. Gilbert*, *supra*.

No prescriptive right existed.

3 Kent, Com. 6th ed. 439; *Angell*, *Water Courses*, §§ 94, 132; *Pratt v. Lamson*, 2 Allen, 275; *Smith v. Moodus Water Power Co.* 35 Conn. 392; *Stoughton v. Baker*, *supra*; *Nickerson v. Brackett*, 10 Mass. 212; *Com. v. Upton*, 6 Gray, 473; *Morton v. Moore*, 15 Gray, 573; *New Salem v. Eagle Mill Co.* 138 Mass. 8; *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643; *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *Lunt v. Hunter*, 16 Me. 9; *People v. Cunningham*, 1 Denio, 536, 43 Am. Dec. 709; *McCallum v. Germantown Water Co.* 54 Pa. 40, 93 Am. Dec. 656.

Loring, J., delivered the opinion of the court:

These are two complaints, one against each defendant, charging them severally with permitting sawdust to be discharged into the Konkapot river, on March 29, 1905, in violation of an order made by the fish and game commissioners, under Rev. Laws, chap. 91, § 8, dated August 1, 1904. The order, after reciting the authority given by the act, and stating that the mill here in question owned by the defendants had been examined by the board, and that it had been determined by the board that the fish in the brook are of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injures the fish therein, directs the defendants (1) to erect a blower or take other means approved by the commissioners to prevent the discharge of sawdust from said mill into said brook directly or indirectly, and (2) not to accumulate a pile of sawdust on the bank of the brook, so that it may be

liable to fall into the stream or be swept away by a rise of water. At the trial it was proved that this order was served on the defendants on or before July 1, 1904, and that the defendants continued to discharge sawdust into Konkapot river up to the time these complaints were instituted. It also appeared that there were edible fish in the river at the time the board passed the order in question.

The defendants offered to show, in substance, that the commissioners, in making the order, did not act on sworn evidence or personal knowledge as to the fish or the sawdust; that in the spring of 1905 the defendants asked for a hearing, which the commissioners denied; that the mill has been used as it is now used for more than thirty years under a claim of right; and that the right was admitted by the next mill owner below; and, finally, that a compliance with the order as to a blower would impair the efficiency of the mill about 25 per cent, that the sawdust could not be sold, and to cart it away would entirely destroy the value of the land for mill purposes. This evidence was excluded and an exception was taken. The defendants then made the following six requests for rulings, to wit: "First. That the act of the commissioners on fisheries and game, by which they determine that the fish in any brook or stream are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust from any particular saw-mill materially injuring such fish, is a judicial act, which can be lawfully performed only after the hearing of evidence bearing upon the questions involved, viz., the value of the fish in such brook or stream and the effect of such sawdust as injuring such fish. Second. That the order in this case, having been passed by the commissioners without hearing any evidence, and without any knowledge by them of the value of the fish in the stream or the amount of water in the stream, or the amount of sawdust that is discharged by defendants' saw-mill into the stream, is not a lawful order under the statute, and is not binding upon the defendants. Third. That the defendants and the predecessors in title, having been discharging sawdust from their saw-mills for more than twenty years consecutively under a claim of right into the Konkapot river, have acquired by prescription a title to such right, and such right is their property, of which they cannot be deprived without compensation. Fourth. That § 8 of chapter 91 of the Revised Laws makes no provision for compensation to the owner of a sawmill who is forbidden by an order of the commissioners to discharge sawdust into a brook or stream, and said

statute is therefore unconstitutional and void so far as these defendants are concerned. Fifth. That this order of the commissioners so interferes with the use of the property of the defendants as to amount to a taking of such property for public use, and the order is void, as no compensation to defendants for such taking is provided by the order, or by the statute under which the order is made. Sixth. That this order of the commissioners so interferes with the use of the property of the defendants as to seriously damage, impair, or injure such property, and the order is void, as no provision is made, either in the order or the statute under which the order is created, for compensating the defendants for such damage, impairment, or injury to their property."

The defendants' grievance is that, by an order of the board of fish and game commissioners, they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood as they and their predecessors in title have conducted it for thirty years last past, that from this decision there is no appeal, and that not only was the order made without a hearing, but, when a hearing was asked for by the defendants, it was denied. Their contention is, first, that under the act they had a right to be heard at the trial in the superior court on the questions of fact determined by the board; second, that they could not be deprived by the board of their prescriptive right to discharge sawdust into Konkapot river without being heard, and by a finding not made on sworn evidence; and, third, that under any circumstances this right cannot be taken without compensation being made therefor. In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was a judicial action; and, in connection with this argument, they rely on the distinction pointed out in *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650, between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth, or cause of sickness dangerous to the public health, and to make an order for the removal of it. The former, being a rule for all, is legislative in character; the latter, being a determination as to a particular thing, resulting in an order to the owner of it to do a specified act, is

judicial in character. For a later case, where it is pointed out that similar legislative and judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see *Nelson v. State Bd. of Health*, 186 Mass. 330, 71 N. E. 693.

We agree with the defendants' counsel as to what the order here in question is not. We agree that it is not a general regulation. What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot river, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that, because it is not a general regulation, it is a judicial action. The question to be decided here does not depend upon a choice between the two classes dealt with in *Salem v. Eastern R. Co.* and in *Nelson v. State Bd. of Health*, *supra*, and for these reasons: We are of opinion, in the first place, that it is within the power of the legislature to protect and preserve edible fish in the rivers and brooks of the commonwealth, and for that purpose, if they think proper, to forbid any sawdust being discharged into any brook containing such fish. The right to run a sawmill on the bank of a brook or a river is, like all rights of property, subject to be regulated by the legislature, when the unrestrained exercise of it conflicts with other rights, public or private. See *Com. v. Alger*, 7 Cush. 53, 54; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 12 Am. St. Rep. 560, 19 N. E. 390. The defendants' contention that they have a prescriptive right to discharge sawdust into the river, even if it kills or injures the fish therein, which prescriptive right cannot be taken away or impaired without compensation being made therefor, means this, and nothing more: Where the legislature, up to the passage of the act here in question (*Stat. 1890*, chap. 129, p. 106), had not regulated the business of sawing wood on the banks of streams having in them edible fish, and where, in the absence of such regulation, the defendants had discharged sawdust into the stream for thirty years, the people have lost the power to regulate the conflicting rights of sawmills on the bank of the stream, and to preserve fish in the stream itself. The statement of the proposition is enough to show that there is nothing in it. The decision in *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605, relied on by the defendants, is confined to the gaining of prescriptive rights with 1 L.R.A. (N.S.)

respect to property owned by the public under a statute of limitations, which puts the property rights of the public on the same basis as those of individuals.

We are of opinion, in the second place, that in case the legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river, on the one hand, and of the public, on the other hand, to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation of the discharge of sawdust. The right of the legislature to delegate some legislative functions to state boards was considered by this court in *Brodine v. Revere*, 182 Mass. 598, 66 N. E. 607. And, further, in case the legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could, in our opinion, leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights. The power thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors, the board of inland fisheries, in prescribing the details of the construction of the fishways to be constructed in dams where, by law, fishways have to be maintained. See *Stat. 1866*, chap. 238, §§ 2, 6, pp. 231, 232; *Stat. 1867*, chap. 344, p. 741; *Pub. Stat. 1882*, chap. 91, § 4. See also 3 *Province Laws*, 1745, 1746, state ed. chap. 20, p. 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what time the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid. The result is that, in our opinion, the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the legislature itself, and no more than in case of the legislature itself is it bound to act only after a

hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the legislature in enacting a statute; and, being legislative, it is plain that the questions of fact passed upon by the legislature in adopting the provisions enacted by them cannot be tried over by the court. This court has been recently asked to try over the expediency of compulsory vaccination in an action under a statute requiring it. *Com. v. Jacobson*, 183 Mass. 242, 67 L. R. A. 935, 66 N. E. 719. On its declining to do so an appeal was taken to the Supreme Court of the United States, and its refusal to do so was held to be correct. *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358. See particularly page 30 of 197 U. S., page 651 of 49 L. ed., and page 363 of 25 Sup. Ct. Rep. See also *Devens, J., in Train v. Boston Disinfecting Co.* 144 Mass. 531, 59 Am. Rep. 113, 11 N. E. 929.

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for thirty years by a board who have not heard evidence, and have refused the defendants a hearing; that the action of the board is final, and that no compensation is due to them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in *Nelson v. State Bd. of Health*, *supra*; namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under § 113, chap. 75, Rev. Laws, forbidding privies within a specified distance from its shore; and, if the defendant had a privy there for thirty years, his right to maintain it would cease, although the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded, under § 118, to investigate this particular privy, the defendant would have been entitled to a hearing, and, on appeal, to a jury, as provided by § 119. Again, take, for example, the regulation of a local board of health in question in *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929, requiring all rags arriving at the port of Boston from any foreign port to be disinfected at the expense of the owner before being discharged. The power of the local board of health to declare these rags a nuisance *per se*, so as to impose upon the owner without trial the expense of disinfecting them, was established by this court in that case. Had the local board undertaken to investigate the particular rags in question in *Train v. Boston Disinfecting Co.* under their jurisdiction to inquire into sources of filth, and they had been authorized under that act to abate the

nuisance if they found the rags to be a nuisance, by ordering them to be disinfected at the expense of the defendant, they would have had to give the defendant a hearing on notice, and from their decision the defendant would have had a right to a trial by jury. That is what was decided in *Salem v. Eastern R. Co.* *supra*. That is to say, on the one hand, where the law is general, and the question is whether, under it, the defendants are committing a nuisance, the facts are determined by judicial action; on the other hand, the determination of the same facts is legislative in case the legislature decides to make the thing a nuisance *per se*. And where it is legislative it is final, and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due.

The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the legislature, if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy. For similar cases, where the use which can be made of property has been left to the final determination of boards, see *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Com. v. Roberts*, 155 Mass. 281, 16 L. R. A. 400, 20 N. E. 522. See also in this connection, *Re Wares*, 161 Mass. 70, 36 N. E. 586. The difference between the majority and the minority of the court in *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100, was on the construction of the act there in question.

Exceptions overruled.

OREGON SUPREME COURT.

S. F. HARRINGTON, Resp't.,

v.

A. L. DEMARIS, Appt.

(.... Or.)

1. Riparian rights—adverse user.

Use of water by a lower riparian owner without a recognition by the upper owner of the right is not adverse to the latter.

2. Same.

The right of a riparian owner to the flow of the stream through his land is not af-

Case Note.—The definition of a water course has caused the courts some trouble. A favorite definition is that there must be a stream flowing in a bed with banks to constitute a water course. This definition is, for most purposes, sufficient; but a too strict adherence to it has caused trouble in some cases. *Farnham, Waters*, p. 1562, says the distinguishing characteristic is the existence

feeted by adverse use where the use shown is not sufficient to enable the one making it to invoke the statute of limitations in his favor.

3. Water course—absence of channel.

Water flowing in one direction over the surface of the ground without a well-defined channel, from a swamp fed by springs, to the channel of a stream, is a water course, which cannot be diverted to the injury of a riparian owner on the stream.

4. Same—artificial supply.

Where the owners of several parcels of land on a stream remove a barrier, and turn water from another source into the stream, it becomes subject to the rules of law applicable to riparian ownership.

5. Riparian right—division of flow of stream.

A riparian owner has no ground to complain of a decree awarding him one half the water flowing in the stream, as against the claims of a lower riparian owner, where the matter is settled solely by the riparian rights of the parties.

6. Appeal—error not complained of.

An award of damages, although erroneous according to the evidence, will not be disturbed on appeal if not complained of by the parties.

(July 18, 1904.)

A PPEAL by defendant from a decree of the Circuit Court for Umatilla County in favor of plaintiff in a suit to enjoin interference with the flow of a stream. Affirmed.

Statement by Moore, Ch. J.:

This is a suit by S. F. Harrington

against A. L. Demaris to enjoin interference with the flow of water in the channel of a creek to plaintiff's premises. It is alleged in the amended complaint, in substance, that until August, 1900, a natural stream of water, consisting of about 480 inches, had its source from time immemorial in certain springs arising in and issuing from the land of one R. M. Dorothy, in Umatilla county, and flowed westward through defendant's land, thence across plaintiff's premises, and through the lands of "other persons," whereby plaintiff's premises were subirrigated, and he and his predecessors in interest had used such water for a beneficial purpose; that more than thirty-five years prior to the bringing of this suit his grantor dug a ditch from the channel of the stream, diverting therefrom 120 inches of water, which was conducted to the land now owned by him, and there continuously used adversely to the defendant and to all other persons for more than ten years prior to August, 1900, in irrigating crops and an orchard; that after such diversion and appropriation there remained in the channel of the stream 360 inches of water, which continued to flow across plaintiff's premises, "and on and to the lands of other persons," and which plaintiff used for stock and domestic purposes, and claims the right to have such quantity continually to flow across his land; and that in August, 1900, the defendant unlawfully placed a dam in the bed of the stream, and prevented the water from flowing to plaintiff's

of a stream of water flowing for such a length of time that its existence will furnish the advantages usually attendant upon streams of water; and that a water course is the condition created by a stream of water having a well-defined and substantial existence. If this substantial existence is present, the fact that the stream is not strong enough to create for itself bed and banks is not sufficient to defeat its character as a water course. This is the logical conclusion which has been finally adopted by the majority of the cases, although there are a few cases which have taken the opposite view. From the note to *Cairo, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 527, and *Farnham, Waters*, pp. 1558 *et seq.*, it appears that the following cases, in addition to those cited in *HARRINGTON v. DEMARIS*, have adopted this view: *West v. Taylor*, 18 Or. 165, 13 Pac. 665; *Gillett v. Johnson*, 30 Conn. 180; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Hinkle v. Avery*, 88 Iowa, 47, 45 Am. St. Rep. 224, 55 N. W. 77; *New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Mansford v. Ross*, 4 New Zealand L. R. 290; *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230.

The leading case of *Case v. Hoffman*, 84 1 L.R.A. (N.S.)

Wis. 438, 20 L. R. A. 40, 54 N. W. 793, cited in the *HARRINGTON CASE*, has been cited in *Blohowak v. Grochoski*, 119 Wis. 195, 96 N. W. 551, holding that a stream does not cease to be a water course by spreading over low land before flowing again in a natural channel; and *Rigney v. Tacoma Light & Water Co.* 9 Wash. 580, 26 L. R. A. 427, 38 Pac. 147, holding that the spreading out of a stream over a large area of low ground does not deprive it of its character as a water course.

Conversely, *White v. Sheldon*, 35 Hun, 193, held that water issuing from springs, and flowing sluggishly, without determinate channel, over adjoining lands toward a natural creek, is mere surface water; so *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, held that it is not sufficient to constitute a water course that the water flows customarily in a known direction if there are no banks and channels.

If the water diffuses itself over the surface so that it never attains a regular course and channel, it cannot be regarded as a water course, although the source is permanent. *Hawley v. Sheldon*, 64 Vt. 491, 33 Am. St. Rep. 941, 24 Atl. 717.

premises, thereby injuring the grass, crops, and fruits trees growing thereon, to his damage in the suit of \$2,000. The answer denies the material allegations of the complaint, and, for a separate defense, avers, in effect, that water originally collecting in a swamp on Dorothy's land never reached plaintiff's premises by any channel having a bed or banks, but that during the rainy season, when the accumulation was greatest, the overflow found its way westward on the surface to defendant's land, where it sunk in the ground and was lost, and another part found its way northward, emptying into an old channel of the Walla Walla river; that about fifteen years ago Dorothy caused the swamp to be drained by digging one ditch northward to such old channel, and another westward to the boundary of his land, where defendant appropriated the water flowing therein, and also extended the latter ditch northward to the old channel, in which he placed a dam, and, by means of another ditch, conducted all the water flowing from the swamp, in the irrigating season, to his premises, where it was appropriated to a beneficial purpose, and ever since has been used adversely to the plaintiff and to all other persons. For a further defense, it is alleged that from time immemorial the stream mentioned in the complaint has had its only source in a spring of water issuing from defendant's land, which, augmented by the flow of water from other springs, on his premises, originally consisted of a volume 12 inches wide and of the same depth, two thirds of which for more than twenty-five years has been adversely used by him and his predecessors in interest in irrigating crops, the remainder being permitted to flow to plaintiff's premises; that from natural causes the volume of water originally flowing in this stream has gradually diminished, and the surplus, after supplying the defendant's use, sinks into the porous soil before reaching plaintiff's land; that in April, 1900, defendant built a new dam in the stream to take the place of an old one therein, but diverts no more water thereby than formerly, "and that defendant's diversion and use of the water of said stream has at all times been, and now is, a right which belongs to him absolutely, as appurtenant to the land by him owned." It is also alleged that, in the fall of 1875 or 1876, defendant's predecessor in interest diverted and appropriated to a beneficial purpose two thirds of all the water flowing from springs on defendant's land, and ever since that time such water has been used adversely to plaintiff and to all other per- 1 L.R.A.(N.S.)

sons, and that during the last five years, owing to the diminution by natural causes of water flowing from these springs, the quantity now used by defendant is less than that originally appropriated by his predecessors. The reply having put in issue the allegations of new matter in the answer, a trial was had before the court, which found the facts, in substance, as alleged in the complaint, and, as conclusions of law deducible therefrom, that plaintiff was entitled to have all obstructions placed in the stream removed, so as to permit one half the water arising from the springs on Dorothy's lands, not exceeding 60 inches, to flow in the channel to his premises, where he could divert 48 inches into his ditch, and permit 12 inches to flow in the bed of the stream through his land, but in no event to take more than one half the entire flow, and that the defendant was entitled to use the remaining quantity after supplying that given to plaintiff, who was awarded damages in the sum of \$700 by reason of his deprivation of the use of the water; and, having given a decree in accordance therewith, the defendant appeals.

Messrs. Henry J. Bean, Stephen A. Lowell, and Thomas G. Hailey, for appellant:

Water spreading over the surface of the land, or gathering into natural depressions, or into swamps, does not constitute a water course.

Gould, Waters, § 263.

For irrigation purposes, water may be turned into a stream from extraneous sources, allowed to run therein, and again, in like amount, be taken therefrom.

Long, Irrigation, § 43; Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769; Wilcox v. Hausch, 64 Cal. 461, 3 Pac. 108; Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

A standard of measurement must be specifically set forth; otherwise the decree is a nullity.

Bradfield v. Dewell, 48 Mich. 9, 11 N. W. 760; Glaze v. Frost, 44 Or. 29, 74 Pac. 336; Long, Irrigation, § 97; Avery v. Babcock, 35 Ill. 175; 11 Enc. Pl. & Pr. pp. 936, 954.

The diversion and use of water of the spring branch, by respondent, below appellant, cannot be adverse to appellant.

Long, Irrigation, p. 160; Hargrave v. Cook, 108 Cal. 72, 30 L. R. A. 390, 41 Pac. 18; Bathgate v. Irvine, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078; Bowman v. Bowman, 35 Or. 279, 57 Pac. 546; Oregon Constr.

Co. v. Allen Ditch Co. 41 Or. 209, 93 Am. St. Rep. 701, 69 Pac. 455.

Messrs. Carter & Raley for respondent.

Moore, Ch. J., delivered the opinion of the court:

An examination of the pleadings, the substance of which is hereinbefore set out, shows that the controversy involved in this suit relates to the use of water from a stream by riparian proprietors; and, though appropriations of water are mentioned in the complaint and answer, no priority of possession of public land is alleged by either party as a foundation for a vested and accrued right to the use of such water (U. S. Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437); nor is it averred by either party that, after the necessary demands of a prior appropriator had been supplied, there remained a quantity which he appropriated. *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; *Carson v. Gentner*, 33 Or. 512, 43 L. R. A. 130, 52 Pac. 506; *Browning v. Lewis*, 39 Or. 11, 64 Pac. 304; *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976. It will be remembered that the complaint states that plaintiff and his grantor had used the water in question more than ten years adversely to the defendant, but, as his land is situated on the stream below that of the defendant, and the testimony fails to show any recognition by the latter of his alleged right, his use has not been adverse to the defendant. *North Powder Mill Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546. So, too, the answer alleges that the water issuing from the springs on Dorothy's land was used by defendant adversely to plaintiff more than ten years prior to bringing this suit. If the water from these springs was never tributary to the stream in question, defendant's use thereof could not have been adverse to plaintiff, who, as a riparian proprietor, was never entitled thereto. The testimony shows that, though the volume of water flowing in the stream to plaintiff's premises was annually diminishing, his use thereof was undisturbed until about 1898; and, if it be conceded that the water from the springs on Dorothy's land originally formed a part of this stream, the defendant's interference therewith not having been sufficient to enable him to invoke the statute of limitations, his use of the water could not toll the plaintiff's right thereto. This eliminates the question of adverse use by the respective parties, and confines the inquiry as follows: (1) What constitutes the waters of the stream flowing through the lands of the parties? 1 L.R.A. (N.S.)

(2) Has the defendant, as a riparian proprietor, taken more than his share of the water of the stream? and, if so (3), What damage has the plaintiff suffered in consequence thereof?

Considering these questions in their order, the testimony shows that one R. M. Dorothy owns the east half of section 21 in township 5 north, of range 36 east of the Willamette meridian, the defendant the west half of that section, and the plaintiff, the southeast quarter and the east half of the northeast quarter of section 20 in that township and range, except, however, 29 acres from the north end of the latter land, and also 1 acre therefrom on which a schoolhouse has been erected; that the Walla Walla river now flows westerly through the northern part of these sections near a bluff, but prior to 1870 it ran in an old channel, about 200 yards south of its present bed; that a small stream, known as "Spring Branch," is found on defendant's land, and flows southwesterly to and through plaintiff's premises, emptying into the river at a point below. This branch was probably an older channel of the river, for during freshets in the latter stream, before the channel was changed to its present bed, the water overflowed the banks on the south and passed down Spring branch, and, to prevent the stream from permanently following such course, plaintiff's grantor, George De Haven, and others, constructed a dam on the south bank of the river on the line of the overflow. About 15 acres of Dorothy's land was originally a swamp, in which brush and tules grew, and where the water during the entire year stood about 3 feet deep; but about 1884 he drained this marsh, and discovered that it was caused by three large springs therein. It is alleged in the complaint, and the court found, that the source of Spring branch was the springs on Dorothy's land, though defendant maintains that the fountain head of this stream is a spring on his premises, and that the water from the springs on Dorothy's land never reached Spring branch in any channel, and, this, being so, the court erred in making its finding to that effect, and in rendering the decree based thereon. Each party introduced in evidence a map on which is severally delineated the land owned by the plaintiff, by the defendant, and by Dorothy; but, no survey of the stream, river, old channel, or dams ever having been made, the charts do not coincide in important particulars, and hence, neither can be adopted as correct, except in so far as the representations thereon are corroborated. The plaintiff contends that the dam placed in the stream, consti-

tuting an obstruction to the flow of water from the springs on Dorothy's land to his premises, is built in the old channel. The defendant maintains, however, that the dam complained of is placed in Spring branch, and permits as much water to flow to plaintiff's land as passed an old dam which was supplanted by the new structure, and that Spring branch is separate from the old channel. Whether or not Spring branch is a part of the old channel of the Walla Walla river is of no consequence; but the identity of the dam that produced the injury of which plaintiff complains is important.

Considering whether the water from the swamp on Dorothy's land ever found its way originally into Spring branch, we think the preponderance of the testimony shows that it flowed westward therefrom on the surface into this stream, and also northward in the same manner into the old channel. When Dorothy drained this swamp, he dug a ditch therefrom northward, and conducted water into the old channel, and also made another ditch westward from the swamp to the boundary of his land, where defendant continued the conduit north, causing the water flowing therein to be discharged into the old channel. The marsh having been reclaimed, it was ascertained that the swamp was caused by three large springs, known as No. 1, which discharges its water westward, and Nos. 2 and 3, which emit their waters northward, and all now emptying into the old channel. This change in the flow of water from spring No. 1 probably causing a scarcity, George De Haven, plaintiff's grantor, Enoch Demaris, defendant's father and predecessor in interest, and one Highby Harris, who then owned land through which Spring branch flowed, about 1885, removed a part of the old dam, built on the bank of the old channel to prevent an overflow, and let the water issuing from these springs flow down such branch, in which, as we understand the testimony, the greater part thereof has continued to glide for more than fifteen years, until the summer of 1900, when the dam was replaced, and the water from the springs conducted in the old channel to a dam built therein, where by means of a ditch it is diverted and used in irrigating crops and an orchard growing on defendant's land.

Mr. Gould, in his work on Waters, 3d ed. § 263, in elucidating the principle that water which does not flow in a channel is not subject to the rules regulating the rights of riparian proprietors, says: "But if a well-defined natural stream empties into a swamp or lake, where all definite channel is lost, and emerges again into

a well-defined channel below, it is a question of fact, dependent upon the extent of the swamp or lake, whether it is the same stream; and, if it is, the owners of land upon the lower stream have riparian rights, and an owner of land upon the stream above the swamp or lake is not entitled to divert water therefrom to their injury." In the next section the learned author discussing this question further, says: "A stream does not cease to be a watercourse, and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." In *Case v. Hoffman*, 84 Wis. 438, 20 L. R. A. 40, 36 Am. St. Rep. 937, 54 N. W. 793, it was held that the flowing of water upon and beneath the surface of lands between a natural lake of about 60 acres in extent, and a creek into which they discharge, constitutes a water course, where the flow is all in the same direction, and a part of the way along a distinct and plainly marked channel, although for some of the distance it spreads over wide reaches of marsh and swamp lands, and percolates the soil in many and most places between the lake and the creek. To the same effect, see *Cox v. Bernard*, 39 Or. 53, 64 Pac. 860, and *Mace v. Mace*, 40 Or. 586, 67 Pac. 660, 68 Pac. 737. Though there is a conflict in the testimony respecting the character of the original outlet from the swamp westward,—some of the witnesses insisting that it was well-defined, and others that the water flowed on the surface,—we think it was in fact a water course emanating from the springs into a swamp of sufficient extent to render it and spring No. 1 tributary to Spring branch. The water flowing in the outlet from the swamp northward into the old channel never originally reached Spring branch, but when De Haven, Demaris, and Harris, by a concert of action, took out the dam, and let such water, together with that from spring No. 1, into the branch, they thereby made these springs tributary to such stream, and subject to the rules of law applicable to riparian ownership. *Cottel v. Berry*, 42 Or. 593, 72 Pac. 584. In that case Mr. Justice Wolverton, in discussing this subject, said: "It seems to be a rule of law that where owners of different parcels of land conduct water across the same in an artificial channel, and do not define their respective interests in the water, their reciprocal rights thereto are to be measured and determined as if they were riparian owners upon a natural stream." In *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep.

304, 2 N. E. 309, 3 N. E. 826, it was held that, where a change is made in the flow of a natural water course, either artificially or otherwise, and riparian owners acquiesce in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, and precludes a restoration of the stream and its surroundings to their original condition. In the case at bar, we think the testimony warrants the conclusion that, after defendant continued the west ditch north on his premises, so as to conduct the water from spring No. 1 into the old channel, the riparian proprietors removed a part of the old dam, permitting the water issuing from Dorothy's land to flow down Spring branch, thereby making it tributary thereto and entitling them to a reasonable use thereof.

The parties being riparian proprietors, and entitled to the reasonable use of the water flowing in Spring branch, including that issuing from the springs on Dorothy's land, the next question to be considered is whether the defendant has taken more than his share. In *Jones v. Conn*, 39 Or. 30, 54 L. R. A. 630, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068, Mr. Chief Justice Bean, after reviewing numerous decisions involving the right of a riparian proprietor to use the water flowing through his land for irrigation, deduces the following conclusion as applicable to the arid region of the United States: "It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigation purposes." In enforcing this rule, it is further said in the opinion: "For the protection of the rights of the several riparian proprietors, it has even been held that a court of equity may, in a proper case, apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances." In *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325, it was held that the inquiry as to what constituted a reasonable use of the water of a stream for irrigating the land of a riparian proprietor was a question of fact, depending upon the circumstances appearing in each particular case; the court saying: "The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each

contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor." In the case at bar it is impossible to determine from the testimony any of these elements, though it will be remembered that the complaint states that, after this stream crosses plaintiff's premises, it flows "on and to the lands of other persons." If others have any rights in, or claims to the use of, the water flowing in Spring branch, it is needless to say that, not having been made parties, the decree herein cannot possibly affect them. If they are entitled to a reasonable use of water, defendant's rights as a riparian proprietor must necessarily be abridged just in proportion as theirs are judicially determined. The plaintiff having been decreed 60 inches of water, providing that does not exceed one half the volume flowing in the branch, the defendant has no cause to complain, because under no circumstances would he be entitled to more, assuming that the demands of the parties are equal. The testimony shows that in 1875 plaintiff's grantor dug a ditch so as to tap Spring branch on the east boundary of his land, and conducted water therein, which since that time, and until August, 1900, has been used in irrigating about 15 acres, which has been cultivated as an orchard, garden, lawn, and meadow. The plaintiff, as a witness in his own behalf, says that, if all the water from the springs on Dorothy's land flowed into Spring branch, the volume therein would be about 3 feet wide and from 7 to 8 inches deep, and, in speaking of the capacity of his ditch, said it was about 2 feet wide and from 2 to 3 inches deep; and, the court having awarded him 48 inches of water for the purpose of irrigation, we conclude the quantity so decreed is the measure of his right. The decree, however, does not prescribe how such quantity shall be ascertained; but, as plaintiff's testimony seems to imply that he estimates it to be square inches of the vertical cross-section of the stream as it ordinarily flows, he is entitled to that quantity, without pressure, to be measured in a box 12 inches wide, placed in his dam on a grade as near as possible with the fall of his ditch, and the 12 inches decreed him in the bed of the creek will be measured in the same manner at his dam in a box of the same dimensions, set as near as possible on the same grade as the average fall of the stream as it flows through his land.

We think the weight of the testimony shows that the dam which confines in the old channel the water issuing from the several springs on Dorothy's land is the primary cause of the injury complained of. Such dam, and also the new one built on defendant's land, will be removed sufficiently to permit the quantity of water awarded plaintiff to flow to his premises, provided, however, it does not exceed at any time one half the volume flowing in Spring branch.

This brings us to a consideration of the damages sustained by plaintiff. The trial court having visited his premises, with the parties and their attorneys, allowed him \$700; but the considerations which led the court to award this sum are not contained in the transcript, although that comprises the entire testimony. The lowest estimate placed by any witness on the damage done was \$1,000 and it would seem that such sum ought to have been awarded; but the plaintiff, not having insisted thereon at the trial in this court, is evidently satisfied therewith.

From these considerations, it follows that the decree is affirmed.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

WILLIAM KINKEAD, Plff. in Err.,

v.
C. W. TURGEON et al.

(.... Neb.)

Navigable river—title to bed.

The title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor on such stream are bounded by the banks of the river.

(October 5, 1905.)

Headnote by OLDHAM, C.

Case Note.—It is to be regretted that a decision which sweeps away property rights in a considerable quantity of real estate should not be based on a consideration of fundamental principles, rather than upon a mere count of the cases pro and con, as seems to have been done in the above case. At common law all streams which were in fact capable of navigation were considered as navigable, whether the capacity was for floatage, for poling boats, for towing them back and forth, or for the more independent means of navigation. Farnham, Waters, p. 112.

So, in *Blount v. Layard* [1891] 2 Ch. 681, note, Bowen, J., in speaking of the River Thames, says: "We are dealing with the 1 L.R.A. (N.S.)

ERROR to the District Court for Dakota County to review a judgment in favor of defendants in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. John T. Spencer and R. E. Evans for plaintiff in error.

Mr. J. J. McAllister for defendant in error Turgeon.

Mr. J. C. McConkey for defendant in error Marsh.

Mr. Edwin J. Stason, for defendant in error Bray:

The riparian owner does not own the "permanent bed" of a navigable stream.

Wiggenhorn v. Kountz, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; *Crawford Co. v. Hathaway* (*Crawford Co. v. Hall*) 67 Neb. 325, 60 L. R. A. 889, 93 N. W. 781; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Steele v. Sanchez*, 72 Iowa, 65, 2 Am. St. Rep. 233, 33 N. W. 366; *Holman v. Hodges*, 112 Iowa, 714, 58 L. R. A. 673, 84 Am. St. Rep. 367, 84 N. W. 950; *Benson v. Morrow*, 61 Mo. 347; *Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 100; *Perkins v. Adams*, 132 Mo. 131, 33 S. W. 778; *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep. 410; *Stockley v. Cissna*, 56 C. C. A. 324, 119 Fed. 812; *Wallace v. Driver*, 61 Ark. 429, 31 L. R. A. 317, 33 S. W. 641; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195, 13 S. W. 931; *Chicago, B. & Q. R. Co. v. Kelley*, 105 Iowa, 106, 74 N. W. 935; *Morgan v. Livingston*, 6 Mart. (La.) 19; *Delaware, L. & W. R. Co. v. Hannon*, 37 N. J. L. 276; *Johnson v. Knott*, 13 Or. 308, 10 Pac. 418; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62; 13 So. 289; *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789, 17

Thames, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river,—that is, all the Queen's subjects have the right of passing and repassing on it, and it is what is called in the old books a 'King's stream,' by which is meant, not that the soil must belong to the King, but that it is a highway, and that the King is the natural guardian and conservator of the commodious and convenient passage of the river by his subjects."

The King's title never depended on the question of navigability, but upon the fact that the soil claimed by him was covered by tide water. This was upon the theory that the King, being the chief personage in the Kingdom, had the right to the most impor-

N. W. 626; St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 31, 49 N. W. 303; Gibson v. Kelly, 15 Mont. 417, 39 Pac. 517; Shoemaker v. Hatch, 13 Nev. 261; Clement v. Burns, 43 N. H. 609; New York v. Hart, 95 N. Y. 443; Wilson v. Forbes, 13 N. C. (2 Dev. L.) 30; Fulmer v. Williams, 122 Pa. 191, 1 L. R. A. 603, 9 Am. St. Rep. 88, 15 Atl. 726; Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566; Stuart v. Clark, 2 Swan, 9, 58 Am. Dec. 49; Packer v. Bird, 71 Cal. 134, 11 Pac. 873; People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; Rees v. McDaniel, 115 Mo. 145, 21 S. W. 913.

Oldham, C., filed the following opinion:

This was a suit in ejectment, which was tried to the court and a jury on the following stipulation of facts: "It is hereby stipulated by and between the parties hereto: That the plaintiff is, and in 1876 was, the owner of so much of the land described in his petition as was above the line of ordinary high-water mark of the Missouri river in May, 1876. That in May, 1876, the Missouri river, which is a navigable state boundary river, suddenly abandoned its permanent channel adjacent to plaintiff's said land, leaving its former channel and forming a new channel by suddenly cutting through a neck of land to the south of plaintiff's said land. That all

the land in controversy in this action and occupied by the defendants, C. W. Turgeon, V. C. Turgeon, N. Turgeon, Charles Bray, and Caleb Marsh, at the time this action was commenced and at the present time, is wholly below and outside of the ordinary high-water mark of the Missouri river, as it flowed at the time of said sudden change, and cut off the permanent bed of said river, and is now the dry, abandoned bed of the said river. That the lands occupied by the defendants at the commencement of this action and at the present time constitute the abandoned river bed of the Missouri river as said river flowed prior to the cut-off in 1876, being that part of said bed between the center of the channel where said river then ran and the high bank of the land owned and occupied by the plaintiff on the Nebraska side and described in plaintiff's petition." The court directed a verdict for the defendant. There was judgment on the verdict, and to set aside this judgment plaintiff brings error to this court.

The stipulation of facts in this case is exceedingly meager, and the most that can be gathered from it is that in and since 1876 the plaintiff was the owner of riparian lands on the Missouri river, a navigable stream; that by a sudden change of the channel the waters receded from plaintiff's land and left an abandoned river bottom between the former high-water mark of the

tant water, which was the sea. And the sea extended as far as the tide flowed. The King's title, therefore, depended on the tide, and not upon the question of navigability. Farnham, Waters, §§ 36 et seq.

As shown in the note to Goff v. Cogle, 42 L. R. A. 161, and Farnham, Waters, chap. 4, the rule of both the common and the civil law was that the propriety of the soil under fresh-water rivers was in the owners of the adjoining lands, Hale, De Jure Maris, chap. 1, stating: "Fresh waters of what kind soever do, of common right, belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil *usque filum aquæ*, and the owners of the other side the right of soil or ownership unto the *filum aquæ* on their side. And if a man be owner of the lands on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length."

And in Murphy v. Ryan, Ir. Rep. 2 C. L. 143, it was said that the title of the Crown to the bed of the river ceases at the point where the flow and reflow of the tide stops, and above that point the bed and soil are vested in the riparian proprietors notwithstanding the river is navigable, and has been immemorially navigated for commerce and other purposes.

Furthermore, the decisions of the Supreme Court of the United States in The Genesee 1 L.R.A. (N.S.)

Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, and the cases which follow it, extending the jurisdiction of the admiralty courts to the limit of navigability, had no bearing whatever upon the question of the common-law test of navigability, or the title to the land under the streams, out dealt merely with the old quarrel between the English common-law and admiralty courts, in which the former had, by mere brute force, confined the admiralty jurisdiction to the high seas outside the body of the county. Under these circumstances, a decision which deprives the owners of lands on fresh water of their title to the land under the stream would seem to have no more justification than would any other decision which would take away private property merely because the court thought that the interests of the public might be furthered by such course.

The courts which have attempted to vest title to the river bottoms in the public have been in great doubt how far the public title ought to extend. The Tennessee court holds that the public title goes only as far as the water is capable of navigation by sea-going vessels. Stuart v. Clark, 2 Swan, 9, 58 Am. Dec. 49. While other courts have made the title depend on navigability, and then differed very largely on the test of navigability, as shown in the note to Willow River Club v. Wade, 42 L. R. A. 305.

river and the middle of its former channel, which is now occupied by the defendants. Plaintiff's claim to the land rests solely on the doctrine that the riparian owner of lands bordering on the Missouri river takes to the middle thread of the stream, notwithstanding the fact of its navigability. Had the addition to these lands been formed by gradual accretion or reliction, a different question would have been presented, since even the riparian owners on tide-water rivers at common law took the alluvion formed by slow and imperceptible accretion. But under the stipulation the lands in question were admitted to have been formed by a sudden change of the channel of the river. Consequently plaintiff's claim to the bed of the river turns on his right as a riparian owner to take to the middle thread of a navigable river that bounds his land. At common law the title to the bed of navigable tide-water rivers is in the King, who holds it in trust for his subjects. In the states of the American Union in which the English common law prevails there is a conflict of opinions in the courts of last resort as to whether the title to the beds of fresh-water rivers, which are navigable in fact, remains in the state or is in the riparian owners of the stream. This conflict arose when some of the colonial courts, and later the Supreme Court of the United States, made a departure from the common-law test of navigability (that it should be a stream in which the tide ebbs and flows, or an "arm of the sea"), and made the test a practical question of fact as to whether or not the stream was actually navigated. When this departure was made, the conflict arose in the different states as to what rule should be applied to the ownership of the beds of streams which were navigable in fact, but not at common law.

As has been stated, at common law the bed of a river in which the tide ebbed and flowed was held by the King, while the title to the bed of all fresh-water rivers was in the riparian owners. Some of the American courts, notably Illinois, Connecticut, Delaware, Georgia, Kentucky, Maryland, and Maine, applied the doctrine that, as these fresh-water streams were non-navigable at common law, the common-law rule as to the title to fresh-water streams should apply, and consequently that each riparian owner took to the middle thread of the stream. *Adams v. Pease*, 2 Conn. 481; *Braxton v. Bressler*, 64 Ill. 488, 493; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Hendrick v. Cook*, 4 Ga. 241. The opposite view found favor in the decisions of the supreme courts of Pennsylvania, Iowa, Missouri, Kansas, Minnesota, California, Nevada, Arkansas, 1 L.R.A. (N.S.)

Alabama, Tennessee, Indiana, and others. *McManus v. Carmichael*, 3 Iowa, 1; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Lamme v. Buse*, 70 Mo. 463; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59, Affirmed in Supreme Court of the United States, 7 Wall. 272, 19 L. ed. 74; *Packer v. Bird*, 71 Cal. 134, 11 Pac. 873; *Shoemaker v. Hatch*, 13 Nev. 261; *Bullock v. Wilson*, 2 Port. (Ala.) 436; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, 22 Am. St. Rep. 195, 13 S. W. 931; *Elder v. Burrus*, 6 Humph. 358, 367; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644. This line of decisions proceeds on the theory that as these streams, although not "arms of the sea" have been determined to be in fact navigable, the rule applicable to the bed of navigable tide-water streams at common law should govern them; and that, as the beds of navigable streams were reserved by the states when the Constitution of the United States was adopted, the title to the beds of those rivers is in the states. The Supreme Court of the United States has held, in *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, and *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210, that it is for the states to determine the question of the title to the beds of these rivers, as between itself and the riparian proprietors.

It is plain that we stand at the parting of the ways in regard to the decisions of the state courts of this country on the question of title to river beds of the class in dispute. It is also apparent that each of these two divergent lines of authority starts from a basis both sound and sane, and that the results of each of these lines of decisions have been sanctioned and approved by the Supreme Court of the United States. It then devolves upon us to examine carefully the decisions of our own court, and determine from them, if possible, which of the diverging paths we shall follow. The first decision of this court called to our attention is the case of *Lammers v. Nissen*, 4 Neb. 245. This was a dispute over the lands on the banks of the Missouri river, claimed as accretions by alluvial deposits. The case, however, was determined on the evidence, which tended to show that the lands had not been formed as alluvion after the survey by the general government. The case also involved a question of meandered lines, not in point in the instant case. The next case cited is *Bissell v. Fletcher*, 19 Neb. 726, 28 N. W. 303. This was a controversy over riparian rights on a non-navigable stream, and turned on a question of fact as to whether or not the lands

claimed were formed by accretion. The question of riparian rights was next brought before this court in *Wiggenhorn v. Kouyatz*, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603. There the dispute arose over the cutting of timber from an island in the Platte river. While the case was carefully considered and the authorities reviewed by the court, yet the question as to the title to the bed of a navigable river was not in issue and in no way adverted to. Consequently this case is of little assistance in reaching a conclusion. In *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104, again the question was as to the right to accretions on the Missouri river, when the river recedes "slowly and imperceptibly, changing the channel of the stream and leaving the land dry theretofore covered by water." It was held that the alluvion so formed belonged to the riparian owner, but that, if the alteration takes place suddenly, the ownership would remain according to the former bounds. This case, while not in point, excludes any claim to the land by plaintiff in this cause of action on the doctrine of accretion. The next case (*Bouvier v. Stricklett*, 40 Neb. 793, 59 N. W. 550) was a dispute over an island in the Missouri river claimed by the riparian owner as an accretion to his land. A judgment entered in the court below in favor of the defendant was affirmed by this court. In reaching the conclusion many authorities are quoted in the opinion relative to the character of testimony necessary to establish the formation of land by accretion. For this purpose the decision of the Supreme Court of the United States in *St. Clair County v. Livingston*, 23 Wall. 46, 23 L. ed. 59, is quoted from, because it discusses with great learning the peculiar character of the Missouri river with reference to changes in its channel. The result reached by the opinion was that the evidence in the case then considered was not sufficient to show that the island had been formed by accretion. But, plainly by some oversight, it is said in the first lines of the fourth paragraph of the syllabus: "Where the middle of the channel of a stream of water constitutes the boundary line of a tract of land. . . ." While the syllabus as a whole properly states the law, yet so much of it as seems to hold that the title to lands on the banks of the Missouri river extends to the middle of the stream is purely *obiter dictum*, and unfounded on any question necessarily decided in the opinion. In *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239, a contest between a millowner and an irrigation company over the waters of the Republican river, Post, J., speaking for the court, clearly indicated his

adherence to the doctrine that the title to the beds of navigable rivers is in the state, and not the riparian owners. But this question was not adjudicated, because it was held that the Republican river was a non-navigable stream in fact, as well as at common law. In *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303, 67 Neb. 325, 60 L. R. A. 889, 93 N. W. 781, again the contest was between a millowner and an irrigation company over the use of the waters of a non-navigable stream. The opinion in this case gives a very thorough and lucid discussion of the law of running waters, and, while the bed of a navigable stream was not in issue, the author clearly expressed his views on this question. Citing many authorities for his position, he said: "While this subject received slight attention in the case of *Clark v. Cambridge & A. Irrig. & Improv. Co.* *supra*, it was not determined, as a decision of the case turned on another point. As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a claim of property therein or the right to the use thereof by an adjoining landowner. When the government in its survey runs meander lines along the banks of a stream and parts with its title to the adjoining land, the boundary of which would be high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be *publici juris*, and not subject to riparian claims by the adjoining landowner." In *McBride v. Whitaker*, 65 Neb. 137, 90 N. W. 966, the controversy was over an island in the Platte river. The learned commissioner who wrote the opinion in the case specifically called attention to the fact that he was only determining the rights of the litigants in that case, from which no impression should go out that any claims of the state to the bed of the Platte river, or any unsurveyed island therein, were to be affected.

While it is probably true, as contended by counsel for plaintiff in error before us, that there has never been a final adjudication by this court of the rights of a riparian owner to take to the middle thread of the stream of the Missouri river, yet we think that the language used in rendering the opinions in *Clark v. Cambridge & A. Irrig. & Improv. Co.* and *Crawford Co. v. Hathaway*, *supra*, leaves little reason to doubt that Nebraska should be added to the list

of states which hold that the title to the beds of fresh-water rivers which are navigable in fact is in the state, and that the right of the riparian owner is bounded by the banks of the stream.

We therefore recommend that the judgment of the district court be affirmed.

Ames and Letton, CC., concur.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE, Appt.,

v.

JOHN McATEER et al.

CITY OF LOUISVILLE, Appt.,

v.

LOUISVILLE WATER COMPANY.

(.... Ky.)

1. Corporation—sole stockholder—ownership of property.

That one owns all the stock of a corporation does not make him the owner of its property.

2. Water company—taxation of.

The property of a water company the stock of which is all owned by the municipal corporation is subject to municipal taxation where the company was organized to sell water to private consumers, and the Constitution limits tax exemptions to public property used for public purposes, while the statutes provide for taxation of

all property not exempted by the Constitution, and require municipal corporations to tax for local purposes all property subject to state tax.

3. Same.

The principle of equal taxation requires the taxation of the property of a water company organized to sell water to private consumers at the lowest rates, although all its stock is owned by the municipal corporation itself, where only a fraction of the inhabitants of the city patronize the company; since its exemption would cast a portion of the burden which should rest on the patrons of the company upon all the inhabitants of the city.

4. Same—credit on tax bills.

A water company taxed for municipal purposes may credit upon the tax bills the reasonable price of water which has been furnished to and used by the city for the years for which the tax is asserted.

(Hobson and Paynter, JJ., dissent.)

(June 18, 1904.)

A PPEAL by plaintiff from a judgment of the Common Pleas Division, No. 1, of the Circuit Court for Jefferson County in favor of defendants in a mandamus proceeding to compel the assessment for taxation of the property of the Louisville Water Company. Reversed.

A PPEAL by plaintiff from a judgment of the Chancery Branch of the First Division of the Circuit Court for Jefferson County in favor of defendant in a suit brought to compel payment of taxes according to an assessment made by the state board. Reversed.

The facts are stated in the opinion.

Mr. Henry L. Stone for appellant.

Case Note.—The doctrine of the Kentucky court that a water company belonging to the city is engaged in a private business is not in harmony with that of most of the courts that have passed upon the question. It is true that in the above case of *LOUISVILLE v. McATEER* and several other Kentucky cases the waterworks were owned by a separate corporation, but the real ownership belonged to the city, as there were no stockholders except the city itself. Indeed, in *Newport v. Com.* 106 Ky. 434, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433, it appeared that there was no separate corporation, but what was called "the Newport Waterworks was used and operated as a water company, and had a secretary, duly elected by the city." But in that as in the *McATEER CASE* it was held that the municipality occupied, as to its waterworks, "the same position as would a private corporation owning such works;" and therefore it was held that it could be taxed under the state statute for its franchise to carry on that business. But, as declared in *L.R.A. (N.S.)*

Farnham on Waters, vol. 1, page 894: "The general rule is to exempt from taxation property owned by the public; and property held and used for the purpose of furnishing a water supply is within the rule; and it is immaterial that a charge is made for water furnished private consumers so that some revenue is obtained from the plant. *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *State, Water Comrs., Prosecutors, v. Gaffney*, 34 N. J. L. 131, 133; *Wayland v. Middlesex County*, 4 Gray, 500." The author points out that the Kentucky court has taken a different view of the matter, referring to the decision in *Clark v. Louisville Water Co.* 90 Ky. 515, 14 S. W. 502, which is followed in the *McATEER CASE*. This held that such property, being owned and operated for the comfort and advantage of individuals, could not be deemed to be operated by the municipality in its governmental character. The ground of exemption contended for by the author is not that the property is owned and used by the municipality in its governmental

Messrs. **Burnett & Burnett, and Kohn, Baird, & Spindle**, for appellees:

The water company is the property of the city of Louisville.

2 Dill. Mun. Corp. § 773; Cooley, Const. Lim. p. 517.

The property of a municipal corporation is not liable to taxation for municipal purposes.

Low v. Lewis, 46 Cal. 549; New Orleans v. McDonogh, 12 La. Ann. 240; Galveston Wharf Co. v. Galveston, 63 Tex. 14; West Hartford v. Water Comrs. 44 Conn. 360; Cooley, Taxn. p. 130; Louisville v. Com. 1 Duv. 295, 85 Am. Dec. 624; Pittsburg v. Sterrett Subdist. School, 204 Pa. 635, 61 L. R. A. 183, 54 Atl. 463.

Mr. **R. L. Greene** also for appellees.

O'Rear, J., delivered the opinion of the court:

The question for decision in this case is whether the property of the Louisville Water Company is liable for taxation by the city. For five years before the beginning of these suits the water company had not been assessed on any of its property for taxation for city purposes. It claims that its property is exempt from city taxation because the city owns all its stock, or did own all but one or two shares for the years in question. The Louisville Water Company is a corporation created by an act of the legislature approved March 6, 1854 (Acts 1853-54, chap. 507, p. 121). Its location, and that of most of its property, is within the city of Louisville. Its business is to furnish water to the citizens of Louisville and vicinity for which it charges rates based upon the quantity of water used. Many years ago the city, by authority con-

ferred by the legislature and exercised by the city council, subscribed and otherwise acquired the great majority of the capital stock of the corporation, and now owns all of the stock. This stock is owned by the sinking fund commissioners of the city. The water company owes a large bonded debt, secured by mortgage on its plant. The income of the water company is used to pay the expenses of operating and maintaining the plant, then to pay the interest on its bonded debt, and then to provide a sinking fund for the ultimate payment of its debt. Rates to consumers are fixed so as to meet these fixed charges. No dividends are paid on the stock. The plan is and has been to operate the plant so as to place the price of water to consumers at the lowest possible figure. As the net income increases, rates are lowered. The contention of the water company in these cases is that, as the city owns all the stock, it in effect owns the plant; that to tax the plant is to tax the city, which it must pay by levying and collecting other taxes from its taxpayers, thus doing the absurd thing of going to the trouble and expense of taking money from one pocket to put it in the other.

It is not true, in law, that the owner of all the stock of a corporation owns the property of the corporation. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Fietsam v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501; People ex rel. Bank of Watertown v. Assessors, 1 Hill, 616; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279. Even if there was not the weight of authority for the last statement, the city would scarcely want to take the full effect of its contention, for,

capacity, but that it is held by all the people in such a way that the burden of the tax, while apparently shifted by placing it upon the public property, is not really shifted. In opposition to this, the **McATEER CASE** contends that only those who consume the water pay for it; and says: "Many thousands of citizens who are taxpayers do not patronize the water company at all, but depend for their water supply on private wells and cisterns, or upon the public wells. If the water company is compelled to pay a municipal tax, it must collect the money with which to pay it, not by taxation, but from its water rates,—from its customers." The court added that, if water was furnished to everybody alike by the city, it would be truly an idle thing for the city to collect taxes from its water company. There may be some ground of distinction between the case which the court had in hand and that of the water companies of most cities, where a different doctrine obtains, in the facts as to the generality of the use of the water supply by the inhabitants. But it has been 1 L.R.A. (N.S.)

assumed in most cases that the water supply is in a fair sense for the general use of the inhabitants of the city as truly as are the streets and fire protection, which do not indeed benefit all alike, but which are furnished impartially to those who have need of them. As emphasizing the doctrine that municipal waterworks are exempt from taxation on the ground that to tax them would not really change the burden of the taxpayers, a considerable number of cases have limited the exemption to the municipality within which the waterworks are situated, so that property or appurtenances connected with waterworks, but lying outside of those limits, is not exempt from taxation outside. As illustrating, see *Newport v. Unity*, 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704; *Rochester v. Coe*, 25 App. Div. 300, 49 N. Y. Supp. 502; *People ex rel. Rochester v. DeWitt*, 59 App. Div. 493, 69 N. Y. Supp. 366; *People ex rel. Auburn v. Duryea*, 59 App. Div. 488, 69 N. Y. Supp. 388; *People ex rel. Amsterdam v. Hess*, 157 N. Y. 42, 51 N. E. 410.

if it did, then it would follow that the company's debt was the city's debt; adding the bonded debt of the water company, of about one and one-half millions, to the city's other authorized debt, might operate to invalidate some of its recent bond issues. If, upon a foreclosure of the mortgage upon the water plant, it was insufficient to pay the bonded debt, the city would not care to be bound for the balance because it happened to own all the debtor corporation's stock.

There is another fallacy in appellee's position: This is not an effort to tax the capital stock or shares of the water company. If it were, then the question would be here whether the city could tax its own property for its own uses. There is a marked distinction, though, between taxing the property of a corporation and taxing its shares of stock. *Cook, Stock & Stockholders*, §§ 7, 567; *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645. Cases from other jurisdictions are cited as authority for the proposition that a municipality cannot tax its own property for city purposes. Strictly, these cases are made to turn upon the legislative intent, as, in our opinion, this one must also turn. It is generally held that, unless expressly authorized or directed by statute, it will not be considered that a municipality was authorized or required to list its own property for taxation for its own purposes.

If it be conceded that taxing the plant of the water company, all the shares of which are owned by the city, is indirectly a taxing by the city of its own property, it brings us directly to consider the source of appellant's power and the extent of its duty to tax alike all property within its jurisdiction. Section 171 of the Constitution of this state requires that taxes "shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." Section 170 of the same instrument creates and limits the exemptions from taxation. It provides: "There shall be exempt from taxation public property used for public purposes." This is the only reference to property owned by a municipality. Property owned by or on behalf of the public, but not used for public purposes, is not exempt. "The express mention of one thing implies the exclusion of another." That the water company, if owned by the city, is public property, is not questioned. But although its stock is owned by the city, and the property is used in supplying the citizens water, the waterworks are not "used for public purposes," within the meaning of 1 L.R.A. (N.S.)

§ 170, *supra*, and are subject to taxation for state and county purposes. *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624; *Negley v. Henderson*, 21 Ky. L. Rep. 1394, 55 S. W. 554, 22 Ky. L. Rep. 912, 59 S. W. 19; *Clark v. Louisville Water Co.* 90 Ky. 522, 14 S. W. 502. In the case last cited this court said, in speaking of the dual character of a city's government, and of property owned by it: "A municipal corporation has a double character. In one it acts strictly in its governmental capacity. In the other, for the profit or convenience of its citizens. Considered in the latter light, it occupies the attitude of a private corporation, merely, while in the former it is an arm of the state government, or a part of its political power. It is an *imperium in imperio*. The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation, but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely." Following the requirement of § 171 of the Constitution, which defines property subject to taxation for state purposes, the statute is (Ky. Stat. 1903, § 4020): "All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempted from taxation by the Constitution."

Louisville, a city of the first class, gets its authority for levying and collecting taxes under § 2980, Ky. Stat. 1903, in which is this provision: "Each city shall raise a revenue from ad valorem taxes, and a poll tax and license fee, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof subject to taxation for state purposes, and shall levy an ad valorem tax on same, not exceeding," etc. By ordinances duly adopted for each of the years in question, the city levied an ad valorem tax upon "all lands, improvements, personalty, and franchises subject to taxation in the city of Louisville." These ordinances were comprehensive enough to embrace the property of the Louisville Water Company, if it would cover the property of any corporation subject to taxation within the city. It was not necessary to set out each piece of property, or the names of the owners, in the levy ordinance. The office of that ordinance

was to fix the rate of taxation. Its subjects had already been fixed by the statute and the Constitution.

Thus we find an express authority for the city's levying this tax. It is made as clear as language could make it, without enumerating the particular property or its owners. We might leave the case with this statement. But counsel have laid such earnest stress upon the proposition that the act of collecting this tax would be a foolish enterprise—taxing the city's property to support the city government—and therefore presumably not within the contemplation of the constitutional convention or the legislature in enacting the provisions above quoted, that we will notice briefly why the convention who framed the Constitution may have employed both the language and the thought we find in the exemption clause quoted from § 170, with the full purpose of having it applied as is here done. Probably the most prominent feature of the present Constitution is its effort to equalize the burdens of government upon all who enjoy its privileges. Class legislation, and special exemptions and rights which amount to that, are strictly forbidden, and guarded against. To grant the exemption claimed by appellee, even if we could by implication enlarge the exemption clause of the Constitution, would of itself work an unjust discrimination in favor of some and against others of the citizens of Louisville who are taxpayers. It has already been noticed that the water company maintains a separate corporate existence, as if the city owned none of its stock. Only those who consume its water pay for it. Many thousands of citizens who are taxpayers do not patronize the water company at all, but depend for their water supply on private wells and cisterns, or upon the public wells. If the water company is compelled to pay a municipal tax, it must collect the money with which to pay it, not by taxation, but from its water rates,—from its customers. This will result in those who use that water paying a slightly increased rate for it. It may be well supposed that many manufacturing concerns, the owners of improved property, and the wealthy generally, are patrons of the water company. If the water company were not compelled to pay taxes to the city, it would need just that much less revenue from its customers. If this were all, it would not be so bad, though it could scarcely be said that it is just to tax everybody to buy a water plant which less than all have the whole benefit of. But that is not all. For the city is compelled to raise annually by *ad valorem* taxation so much money to support its fire department, its public parks, its schools, and its government generally.

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If one class of property escapes taxation, to the extent of its value all other classes that are taxed must bear the additional burden. Therefore, if appellee water company is not taxed by the city, an equivalent in the taxes it would pay must be paid by other property and citizens. So that those who do not, by reason of the location or nature of their property, or for other cause, patronize the water company, have to pay an additional tax to maintain the city government, in order that those who do patronize the water company may have cheap water. That would amount to the taking of one person's property for the benefit of another. If the water company pays taxes as other corporations are compelled to do, their sum will be apportioned among the various funds; *e. g.*, a certain per cent for school purposes, so much for police, and so on. Thereby those who get the benefit of the waterworks will contribute to it in rates, in the proportion they use the water, enabling it to pay all its fixed charges, including taxes. If water was furnished to everybody alike by the city, as it does police and fire protection, and the use of its streets, parks, and schools, it would be just and proper that the waterworks should be maintained by general taxation, as are the public agencies and institutions named. In that event it would be truly an idle thing for the city to collect taxes from its water company. The line of thought just presented brings us to this further proposition: If it were not contemplated that a city's property not used for public purposes, but used as a private corporation, was not to be taxed by the city, on the ground that the city would be thereby indirectly taxing itself, and that such a thing is not to be thought of, then it would follow that, if the city owned less than all the capital stock of any corporation within its limits, it should not tax that corporation,—at least to the extent that it owned stock in it. This would result in the city's not taxing the gas company, if it owns stock in it, as it doubtless does. And if its sinking fund commissioners have invested part of the sinking fund in the stock of a bank within the city, or in city railway stock, the property of those concerns ought not to be taxed,—at least to the extent of the city's stock. It is a historical fact that certain of the state's sinking funds have for many years been invested in the shares of certain banks and other corporations in this state. It has not been urged that on that account those institutions were exempt from state taxes to any extent. The reason is obvious. Its application and the analogy to the case in hand are equally clear.

The record discloses that, for many years

prior to the period of the default, appellee water company had paid taxes to the city, and charged the city contract rates for water furnished its various departments. The last contract does not seem to have been renewed, although some of the departments, notably the city schools and park board, have been paying their water rates to the water company as heretofore. So long as the water company maintains a separate corporate existence, owning its corporate property and exercising its franchises, it ought to be managed and maintained as a separate concern, dealing at arm's length with the city on business principles, as other corporations in which the city owns an interest deal with it. No inequality among, nor injustice to, the taxpayers can then occur from the city's operating this private corporation for the benefit mainly of those who can pay for its service.

In this suit the city should credit upon appellee's tax bills the reasonable price of the water it has used for the years for which the tax is being asserted, and for which it may not have paid. The basis of this credit should be upon just such terms as the court may find from evidence, if the parties cannot agree upon it. Credit should be given on the city's tax bills for each year's water rents, so as to avoid penalties and interest, so far as such water rents may go to extinguish the annual bills.

For the reasons indicated, the judgment of the Circuit Court in the suit against Mc-Ateer, etc., refusing the mandamus against the board of equalization to compel them to pass upon the assessment of the water company's property as returned by the assessor, and the judgment of the Circuit Court in the franchise tax case, dismissing the city's petition, are each reversed, and they are remanded for proceedings consistent herewith.

Paynter and Hobson, JJ., dissent.

ILLINOIS SUPREME COURT.

CITY OF CHICAGO, Appt.,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(218 Ill. 40.)

1. Municipal corporation—water rates—liability of property owner.

A municipal corporation engaged in the business of furnishing water to its inhabitants for pay cannot, after losing by lapse of time its lien on a parcel of property for water furnished thereon, compel its owner

to pay for water furnished before he acquired title.

2. Water rates—payment under duress.

Payment of water rates under protest, to avoid the shutting off of the water, which would be a great detriment to the property owner, is under duress, within the rule that payments so made may be recovered back.

3. Interest—liability of municipal corporation for.

A municipal corporation is liable for interest where it wrongfully exacts money which it holds without just right or claim.

(October 24, 1905.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover money which had been paid for water rates under protest. Affirmed.

Statement by Wilkin, J.:

Appellee brought an action of assumpsit against appellant in the superior court of Cook county, to recover for certain water charges paid by it under protest. An agreed state of facts was entered of record, and, upon the case being submitted to the court without a jury, judgment was entered against appellant for \$1,849, together with interest and costs of suit. This judgment has been affirmed by the appellate court, and a further appeal has brought the case to this court. The agreed state of facts shows that the city of Chicago has for more than ten years been operating a water system and furnishing its inhabitants with water, and it is the only corporation, firm, or person within the limits of the city owning or operating a waterworks system. Section 32 of the ordinances provides that any person failing to pay his water rates within the time prescribed shall not be entitled to any discount; and, if the rate is not paid within sixty days after the first day of the current assessment period, the water shall be shut off from the premises; and in case of failure of the water bureau to shut off the supply on or before thirty days prior to the expiration of the current collection period, the water bureau shall lose any lien it may have against the premises as to 75 per cent of the frontage rate and all extra fixtures, and shall collect the same by an action at law. The appellee is a corporation organized under the laws of the state of Wisconsin, and obtained title to a number of pieces of property in the city of Chicago at various times through foreclosure proceedings. The city of Chicago presented to appellee separate bills for water supplied upon each piece of property, thus seeking to charge appellee not only for

the water supplied to it upon the particular property to which said bill related, but, in addition thereto, seeking to charge it with back water rates for water supplied to former owners or tenants prior to the ownership or occupancy of appellee, and which the former owner or tenant had failed to pay. In each case, upon the presentation of the bill, appellee tendered to appellant the amount of charges for water furnished since the particular piece of property had been transferred to appellee, and denied any liability for the back water rates furnished other tenants or occupants; and appellee remonstrated with the authorities of the city of Chicago against the charges for back water rates, but was informed by appellant that, unless the particular bill or bills were paid as rendered, the appellant would proceed at once to shut off the water from the particular premises; and in some instances the water was shut off from certain premises by the appellant. Thereupon appellee made payment to appellant of each of said water bills, aggregating the sum of \$1,564.94, including the back water rates, and also including a charge for shutting off the water in places where the water had actually been shut off. Each of said payments was made by a check inclosed in a letter stating that said payment was made under protest, and for the sole reason that appellant had threatened to shut off, or had shut off, the supply of water from the premises to which the particular bill so paid related. Each of the particular pieces of prop-

erty to which the several bills related was improved, at the time, with buildings used as stores, flats, and residences, furnished with tubs, boilers, washbasins, and a system of water pipes and faucets connected with and supplied by water from the system of water pipes of appellant.

Mr. Edgar B. Tolman, with Mr. William D. Barge, for appellant:

As appellee was not under duress when making the payments, no recovery can be had.

Elston v. Chicago, 40 Ill. 514, 89 Am. Dec. 361; *Falls v. Cairo*, 58 Ill. 403; *Heaps v. Dunham*, 95 Ill. 583; *Walser v. Board of Education*, 160 Ill. 272, 31 L. R. A. 329, 43 N. E. 346; *Otis v. People*, 196 Ill. 542, 63 N. E. 1053; *Yates v. Royal Ins. Co.* 200 Ill. 202, 65 N. E. 726; *Loan & Protection Asso. v. Holland*, 63 Ill. App. 58; *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Union P. R. Co. v. Dodge County*, 98 U. S. 541, 25 L. ed. 196; *Cooley, Taxn.* 3d ed. p. 1501.

The city is not liable for interest.

Pekin v. Reynolds, 31 Ill. 530, 83 Am. Dec. 244; *Chicago v. People*, 56 Ill. 327; *Mt. Morris v. Williams*, 38 Ill. App. 401; *South Park v. Dunlevy*, 91 Ill. 49; *Shoenberger v. Elgin*, 164 Ill. 80, 45 N. E. 434; *Vider v. Chicago*, 164 Ill. 354, 45 N. E. 720.

Messrs. Hoyne, O'Connor, & Hoyne, for appellee:

The circumstances under which appellee

Case Note.—The right of a municipal corporation or water company to compel a property owner to pay for water furnished to a former occupant seems to depend on the existence of a lien against the property. In the absence of such lien, the water company is not allowed to enforce a contract obligation of one person against another who has not in any way assumed it, except where the water is actually turned off at the time of the purchase, so that the new owner may obtain an adjustment of the equities before he pays the purchase price for his property.

Turner v. Revere Water Co. 171 Mass. 329, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634, holds that to create a lien the authority of the legislature is necessary, and a mere regulation of the water company is not sufficient.

A purchaser of property will, however, take it subject to a statutory lien existing against it for water furnished the prior occupant. *Vreeland v. O'Neil*, 36 N. J. Eq. 399. Affirmed in 37 N. J. Eq. 574; *Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co.* 58 N. J. Eq. 59, 43 Atl. 418.

It has, however, been held that, if the water has actually been turned off for default of a landowner, a successor in title cannot require it to be turned on again 1 L.R.A. (N.S.)

without the settlement of the arrearages; it being held that his remedy is against his grantor for indemnity for the amount due. *Jones v. Nashville*, 109 Tenn. 550, 72 S. W. 985; *Altoona v. Shellenberger*, 6 Pa. Dist. R. 544; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393; *Howe v. Orange* (N. J.) 62 Atl. 777. And this rule may be enforced by a private water company. *Brumm v. Pottsville Water Co.* 9 Sadler (Pa.) 483, 22 W. N. C. 137, 12 Atl. 855. And this is especially true if such course is authorized by the legislature. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214.

However, under a statute imposing a penalty on a water company for failure to furnish a supply to anyone who has paid or tendered the rates, the company cannot withhold water from one who has complied with the conditions because of arrearages due from a former occupant. *Sheffield Waterworks Co. v. Wilkinson*, L. R. 4 C. P. Div. 411, 48 L. J. Mag. Cas. N. S. 145.

Under the English statute 50 & 51 Vict. chap. 21, § 4, a personal action may be brought against a purchaser for arrears of water rents accruing before the date of his purchase. *East London Waterworks Co. v. Kellerman* [1892] 2 Q. B. 72, 67 L. T. N. S. 319, 56 J. P. 773.

12 N. E. 737; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631.

The character of acknowledgment required is such as is usually given legitimate children.

Hawbecker v. Hawbecker, 43 Md. 516; Ives v. McNicoll, 59 Ohio St. 402, 43 L. R. A. 772, 69 Am. St. Rep. 780, 53 N. E. 60; Blythe v. Ayres, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915; Ré Jessup, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742, 1028, 21 Pac. 976; 5 Cyc. Law & Proc. p. 633; Watson v. Richardson, 110 Iowa, 673, 80 N. W. 407; Markey v. Markey, 108 Iowa, 373, 79 N. W. 258; Robinson v. Ruprecht, *supra*.

Cartwright, Ch. J., delivered the opinion of the court:

Alexander Miller and Rusaw Miller, the appellants, and their mother, Betsy Pennington, widow of Anthony Pennington, deceased, filed their bill in this case in the circuit court of Wayne county against the appellees, who were children and grandchildren of said Anthony Pennington, praying for the assignment of dower and homestead to said Betsy Pennington in the lands of which Anthony Pennington died seized, and for partition of said lands among appellants and appellees as heirs-at-law. The

adult defendants answered, admitting the death of Anthony Pennington, that he was seized of the lands described in the bill, and that the complainant Betsy Pennington was his widow and entitled to dower and homestead, but denying that her children, Alexander Miller and Rusaw Miller, were children and heirs of Anthony Pennington. The minor defendants, by their guardian *ad litem*, filed a formal answer, neither admitting nor denying the allegations of the bill, but calling for proof. Replications having been filed, the cause was heard and a decree was entered assigning homestead and dower to Betsy Pennington, but dismissing the bill as to the complainants Alexander Miller and Rusaw Miller. The record has been brought to this court by appeal.

The facts proved at the hearing are as follows: In the year 1864 Anthony Pennington, a farmer and stock dealer, was living with his first wife, Phœbe Pennington, and they had four children. Betsy Miller was an unmarried woman and cousin of Phœbe Pennington. Rusaw Miller and Alexander Miller, who will be hereafter termed the complainants, were born to her,—Rusaw on March 14, 1864, and Alexander on April 24, 1865,—and Anthony Pennington was their natural father. Subsequently four more

of no rule of construction, and certainly there is no reason, requiring a different meaning should be given to the words in one section to that given them in another.

... We do not see the force of the reasoning that would so restrict the meaning of the section as to exclude from its operation parents, one or the other of whom has violated his or her marriage obligations in the procreation of the child. The child of such parents is not less innocent or unfettered than the child of parents who were unmarried at the time of the copulation, and the ground upon which the insistence is based that a distinction should be made—that the child shall be punished for the sins of the parents—shocks every sense of justice and right. The degree of moral or criminal delinquency of the parents does not enter into consideration in construing the section."

Under a statute legitimating the issue of marriages decreed null in law, it was held, in *Stones v. Keeling*, 5 Call (Va.) 143, that the children of a woman who left her husband to marry another man, by whom the children in question were begotten, became the heirs of the latter, and entitled to administration upon their father's estate.

The correctness of this decision is recognized and sanctioned *obiter* in *Garland v. Harrison*, 8 Leigh, 368.

In *Ives v. McNicoll*, 59 Ohio St. 402, 43 L. R. A. 772, 69 Am. St. Rep. 780, 53 N. E. 60, the supreme court of Ohio, construing precisely the same statute as that in force in Kentucky, came to a contrary conclusion, 1 L.R.A. (N.S.)

expressly disapproving the decision in *Sams v. Sams*. "The adulterous connection," says the court, "is not had with a view to subsequent marriage and legitimating children, but with a view to present pleasure; and the ardent hope and desire usually exists that no offspring should result therefrom; and this section was enacted to enable parents, when all impediments to a legal marriage should be removed, to intermarry and recognize and acknowledge their offspring, and thereby in a measure atone for the sins of the past, and do justice to their innocent and unfortunate children."

The same interpretation to the statute is given in the earlier case of *Sutphin v. Fox*, 2 Ohio Dec. Reprint, 90, where the child of a woman, born to a stranger during her coverture, was held to be legitimated by her marriage to such stranger after divorce from the first husband.

So, the marriage of a man, after the death of his wife, to a woman who bore children to him while he was yet in coverture, is held, in *Hawbecker v. Hawbecker*, 43 Md. 516, under a similar statute, to legitimize them, the court refusing to exclude such offspring from the benefit of the statute, in the absence of an expressed intent of the legislature to deprive them of it.

No adoption can be presumed where the illicit relations began during the coverture of the woman, and continued after her divorce from her husband, but without establishing a marriage with the putative father. *Sbarboro's Estate*, Myrick, Prob. Ct. Rep. (Cal.) 255.

children were born to Anthony Pennington and his said first wife. Phœbe Pennington, the first wife, having died, Anthony Pennington married Betsy Miller, the mother of the complainants, on April 2, 1902, and he lived with her as his wife until his death, on September 9, 1904. Prior to the death of his first wife he frequently denied the paternity of the children, but when he determined to marry their mother, and after the marriage, from time to time, and within a short time before his death, he acknowledged to many different persons that they were his children. He told several persons that he was going to marry Betsy Miller, that they were his children, and he thought he was doing right. When he went to the justice to get the license and procure his attendance at the ceremony, he told the justice he wanted him to come down and marry him, that he thought it was the right thing for him to do, and that the complainants were his children. After the marriage, at different times, he made the same statements as to the parentage of the complainants, with expressions of opinion that he had done right in marrying their mother, saying that after Phœbe died he concluded to marry Betsy, and that he did not think it any more than right that he should marry her. These acknowledgments were made to about twenty-five disinterested persons who testified in the case. There was also evidence of other witnesses, not so numerous, and several of whom were relatives of his first wife's children, that Anthony Pennington denied to them that he was the father of complainants, and these denials were made both before and after he married their mother. It appears that he was somewhat addicted to the use of intoxicating liquors, and that he was more likely to refer to the subject of the paternity of the children and his marriage to their mother at times when he had been drinking to some extent, which was perhaps natural enough, but it is very clear from the evidence that at such times he was entirely capable of intelligently making the acknowledgment. He made the statements to some witnesses when he had not been drinking and to others when he had; but he was a capable business man of considerable property, a stock buyer and farmer, and the force of his statements and acknowledgment is in nowise affected by the fact that on some occasions he had been drinking.

At the common law, an illegitimate was of kin to no one, and therefore was incapable of being the heir of any person, and the common law was in force in this state until changed by statute. *Blacklaws v. Milne*, 82 Ill. 505, 15 Am. Rep. 339. But this state, like many others, has abrogated the common-law rule by statute. The civil law, which is 1 L.R.A. (N.S.)

now recognized as more humane and just than the common law, enabled the father of an illegitimate child to make some reparation by securing to the innocent and unfortunate the rights of inheritance to which it is naturally entitled. There were several methods under the civil law by which an illegitimate child might be made legitimate, one of which was the mere marriage of the father and mother; and in some states their marriage alone, without any acknowledgment of paternity, has this effect. In others, children born out of wedlock become legitimate by the marriage of their parents and the recognition of the children by the parents as their own. In others, the subsequent marriage and recognition by the father, before or after marriage, is sufficient, and, in others, the acknowledgment is required by the statute to be in writing. By our statute two of these methods have been adopted as applied to different conditions. Where there has been a judicial finding of the paternity of the child, the marriage of the parents without any acknowledgment of paternity renders the child legitimate. Section 15 of the bastardy act provides that if the mother of any bastard child and the reputed father shall, at any time after the birth of the child, intermarry, the child shall in all respects be deemed and held legitimate. Hurd's Rev. Stat. 1899, chap. 17, p. 205. Other cases of illegitimacy are provided for by the statute of descent. Section 3 of that act is as follows: "An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate." Hurd's Rev. Stat. 1899, chap. 39, p. 653. The rights of the complainants as heirs of Anthony Pennington are to be determined under the latter statute, and it was necessary for them to establish, by the proof, three facts: First, that Anthony Pennington and Betsy Miller were their parents; second, that their said parents intermarried; and, third, that Anthony Pennington acknowledged them as his children. Each of those facts was clearly and indisputably established by the evidence, and, the conditions of the statute having been fully complied with, they are thereby declared to be legitimate. The fact that the children were the result of adulterous connection makes no difference. *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631. The civil law excluded illegitimates who were the result of adulterous connections, but the provision which existed in the civil law is not contained in our statute, and, where that is the case, all illegitimates are included. *Garland v. Harrison*, 8 Leigh, 368; *Ives v. McNicoll*, 59 Ohio St. 402, 43 L. R. A. 772, 69 Am. St. Rep. 780, 53 N. E. 60.

The argument in support of the decree

is to the effect that the acknowledgment required by the statute is a general and public one; that the father must show, by his acts, words, and treatment of the child, that he regards, and desires the public to regard, it as his legitimate offspring; and that all his acts and words, taken together, must show that he intends to make the child legitimate and capable of inheriting his estate. Counsel say that, although Anthony Pennington told many persons that the complainants were his children, he told others that they were not, and that, considering the whole evidence, it cannot be said that he intended they should be included among his heirs. At the time of the marriage of their mother they were grown men with families of their own; and, if the argument were sound as applied to children of tender years, there could be no inference from the fact that they were not received into the family as children, but lived by themselves. We do not understand, however, that we are authorized to add anything to the statute, or to enlarge or restrict the meaning of its words, and the statute does not contain the conditions contended for by counsel. They cite cases from California and Iowa, and quote from the decision in the case of *Re Jessup*, 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742, 1028, 21 Pac. 976, where the acknowledgment was held not to be sufficient under the California statute. The statutes of the different states providing for the legitimation of illegitimate children are widely different, and an examination of that case shows that the statute is entirely different from our own. One provision of the California law is that a child born before wedlock shall become legitimate by the subsequent marriage of its parents, and under that provision no acknowledgment is required. Another provision is that an illegitimate child is the heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child. Another section provides for legitimation without the marriage of the parents, and is as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed, for all purposes, legitimate from the time of its birth." That section relates only to minor children. *Re Pico*, 52 Cal. 84. Under those statutes neither an oral admission nor proof of paternity will constitute an illegitimate child an heir, and the section providing for an acknowledgment requires it to be public, and 1 L.R.A. (N.S.)

that the child shall be received by the father as his own with the consent of his wife, if he is married, into his family, and otherwise be treated as his child. There must be a public acknowledgment and such treatment as a father would naturally give his child. *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915. But there is no such provision in our statute and no requirement for a written acknowledgment, so that an oral acknowledgment, when clearly and satisfactorily proved, is sufficient. So, also, the Iowa Code provides that to entitle an illegitimate child to inherit from the father, the recognition of the child by the father must have been general and notorious or in writing. *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407. Our statute does not require either, but is similar to the Indiana statute, which provides that if the father shall marry the mother of a bastard child, and acknowledge it as his own, the child shall be regarded as legitimate. In construing that statute, the supreme court of Indiana has held that an acknowledgment by the father removes from the child the status of illegitimacy, no matter what the purpose of the acknowledgment was, or whether the father intended to make the child his heir; and that it fixes the status of the child, which cannot be changed by anything the mother or father might afterward say. The court said: "Having removed the 'bar sinister,' they cannot replace it." *Brock v. State*, 85 Ind. 397; *Binns v. Dazey*, 147 Ind. 538, 44 N. E. 644. That seems to us to be the correct interpretation of our statute, the purpose of which is to fix the status of the child as legitimate. It seems to us that it would be an unjust and unwarranted construction of the law to say that the father of an illegitimate child, who has legitimated it by marrying its mother and acknowledged it to be his, can thereafter change its status by any subsequent declaration. All that the statute requires in respect to the acknowledgment is that the father shall own or admit the child to be his; and the fact that Anthony Pennington very frequently acknowledged these children to be his is beyond dispute or controversy. It follows that the court erred in dismissing the bill as to the complainants, who asked for a partition of the lands.

The decree is reversed and the cause is remanded to the circuit court, with directions to grant the prayer of the bill, and to enter a decree for the partition of the lands therein described in accordance with the views above expressed.

Petition for rehearing denied December 12, 1905.

WEST VIRGINIA SUPREME COURT OF APPEALS.

OSCAR F. RILEY et al., Pliffs. in Err.,
v.

F. HARRIS YOST.

(.... W. Va.)

1. Profert—oyer—unsealed instrument.

Profert cannot be made, or oyer demanded, unless the declaration avers a sealed instrument.

2. Pleading—profert.

The fact that a declaration makes profert does not alone make the writing part of the declaration, without a demand of oyer.

(October 31, 1905.)

ERROR to the Circuit Court for Taylor County to review a judgment in favor of defendant in an action brought to recover an amount alleged to be due under a contract. Reversed.

The facts are stated in the opinion.

Messrs. Dent & Dent for plaintiffs in error.
Messrs. Davis & Davis and E. D. Lewis, for defendant in error:

In an action in assumpsit on special contract to recover damages, the entire consideration and the entire act to be done must be stated in the declaration.

Davison v. Ford, 23 W. Va. 617; Sterrett v. Teaford, 4 Gratt. 84; Bennett v. Giles, 6 Leigh, 316; Eib v. Pindall, 5 Leigh, 115; Jarrett v. Jarrett, 7 Leigh, 93.

Brannon, P., delivered the opinion of the court:

Oscar F. Riley and Columbus N. Mason

Headnotes by BRANNON, P.

Case Note.—Under the Code practice prevailing in New York and many of the other states, profert and oyer are obsolete, and the requirement that a document forming the foundation of an action must be set out as part of the declaration, or as an exhibit attached thereto, has taken their place. See, for the operation of Code rules, 1 Abbott, Trial Brief, Pl. §§ 246 et seq.

The well-established common-law rule, that neither profert can be made, nor oyer demanded, of an unsealed instrument, is well stated in RILEY v. YOST. The reason of the rule is given by Gould, Pl. chap. 8, p. 423, as follows: "As a general rule profert is required of no other instruments than deeds, these being the only private writings which, by the original principles of the common law, are considered as instruments on which an action or defense can be directly founded. And, consequently, he who pleads a writing not under seal—as a bill of exchange, promissory note, or other unsealed written agreement—is not bound to make profert of it; for written contracts not

brought an action of assumpsit in Taylor county against F. Harris Yost. The declaration contains the common counts and one special count upon a written contract. Under a demurrer there was a judgment of *nil capiat*, and the plaintiffs brought the case here.

The defendant says that the written contract does not support the action as stated in the special count upon it; but we must take that count without considering the written contract. That count avers the executing of a written contract and makes profert of it. We cannot consider it for these reasons. The count does not say that the contract is under seal. There can be neither profert nor oyer of a contract not under seal, and, though profert be made, it is unavailing to make the writing part of the declaration. There cannot be profert, because the declaration does not profess to declare upon a sealed instrument; and, there having been no oyer demanded, we could not read the contract, even if said to be sealed, because to read it there must be, not only profert, but oyer. Duval v. Malone, 14 Gratt. 24; 16 Enc. Pl. & Pr. p. 1087. There can be no profert or oyer, except of certain sealed instruments. Andrews' Stephen, Pl. 159; 1 Barton, Law Pr. 316; 16 Enc. Pl. & Pr. p. 1083. Such is the common-law rule of pleading. There seems to be an erroneous idea with some that a profert of an instrument, sealed or unsealed, makes it a part of the declaration, and we meet with declarations sometimes which file writings marked as exhibits, just as if the case were in chancery. That does not make such paper part of a common-law pleading, though it does in the case of equity pleadings. A declaration at law on a writing must give

under seal are regarded by the common law, not as instruments on which actions are founded, but merely as simple contracts, or, more precisely, as evidence of parol contracts. Of such instruments, therefore, oyer is not demandable."

Illustrations of the application of this rule in the courts appear in Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 Am. Dec. 543, where the lower court's refusal to grant oyer of an unsealed insurance policy, upon which the action was based, was held no error; Gatton v. Dimmitt, 27 Ill. 400, where oyer of a promissory note declared on was refused. To enable the court to examine it, the defendant must bring it before the court by bill of exceptions, demurrer to evidence, agreed case, or special verdict; Chapman v. Harper, 7 Blackf. 333, and Russell v. Drummond, 6 Ind. 216, in both of which cases the rule is recognized, but deemed waived by the plaintiff, who made profert of an unsealed negotiable instrument without objection on demand of oyer.

the legal effect of the writing, and to do so must state so much of it as will support the action; but that does not make the instrument a part of the pleading. It is not generally the office of common-law pleading to incorporate writings. Perhaps, where the declaration sets out the instrument by its tenor,—and that is, in its very words,—it becomes a part of the declaration, but not where the tenor is not given. 8 Enc. Pl. & Pr. p. 740. It may be asked, How can a variance between the declaration and writing be taken advantage of? By objection to the introduction of the paper in evidence; if a sealed instrument, also by oyer and demurrer; or, where it is claimed that the writing does not support the action, a demurrer to the evidence would raise that question.

Looking, then, at the special count, and not reading the writing, we find that it states that the plaintiffs owned various options giving them the right to purchase the coal in various tracts of land, and that they sold and assigned to the defendant all their rights in said options in consideration of \$150 cash and other considerations, one of which was that the plaintiffs were to receive from the defendant the difference between \$18 per acre and the purchase price per acre of the option for each and every acre of coal the defendant "may purchase under said option." It is claimed that this gave the defendant only the option to purchase the tracts—that is, option to consummate the options assigned to him—without obligation to pay the plaintiffs the difference between the purchase price named in the option and \$18 per acre, unless he should purchase the land under the option; and that the declaration should have averred such purchase. But the declaration goes on and avers that by the writing the defendant "agreed to pay plaintiffs the difference between \$18 per acre and \$15, the purchase price under the option, to wit, \$3 per acre, for each and every acre of coal which the defendant could and might purchase under said options, whenever the number of said acres of coal should thereafter be ascertained and determined during the life period of said option as limited on the fact thereof, or as extended at the special instance and request of the defendant, whose duty it became to keep alive said option until considerations for the transfer thereof were fully paid and satisfied, and his purchase could be fully compensated thereunder." The count then avers that the number of acres of the coal had been ascertained to be not less than 2,000. Now, from that count on its face Yost did not have the right to determine not to purchase under said option and refuse the plaintiffs the \$3 per

acre; for the declaration says that the defendant was to pay the plaintiffs \$3 for every acre which he "could and might purchase under said option," and that he was to make such payment whenever the number of acres of coal should be ascertained. The count says that the instrument bound Yost to keep alive the options until the consideration should be paid, thus importing intent to impose absolute liability for the consideration. Testing the matter by the declaration alone,—that is, by its version and legal effect of the legal contract,—an absolute liability was imposed on Yost to pay that \$3 per acre to the plaintiffs, whether he purchased the coal under the the options or not. I repeat that we do not say whether or not that liability is imposed on the defendant by the written contract.

We reverse the judgment, overrule the demurrer, and remand the cause.

WEST VIRGINIA SUPREME COURT OF APPEALS.

MINNIE BROWN, alias MINNIE BLAKE,
Appt.,

v.

B. F. BECKWITH, Constable of White
County, et al.

(.... W. Va.)

1. Exemption—loss by removal.

A person who has acquired, under the provisions of chapter 41 of the Code of 1899, the right to have personal property exempted from forced sale, does not forfeit it on the ground of nonresidence until he be-

Headnotes by POFFENBARGER, J.

Case Note.—The question when a person who intends to leave a state permanently, but has not yet done so, becomes a non-resident, has arisen mostly, if not wholly, in two classes of cases, those involving the right to exemptions, and those relating to the issuance of attachments.

In the first-named class, it has been held, in conformity with the rule that, to effect a change of residence, there must be both intention and act, that an intention to remove from the state at a future time will not defeat a claim to an exemption. *Springer v. Lewis*, 22 Pa. 191; *Urquhart v. Smith*, 5 Kan. 447; *Winslow v. Benedict*, 70 Ill. 120.

But where the intention exists the question arises, What act may be deemed sufficient to make it effective? That preparation to leave, such as delivery of one's furniture to the railroad for shipment (*Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 206; *Herzfeld v. Beasley*, 106 Ala. 447, 17 So. 623), or sending one's family to another state with the intention of following when one's property is disposed of (*Stirman v.*

gins to remove his person from his place of abode in this state to another state or country, with intent to fix his residence in such other state or country, although he may intend to leave the state permanently, and has made complete preparation so to do, and delivered his personal property and effects for shipment to a point outside the state.

2. Judgment—finding of nonresidence—effect.

A finding of nonresidence on a suggestion and motion to require security for costs in a pending action is not *res judicata* in another action between the same parties. Such proceeding is a collateral one, not reaching the merits of the case.

3. Exemption—evidence.

An exemption list and claim, irregular in form, considered, and pronounced sufficient.

4. Attachment—exemption.

An order of attachment is process, within the meaning of §§ 23 and 24 of chapter 41 of the Code of 1899, against which the right to exempt personal property may be exercised.

(October 24, 1905.)

A PPEAL by plaintiff from a decree of the Circuit Court for Wood County dissolving an injunction which had been issued to prevent an attachment sale of her property. Reversed.

The facts are stated in the opinion.

Mr. Walter E. McDougle, for appellant:

Plaintiff was not a nonresident.

Dean v. Cannon, 37 W. Va. 123, 16 S. E.

Smith, 8 Ky. L. Rep. 781), will not deprive one of the benefit of exemptions secured to residents of the state, is undisputed.

It is not so clear whether an actual inception of the journey is such an act. In Anthony v. Wade, 1 Bush, 110, it was held that an avowed intention to remove from the state, and a packing up for that purpose, will not deprive a person of the character of housekeeper; nor does he cease to be such while *in transitu*.

But in State use of Burt v. Allen, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29, 35 S. E. 990, it was held that nonresidence, within the meaning of the exemption law, has the same meaning as nonresidence under the attachment law; and that one becomes a nonresident directly he begins the removal of his person from the place of his residence, even before he gets outside the state.

In view of the difference in spirit existing between attachment and exemption laws, and of the rule that the latter are to be construed liberally to effectuate their humane purpose, it may be doubted if the foregoing case is supported by reason; and, as will appear from cases hereinafter discussed, it is not wholly sustained by authority.

The rule governing the question under 1 L.R.A. (N.S.)

444; State use of Burt v. Allen, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29, 35 S. E. 990.

Messrs. H. B. Dodge and L. R. Via, for appellees:

Plaintiff was a nonresident.

Moore v. Holt, 10 Gratt. 284; Clark v. Ward, 12 Gratt. 440.

Poffenbarger, J., delivered the opinion of the court:

Minnie Brown complains of a decree of the circuit court of Wood county dissolving an injunction by which she attempted to prevent the sale of certain personal property claimed by her as exempt under the provisions of §§ 23 and 24 of chapter 41 of the Code of 1899, and dismissing her bill. The property consisted principally of household goods, and B. F. Beckwith, constable, was proceeding to sell the same under orders of a justice of the peace in attachment proceedings instituted by three several creditors of the plaintiff, Samuel L. Koonse, Samuel Cross, and A. E. Beatty. The attachments were levied on the 9th day of December, 1902, exemption claims were delivered to the officer on the 13th day of December, 1902, judgments were rendered and orders of sale made on the 18th day of December, 1902, and on said last-named day the debtor served on the constable written instruments demanding the release of the property, notifying him that, in case of his refusal to do so, she would claim the damages allowed by law for deten-

discussion in cases of attachment is stated in 4 Cyc. Law & Proc. p. 434, as follows: "A resident of a state becomes a nonresident by actually leaving the state with the intention of becoming a nonresident."

A mere intention to remove from the state, unaccompanied by any act, does not make a person a nonresident within the meaning of the attachment law. Mann v. Taylor, 78 Iowa, 355, 43 N. W. 220; Lyle v. Foreman, 1 Dall. 480, 1 L. ed. 232; Degnan v. Wheeler, 2 Nott & M'C. 323.

Nor will preparation to send household goods away. State, Stafford, Prosecutor, v. Mills, 57 N. J. L. 570, 31 Atl. 1023.

Nor surrender of the premises occupied by him, although he leaves on the following day. Kugler v. Shreve, 28 N. J. L. 120.

Foreign attachment cannot be maintained against the estate of a person who, having been a resident of a state for many years, suddenly disappears, alleging an intention to remove from the state, but who only goes to another part of it, returning in about ten days. Shipman v. Woodbury, 2 Miles (Pa.) 67.

A resident who has left his home with the intention of leaving the state does not become a nonresident, within the meaning of the attachment law, until he gets outside of the state. Ballinger v. Lantier, 15 Kan. 608.

tion thereof. By some collateral proceedings which need not be here detailed, action was delayed, so that the time fixed for sale was the 5th day of March, 1903, on which day a preliminary injunction was awarded on the plaintiff's bill against the justice, constable, and creditors, restraining the sale. Answers were filed by the defendants, depositions were taken and filed, and on the 20th day of August, 1903, the order complained of was made and entered.

The defense relied upon mainly is the alleged nonresidence of the plaintiff at the time she presented her claim of exemption. She had occupied as tenant a certain house in the city of Parkersburg, from which, on the day on which the actions were commenced and her property seized, she had removed all her property and effects, including her wearing apparel not in actual use, to the wharfboat at said city, and had them consigned to herself at Marietta, in the state of Ohio, and had vacated the house in which she had resided. She testifies that she stayed at the De Witt hotel, in Parkersburg, on the

night of the day on which her property was sent to the wharfboat and levied upon, and later went to the residence of a Mrs. Core, in Parkersburg with whom she stayed for some time and then went to another place in said city. She denies that she ever had any intention of leaving the city, and explains the shipment of her property by saying she had rented it to certain persons in Marietta. In addition to the fact of the removal of plaintiff's property and the evidence of intent on her part to take up her residence at Marietta, the defendants rely upon testimony showing her presence at Marietta at a time subsequent to the presentation of her exemption claim, and also an admission made by her in an action which she prosecuted in a justice's court against the constable for damages for the detention of the property. This trial was had at Williamstown, directly opposite the city of Marietta, and a witness testifies that she came to Williamstown on the morning of the trial from Marietta. On that occasion she testified that she had no legal residence. If it be conceded that the

On the other hand, it was said, *obiter*, in *Moore v. Holt*, 10 Gratt. 284, that, upon an equitable construction of a statute reciting that, "whereas creditors had experienced great difficulties in the recovery of debts due from persons residing out of the jurisdiction of this commonwealth;" and going on to provide for attachments "upon affidavit that such defendant or defendants are out of the country, or that, upon inquiry at his, her, or their usual place of abode, he, she, or they could not be found, so as to be served with process,"—that, "where a debtor has actually left his usual place of abode and set off for a distant state, with the intention not to return to his residence, but in future to reside out of the state, an attachment sued out after his departure might be sustained, although it chanced he had not actually passed the state line at the time the subpoena issued."

In the case of *Clark v. Ward*, 12 Gratt. 440, where the point was directly presented, this view was adopted.

Upon the strength of these cases, it was held in *Spalding v. Simms*, 4 Met. (Ky.) 285, that, where absence from the state for four months is ground for attachment, one who leaves home with the intention of leaving the state, and who actually consummates his purpose, but who is unavoidably detained within the state for a few days, should be regarded as absent from the state from the time he left home.

In *Waples on Attachment*, 2d ed. § 46, it is said, citing the above cases as favoring the view: "As previously remarked in another connection, one immediately becomes a nonresident if he leaves his state with the design of becoming such, though the design has been held not to be decisive on this question until accompanied with the act of leaving, until he has passed beyond 1 L.R.A. (N.S.)

the state bounds. But, if he has broken up his home, so that process can no longer be served there and be binding upon him, must his creditor be confined to personal service upon his debtor as the only means of reaching him? The case is not that of an absconding debtor; the plaintiff cannot truthfully set up the ground, in his affidavit, that the defendant is running away to avoid process, concealing himself, hiding his goods, etc., in fraud of creditors. The defendant avowedly means to abandon his residence, which he may lawfully do, and has broken up his home, and is openly traveling towards the state bounds to depart permanently. Why should not the extraordinary process be invokable on the ground of nonresidence?"

The decision in *State use of Burt v. Allen*, *supra*, that a person becomes a nonresident, within the meaning of a statute allowing attachment on the ground that a party "is a nonresident," the moment he begins the removal of his person from the place of his residence, with intent to acquire a residence in another state, is based largely on the argument in *Waples on Attachment*, and the cases above stated. The question in issue, however, did not arise over the construction of the attachment, but of the exemption law.

It is thus apparent that the doctrine that nonresidence begins at the inception of removal is based in authority on the cases construing the Virginia statute above stated, which, in addition to permitting attachments against persons who were out of the country, extended the remedy to cases where the defendant could not be found at his usual place of abode; but it may be doubted if this foundation is sufficient to support the broad conclusions which have been drawn.

evidence justifies the finding by the court of a fixed intention on the part of the appellant to remove from Parkersburg to Marietta, and of preparation by her to do so, we are confronted with the question whether there does not yet remain to be supplied one essential element of change of residence, namely, actual commencement of removal, not of the property, but of the person,—personal departure from the old place of residence in the state for the new outside of it. State use of *Burt v. Allen*, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29, 35 S. E. 990, decides that within the meaning of the attachment laws a person becomes a non-resident the moment he begins the removal of his person from the place of his residence with intent to acquire a residence in another state, even before he gets outside the state. To the same effect are *Moore v. Holt*, 10 Gratt. 289, and *Clark v. Ward*, 12 Gratt. 440. According to many authorities, such commencement of removal, coupled with an intent to abandon the state, falls short of the requisites of nonresidence. Shinn on Attachments, § 96, says it is necessary that the defendant acquire a residence and place of abode outside of the state. Drake on Attachments, § 64, says a mere purpose to change residence, evidenced by acts of the removal of the party's property, will not make him a nonresident of the state from which he purposes to depart until he shall have begun at least the removal of his person. Wade on Attachments, § 78, accords with the proposition last above stated. No case has been found which propounds a doctrine more rigid and illiberal toward the defendant. Hence it may be safely said that by the great weight of authority nothing short of such act of removal, accompanied by intent to abandon the state, will render the party amenable to an attachment on the ground of nonresidence.

This proposition seems to be in accord with the general principles of the law relating to domicile and residence, enunciated by this court in *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 896, 8 S. E. 596, as follows: "The original domicile continues until it is fairly changed for another. It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired. *Baird v. Byrne*, 3 Wall. Jr. 1, Fed. Cas. No. 757. When one domicile is definitely abandoned and a new one selected and entered upon, length of time is not important. One day will be sufficient, provided the animus exists. Even when the point of destination is not reached, domicile may shift *in itinere*, if the abandonment of the old domicile and the

setting out for the new are plainly shown. *Munroe v. Douglas*, 5 Madd. 405. Thus a constructive residence seems to be sufficient to give domicile, though an actual residence may not have begun." *Burt v. Allen*, cited, further declares that the elements of nonresidence in the law of attachment and the elements of nonresidence within the meaning of the statutes conferring a right to exempt personal property from forced sales are the same. This position seems to be supported by both principle and reason. Surely the law is not less favorable to the claimant of a constitutional right of a character so high that the statutes providing for its vindication are by the courts of almost all the states liberally construed (12 Am. & Eng. Enc. Law, p. 75) than to the right of a debtor to defeat an attachment. In the former case the law impresses upon the property a status, immunity from forced sale, and withdraws it from the reach of the creditor; in the latter, the party is only given the benefit of a strict construction of remedial statutes, designed to give the creditor a means of obtaining from him what he is entitled to have,—satisfaction of his debt out of the property. In both instances the law is liberal to the debtor. Hence it would seem that in both cases the same rules for determining the question of nonresidence ought to govern.

What evidence in the case supplies this element of personal removal? Nobody testifies to any departure by the appellant from Parkersburg. A witness states that she came from Marietta to Williamstown to attend the trial of an action brought by her against the constable, and that on that occasion she said she had no legal residence. Her coming from Marietta is in no sense inconsistent with the retention of her residence in Parkersburg at the time, which she establishes by the testimony of herself and other witnesses. The statement that she had no legal residence must be subject to the rule that she did have a legal residence somewhere; for, having had a residence in this state, it continued until she acquired one elsewhere. The language in *State use of Burt v. Allen*, importing that one need not acquire a domicile or residence in another state in order to render him a nonresident of this state, means that there need not be an actual domicile or residence in another state. There may be a constructive residence in either state for the purpose of working out the legal rights of parties. Appellant not having acquired either an actual or constructive residence elsewhere, her residence in this state must be deemed to have continued. Our conclusion is that the evidence wholly fails to establish the element of actual removal to a place out of the state, and also the inception or beginning of such removal

within it. On the question of residence, the principle of *res judicata* is relied upon. In the action by the appellant against the constable, an affidavit of her nonresidence was filed and a demand made for security for costs. This motion was resisted and evidence was heard upon it, and the justice, believing nonresidence to have been established, required security to be given, and, in default thereof, dismissed the action. This was not a hearing on the merits, but one upon a mere collateral motion. "A judgment not based upon the merits is not final and conclusive in the sense that a plea of *res judicata* may be founded on it." 21 Am. & Eng. Enc. Law, p. 266. A nonsuit is not *res judicata*. Id. p. 271. The dismissal in equity for want of jurisdiction, or any cause precluding inquiry into the merits, is not *res judicata*. Id. p. 271.

But one other proposition remains to be disposed of, namely, that the claim of exemption is insufficient, which contention is based upon two grounds, one of which is predicated upon the following language in the affidavit: "That she is entitled to have and claims all the above-listed property claimed by her as husband and parent exempt from execution or other process in the above cause." The point made is that she does not specify the character in which she claims. To determine this question it is necessary and proper to read the language above quoted in connection with another part of the affidavit in which the appellant says she is a parent and resident of the state. This language established her character as a female parent, and is wholly inconsistent with the character of husband. Moreover the word "husband" was used by way of recital and description of the property, and its use appears to have been a mere inadvertence. So read, the affidavit plainly asserts a claim as parent and residuent. In this respect the demand is sufficiently certain in a legal sense.

The other is based upon the assertion that at the time the officer received the lists and claims of exemption he held no execution or other process authorizing a sale of the property. The statute clearly includes an order of attachment within the term "process." In § 25 of chap. 41, attachment is specifically mentioned, and provision made for release by the officer of claims and demands garnished under the order of attachment. While there is no specific direction to him as to property levied upon and taken into his possession under an order of attachment, the provision for the release of claims and demands suggested and garnished shows a clear legislative intent that the officer shall not, after the delivery to him of the lists specified in the statute and the lapse of the time prescribed for appraisalment, withhold 1 L.R.A. (N.S.)

the possession of the property taken under process of any kind, unless it be in respect to claims which are excepted from the operation of the exemption laws.

The conclusion resulting from this examination of the record and authorities is that the Circuit Court erred in dissolving the injunction and dismissing the bill, and that the decree must be reversed, with costs in this court to the appellant, the bill reinstated, and a decree entered perpetuating the injunction and requiring the appellees to pay to the appellant her costs in the Circuit Court.

MARYLAND COURT OF APPEALS.

MARGARET L. ROBERTS, Appt.,

v.

JOHN M. ROBERTS et al., Trustees, etc.

MARGARET A. LONDON et al., Appts.,

v.

CATHERINE E. REESE et al.

(.... Md.)

1. Devise for life—power of disposition.

There may be a valid devise to one for life with power of disposition, which will not affect the remainder over unless the power is exercised as authorized.

2. Remainder—contingent.

The remainder created by a clause in a will which, after giving the estate to testator's wife for life with power of disposition, disposes of the estate "remaining at her death," is not necessarily contingent.

3. Same.

An intention to create a contingent remainder is not shown by a clause in a will which, after giving an estate with power of

Case Note.—In *ROBERTS v. ROBERTS* the court applied the common-law rule that a devise or bequest for and during the term of the natural life of the devisee or legatee, with limitation over, conveys a life estate only, notwithstanding such person has the power to use and dispose of the estate during his life, and the limitation over relates only to what may remain upon his death. The rule is recognized by text writers (Gardner, Wills, p. 476; Page, Wills, 670; Jarman, Wills, *1131), and adopted by the overwhelming weight of adjudicated cases, among which are the following: *Denson v. Mitchell*, 26 Ala. 360; *Weathers v. Patterson*, 30 Ala. 404; *Morffew v. San Francisco & S. R. Co.* 107 Cal. 587, 40 Pac. 810; *Adams v. Lillibridge*, 73 Conn. 655, 49 Atl. 21; *Wetter v. Walker*, 62 Ga. 142; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Eubank v. Smiley*, 130 Ind. 393, 29 N. E. 919; *Greve v. Camery*, 69 Iowa, 220, 28 N. W. 564; *Shaw v. Hussey*, 41 Me. 495; *Johnson v. Battelle*, 125 Mass. 453; *Gregory v. Cowgill*, 19 Mo. 415; *Harbison v. James*, 90 Mo. 411, 2 S.

disposition, and providing that the estate remaining at the death of the life tenant shall be distributed among testator's children, share and share alike, directs that the child or children of a deceased child shall stand in its or their parent's place and stand, and receive and have the share its and their parent would have been entitled to if living.

4. Same—vested.

Vested, and not contingent, remainders are created by a will which gives testator's estate to his wife during life in trust for the use of herself and "her children," with power to sell property and invest the proceeds, and lease real estate, and use whatever is necessary for support and education, and make advancements; and directs that all property "remaining at her death" shall be divided among such children, share and share alike. The child of a deceased child to stand in its parent's stead and receive and have the share which its parent would be entitled to if living.

W. 292; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Leggett v. Firth*, 132 N. Y. 7, 20 N. E. 950; *Dillin v. Wright*, 73 Pa. 177; *Pool v. Pool*, 10 Lea, 486; *McCullough v. Anderson*, 90 Ky. 126, 7 L. R. A. 836, 13 S. W. 353.

This rule, while adhered to by nearly all the authorities, is not strictly followed in all jurisdictions; thus, in Virginia and Tennessee it is held that the devisee takes a title in fee where the power of disposal is absolute, even though the will otherwise purports to give but a life estate. *May v. Joyner*, 20 Gratt. 692; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Davis v. Heppert*, 96 Va. 776, 32 S. E. 467; *Bradley v. Carnes*, 94 Tenn. 27, 45 Am. St. Rep. 696, 27 S. W. 1007; *Hair v. Caldwell*, 109 Tenn. 148, 70 S. W. 610. But, to come within the rule of these Virginia and Tennessee cases, the power of alienation must be absolute and unrestricted. Thus, in *Johns v. Johns*, 86 Va. 333, 10 S. E. 2, where the power of disposal was not absolute in the devisee for her sole benefit, but was also for the benefit of her children, it was held that the estate was limited to one for life. And in *Miller v. Potterfield*, 86 Va. 876, 19 Am. St. Rep. 919, 11 S. E. 486, where the power of disposal was for the benefit of a third person as well as the devisee, the devisee took but a life estate.

The statutes of some of the states have modified the rule somewhat; but the decisions arising under these statutes will not be discussed, as the existence and effect of the common-law rule is the question here involved.

Of course the rule under discussion here is limited to those cases where the will expressly gives a life estate, with limitation over after the death of the life tenant, and an attempt is made to add to such life estate by the subsequent language in the will, which gives a right to use or dispose of the property; and does not include those cases in which the will either uses general lan-

5. Deed of trust—identity of property granted.

A deed of trust for benefit of creditors, of, "all and singular, the real and personal estate" and "all other property, of every nature, kind, and description, whosoever situate," of the grantors, signed by a man and wife, is sufficient to identify with reasonable certainty, as required by statute, a vested remainder belonging to the wife under a will.

6. Same—separate estate.

A deed of trust signed by a man and his wife, conveying, all and singular, the real and personal estate, and all other property of every nature, kind, and description, "of us," is not limited to their joint estates, but will convey her separate property.

7. Same—vested remainder.

A vested remainder will pass by a deed of trust for benefit of creditors of all the property of the grantor.

(November 16, 1905.)

guage or expressly gives an absolute fee coupled with language giving a right to dispose of the property with limitation over as to the remainder. In these latter cases it is uniformly held that the language giving the right to use and dispose of the property, and attempting to devise or bequeath the remainder, cannot cut down the absolute title into a life estate so as to make the limitation over valid. *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089, 3 Sup. Ct. Rep. 575; *State v. Smith*, 52 Conn. 557.

This distinction is well brought out in *Jackson ex dem. Livingston v. Robins*, 16 Johns. 588, where Chancellor Kent says: "We may lay it down as an incontrovertible rule, that, where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases;" citing *Tomlinson v. Dighton*, 1 Salk. 259, 1 P. Wms. 149; *Crossling v. Crossling*, 2 Cox, Ch. Cas. 396; *Reid v. Shergold*, 10 Ves. Jr. 370; *Goodtitle ex dem. Pearson v. Otway*, 2 Wils. 6.

Like all rules relating to the construction of wills, the general rule above set forth is subject to that cardinal rule of construction that the intention of the testator must govern.

There is another rule that must not be overlooked in considering questions of this kind, and that is that, where a fee is given by a fair construction of the will, it cannot be cut down by subsequent language imposing limitations or creating remainders in favor of others, as such a clause is repugnant and void. *Gardner, Wills*, 375.

or for the education or advancement in life of the latter. In *Benesch v. Clark*, 49 Md. 497, it was said that, where an estate is given to a person generally or indefinitely with the power of disposition, such gift carries the entire estate, and the devisee or legatee takes the property absolutely; but when the property is given to one expressly for life, and there be annexed to such gift a power of disposition of the remainder, the rule is different, and the first taker takes only an estate for life, with the power annexed. That has been approved in *Foos v. Scarf*, 55 Md. 310, *Russell v. Werntz*, 88 Md. 214, 44 Atl. 219, and other cases. It is clear from those decisions and authorities cited in them that there may be a valid devise to one for life with a power of disposition, which will not affect the remainder over, unless the power is exercised as authorized; and as to any part of the estate upon which the power is not exercised the remainder is unaffected. It is equally clear that the clause in the will last quoted does not of itself make these remainders contingent. The testator, having given his widow a power of disposition, naturally and properly spoke of his estate "remaining at the death of my said wife;" but that would not convert what would otherwise have been a vested into a contingent remainder. The remainder may vest subject to the power, and the uncertainty as to whether the power will be exercised as to all or part of the estate does not make it a contingent remainder. As was well said in *Ducker v. Burnham*, 146 Ill. 10, 37 Am. St. Rep. 135, 34 N. E. 560: "If the remainder is contingent because it may consist of what remains after the exercise of the powers of sale and use conferred upon the life tenant, then, in case the life tenant should fail to sell any of the estate, or to exhaust for her own use any of the principal thereof, the remainder would still be contingent, because it would consist of what remains after paying off the charges created upon the property by the directions to pay the debts and the bequests. To hold that a remainder is contingent, because it cannot be known how much will be left until the debts and funeral expenses and other charges are paid, would make every remainder given by will a contingent one. But it is well settled that a devise to a person after the payment of debts and legacies is not contingent until such debts and legacies are paid, but confers an immediately vested interest. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351. In such cases the remainder vests subject to the payment of debts and legacies, and subject to the exercise of the power to use and sell, but liable to be divested as to so much of the estate as may be disposed of for the

payment of debts and legacies, and by the execution of the power. The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take." See also *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310; *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23, and other cases cited in 24 Am. & Eng. Enc. Law, p. 389.

It is not necessary to go beyond our own decisions to find authorities on the subject, but the above quotation from *Ducker v. Burnham* seems to be very apt. In *Taylor v. Mosher*, *supra*, the testator, after making certain devises, bequests, and dispositions in favor of his wife and servants, devised his estate not otherwise specifically disposed of to trustees. He directed them to pay certain annuities, and then to invest "the clear income of my estate, if anything remain after the application annually or otherwise of the several sums of money hereinbefore charged thereon," and provided: "Upon the death of my son William, I will and desire that a distribution of my estate be made among all my grandchildren, to wit, the children of my late son, James Mosher, and the children of my aforesaid son, William, provided any child he shall leave. All my said grandchildren to take *per capita*." The court said: "It is doing no violence to this language or to any rule of law to hold that the children of James, who were *in esse* at the date of the will and of the testator's death, took vested interests, liable to be divested *pro tanto* for the purpose of letting in for a share any child that William, who then had none, might, by possibility, have and leave surviving him. The fact that an estate is liable to be divested in whole or in part upon a contingency, does not make it a contingent estate." See also *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146, for a similar decision. It would seem, then, to be clear that the reference to the estate "remaining at the death of my said wife" did not make the remainder contingent.

But it is argued, and was so held by the learned judge below, that the rest of this clause shows that the interests left to the children were contingent,—that their right to participate in the distribution of his estate was contingent upon their surviving the testator's wife. But we cannot see how that clause indicates an intention on the part of the testator to create contingent remainders. The wife might in her lifetime have given one child more than she gave another, and that child might have survived her mother, while the other who received very little might have died, without issue, be-

fore her mother. It would seem to be more in accordance with the intention of the testator and more natural for him to vest the remainder in his children at his death. We have seen what confidence he had in his wife's judgment and sense of justice, and he was willing for her to decide what was necessary to be expended for the support of herself and children, and for their education or advancement in life. He did not direct that any charge should be made against them for sums thus advanced in excess of what was given others; and, even if the remainder be treated as contingent, those thus favored might survive their mother, and receive a share of the remaining property. The equality of distribution does not in any way depend upon whether the remainders were contingent or vested. It is a familiar but important rule that the law favors the early vesting of estates, and it is likewise a well-recognized rule of construction that, in doubtful cases, the interest should be deemed to be vested in the first instance, rather than contingent, unless the instrument under consideration does not admit of such construction. It cannot be doubted that Mr. Shriver did not intend to die intestate as to any part of his estate. He prefaced his will with the statement: "Subject to the payment of my debts and funeral expenses, I dispose of all my estate in manner and form following." Yet it was quite possible, although not probable, that all of the children by his second wife might have died without leaving issue before his wife died, and in that event there would have been an intestacy as to the remainder, if it must be regarded as contingent. The children provided for during the lifetime of his wife ("our children;," that is, those of his second wife and himself) were the same who were referred to in the clause under consideration ("my children by my said wife"). Mrs. Reese was one of those children, and left two children who would admittedly have been entitled to their mother's share if they had survived their grandmother. The testator did not leave the remainder to such of his children as survived his wife, or to such children and grandchildren (children of a deceased child) as survived her. He did make provision in that clause for the share and interest of a deceased child who had died leaving a child or children, but made none as to the share of a deceased child who died without leaving issue. The provision that "the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living" is not of controlling effect on

this question, by reason of the use of the words "receive and have." That was speaking of the period of distribution, and whether vested or contingent, the remaindermen were not entitled to "receive and have" their shares until that time arrived. The trustee was to receive, have, and hold the estate until then, excepting such part as she previously disposed of under the other provisions of the will. Without further discussion of this clause, it is sufficient to say that we do not find anything in it which necessarily indicates an intention on the part of the testator to create contingent remainders, and it will be well to now see what this court has said about the effect of similar or analogous provisions in other wills.

In *Meyer v. Eisler*, 29 Md. 28, the testator after making certain bequests and legacies, gave all the rest of his estate to his wife and another in trust, to hold the same with surplus or unappropriated revenue or income arising from the same, etc. He then authorized them to receive all rents, issues, interest, and profits arising or growing out of the property, and from the amounts so received to pay insurance, taxes, and repairs, and out of the residue to pay his wife for her use and benefit one third part, and directed the balance of the income to be invested in Baltimore city stock to be held in trust with the other property, until the end of twenty years after his death, or until his youngest child should arrive at the age of twenty years, and then the whole, including principal and interest, to be divided and paid over as follows: To his wife one-third part "and the other two-third parts to all my children, share and share alike; . . . and in the event of the death of either of my said children, leaving lawful issue, such issue to have and receive the share or proportion that the deceased would have been entitled to if living." He then provided for a similar distribution of the third left to his wife, in case she "shall be dead at the time of such division." Elizabeth, one of the children, after the testator's death, married John Rose, and subsequently died before the time had arrived for a division of the estate, intestate, and without issue. The widow also died before that time. This court held that the children took a vested interest in the property devised to them, and that John Rose, as husband of Elizabeth, was entitled, under the statute then in force, to a life estate in her share of the realty, and absolutely to her share of the personalty. That case is strikingly similar to the one under consideration, and has been fully approved in *Taylor v. Mosher*, 29 Md. 451, *Small v. Small*, 90 Md. 568, 45 Atl. 190, and *Daughters v.*

Lynch, 93 Md. 305, 48 Atl. 1055, and other cases.

In *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, the testator left certain real and personal property to his wife for life, and his will contained this clause: "It is my will that after the death of my wife, Mary Ann Handy, that all the property devised to her for life . . . shall be sold if necessary for equal partition, or, if the same can be accomplished without a sale, shall be divided amongst my children, share and share alike; the child or children of any deceased child to take the portion to which the parent, if living, would have been entitled." This court held "that a share of the property vested in each of the children of Wm. W. Handy, who survived him; but if any such child should leave children at his death, his share was divested in favor of his children; and that it was not divested by the death of the child in the lifetime of the tenant for life without leaving children;" and in the opinion delivered after a motion for reargument, it was said: "A share of the property vested in each of the children who were living at the time of his death, and if any child died before the period of distribution, leaving children, they were substituted in his place; his share, however, was not divested if he left no children, but it went to his representatives." That case has been recently approved in *Hoover v. Smith*, 96 Md. 393, 54 Atl. 102, and in *Re Rogers*, 97 Md. 674, 55 Atl. 679.

The cases we have cited would seem to conclusively show that these remainders were vested, and not contingent. This opinion has already reached such length as to make it undesirable to attempt to discuss in detail the authorities relied on by the appellees, such as *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014; *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702; *Small v. Small*, 90 Md. 550, 45 Atl. 190. In the latter, Judge Fowler referred to *Larmour v. Rich*, and said: "The distinction is clearly drawn between that class of cases where the estate or interest vests at the death of a testator, because of an absence of any expressed intention that it vest later, and those where the testator by his will fixes a more distant period for the vesting." It is sufficient to say that, in our opinion, the testator did not by his will express or indicate an intention that the remainder of his estate should not vest until after his wife's death. In the very recent case of *Ridgely v. Ridgely* (Md.) 59 Atl. 731, many of the cases affecting this question are cited. *Engel v. State*, 65 Md. 539, 5 Atl. 249, *Small v. Small*, and *Lar-*

mour v. Rich, are there included in the class of cases where gifts were made for life and then over to survivors, in which cases the period of survivorship is generally referred to the period of distribution, and not the death of the testator. There is no reference to survivorship in this will. In *Daughters v. Lynch*, *supra*, we repeated what had been said in *Tayloe v. Mosher*, that "estates will be held to be vested wherever it can fairly be done without doing violence to the language of the will, and, to make them contingent, there must be plain expression to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for construction." We are therefore of the opinion that the court erred in rejecting the claims of Margaret A. Landon and Clymer Whyte, administrators, for the shares claimed by them respectively,—the one being for this interest in the real property, and the other for that in the personalty distributed.

2. This brings us to the consideration of the appeal of Margaret L. Roberts. Having held that the children of Mr. and Mrs. Shriver took vested estates, it will not be necessary to determine whether a deed of trust such as that made by Mr. and Mrs. Roberts to Messrs. Reindollar and Roberts, trustees, would include a contingent remainder. The appellant contends that the deed of trust did not pass the interest of Mrs. Roberts for several reasons which we will briefly refer to.

(a) It is claimed for her that it does not contain a description of the real estate sufficient to identify it with reasonable certainty, as provided in § 9 of article 21 of Code Pub. Gen. Laws. The description in the deed of trust is "all and singular the real and personal estate, wheresoever situate, . . . and all other property of every nature, kind, and description and wheresoever situate [except so much thereof as is exempt from execution] of us the said" William and Margaret. It is difficult to understand how it would be possible to identify property intended to be conveyed more thoroughly than is done by that description. The intention manifested on the face of the deed was to convey and assign all of their property of every nature, kind, and description. If they had undertaken to specify it, some might have been omitted, and to show on the face of the deed that they intended to make an assignment of all property, it would have been necessary to have added some such clause as the one that was inserted. This court decided in *Maughlin v. Tyler*, 47 Md. 545, and other cases,

that a deed of trust for the benefit of creditors, creating preferences and exacting releases, is void, unless it appears on its face to convey all the property of the debtor. It is true this deed does not create preferences or exact releases, but, if the position of the appellant be correct as to the effect of this statute, it would be difficult to ever comply with the requirements of the law as announced in *Maughlin v. Tyler*. If a grantor intends to convey part of his property, of course he must describe it specifically, but, if he intends to convey all of it and uses such language as is in this deed, who could be misled or in doubt as to what he conveyed? The object of § 9 is to require sufficient notice to the public and certainty as to what is conveyed. As well might it be required of a testator to specify his property in detail in a residuary clause in his will as to require a debtor making an assignment for the benefit of his creditors to do so. This statute has never been construed to require a schedule or list of the grantor's property to be set out in such a deed, and, so far as we are aware, it is the universal custom throughout the state to use terms similar to those in this deed, when it is intended to make a general assignment of all the debtor's property. In *Carey's Forms & Precedents*, p. 371, a very similar description of property is given for such a deed of trust, and there have been many cases in this court where such descriptions were given and never questioned. The case of *Farquharson v. Eichelberger*, 15 Md. 63, is conclusive of the question. It is said by the appellant that, as it was decided prior to Acts 1856, chap. 154, § 24, p. 255, which is now the section of the Code above mentioned, the effect of the statute was to change that decision. But that was "An Act to Simplify and Abridge the Rules and Forms of Conveyances," and if such a description was valid before the rules and forms were simplified, surely it is now. In our opinion, the statute does not in any wise invalidate this instrument.

(b) It is further contended on behalf of Mrs. Roberts that the deed of trust only conveyed the joint estates of her husband and herself,—that she united in the deed simply to convey her potential right of dower. We find nothing in the deed that sustains that contention. It recites that they are "indebted unto sundry persons and corporations in several sums of money, and, being unable to pay the same in full, have proposed and agreed to assign all our property . . . in trust for the benefit of our creditors, as hereinafter mentioned." It then assigns the property as we have stated, and, after giving the trustees authority to convert it into money, and pro-

viding for costs, etc., directs them to apply the residue of said moneys in payment "of the several debts due to the creditors aforesaid of us, the said William Jesse Roberts and Margaret L. Roberts, his wife, *pari passu*, and without any preference or priority of payment," and, after the payment of debts, costs, expenses, and commissions, "then in trust to apply the surplus (if any) unto the said William Jesse Roberts and Margaret L. Roberts," etc. It seems clear to us, therefore, that Mr. and Mrs. Roberts not only conveyed and assigned any property owned by them jointly, but all they owned individually. Whether or not she owed any individual debts which are entitled to be paid we have no means of knowing, and we do not intend to determine how the money realized from her father's estate is to be distributed by the trustees. That can be disposed of in the proceeding in which they make distribution.

(c) After having determined that the interests of the children of Mr. Shriver under his will were vested remainders, we do not deem it necessary to discuss at length the question as to whether Mrs. Roberts's interest passed by the deed of trust as we think it did. A vested remainder can be devised, mortgaged, or conveyed. It also is liable to execution by a judgment creditor. *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990. We are of the opinion, therefore, that Mrs. Roberts's interest should be distributed to the trustees named in the deed of trust, and it can then be determined what creditors are entitled to it. As the court below so decided, although on a different ground, as to Mrs. Roberts's interest that part of the decretal order will be affirmed, but, as we do not agree with the court as to the interest that would have gone to Carrie Reese, and is now claimed by Margaret A. Landon, and Clymer Whyte, administrator of Augustus Shriver Reese, and of William Reigart Reese, the portion of the order appealed from by them will be reversed. Of course we do not mean to disturb the portions of the decretal order not appealed from.

Decretal order affirmed in part, and reversed in part,—the costs in No. 18 (office docket) to be paid by the appellant in that case, including one half of the cost of transmitting and printing the record, and the costs in No. 19 (office docket) to be paid out of the estate of Augustus Shriver, including the other half of cost of transmitting and printing the record (one half by the trustees, and the other by the receiver),—and cause remanded for further proceedings in accordance with this opinion.

MISSOURI SUPREME COURT.

HARRIS BANKING COMPANY

v.

HELEN A. MILLER, Interpleader, Resp't.

and

WILLIAM JOHNSON et al., Exrs., etc., of
Giles Burlingame, Deceased, Appts.

(.... Mo.)

1. Appeal—equity case—review of evidence.

The supreme court will weigh for itself the testimony in an equity case where it is practically undisputed, and draw its own conclusion as to the rights of the parties, notwithstanding the finding of the trial court.

2. Gift—bank deposit.

A gift *inter vivos* is not established by depositing a fund in bank with the statement that it is intended for the donee, taking back a certificate of deposit, and placing thereon an indorsement to pay the amount to the donee, handing the certificate to the

donee to read, with the statement "It is yours," and then taking and retaining the certificate till death, to enjoy the use of it during life.

3. Trust—parol proof.

A trust in a fund in bank may be established by parol.

4. Gift—failure of proof—trust.

Failure to establish a perfect gift *inter vivos* does not preclude the donee from showing and having enforced a perfected, valid trust.

5. Trust—bank deposit.

A valid, executed trust is established by depositing a fund in bank, and, upon advice as to the method of transferring the fund to the *cestui que trust*, taking back and indorsing to him a certificate of deposit, and then notifying the bank and *cestui que trust* that the certificate is held by the depositor for the latter, although the depositor retains the right to use the income during life.

(October 25, 1905.)

Case Note.—The circumstances attending a deposit of money in bank in trust for a third person may be such as to effect a perfected trust in favor of that person. In such cases there can be no question that the title to the funds will pass to him. In case the depositor's acts are equivocal, the rule seems to be to seek his intention, and let that govern. Perry on Trusts. Vol. 1, § 82, says: "In case of a deposit in bank in trust for another, there must be an intent to pass the beneficial interest during the life of the donor, and not merely a testamentary intent that the person named as *cestui* shall have the money at the decease of the donor, who retains complete control of the fund during his life. The general rule is that a deposit of money in the name of the depositor, in trust for another, transfers the title to the latter."

Upon the question of what is sufficient to establish a completed trust there is some conflict among the authorities. One line of cases holds that, to perfect the trust, knowledge of the deposit must be communicated to the beneficiary; and that the mere deposit, without more, is without effect.

In Massachusetts the courts require the depositor to inform the person in whose favor the deposit is made, and to state to him that it is to be his after the depositor's death. *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365.

In *Jewett v. Shattuck*, 124 Mass. 590, it was held that if the beneficiary did not know of the trust, it would not be enforced.

In *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222, it was held that no trust was created where a depositor made two deposits in a savings bank, one in his own name and the other in his name as trustee for his daughter, a pass book being issued to him, which he always retained. The court said that there must be some act of delivery out of the possession of the donor, for the purpose and with

the intent that the title should pass thereby. The doctrine of *Brabrook v. Boston Five Cents Sav. Bank* was considered decisive in the case of *Clark v. Clark*, 108 Mass. 522.

In *Stone v. Bishop*, 4 Cliff. 593, Fed. Cas. No. 13,482, it was held that a deposit in trust for a third person will not pass to him if he is ignorant of the deposit until after the depositor's death, and where the laws of the bank require presentation of the pass book before money can be withdrawn.

In *Bartlett v. Remington*, 59 N. H. 364, the court held that a fund deposited in a savings bank in the name of the depositor, in trust for another, who was not a party to the transfer, the depositor retaining the title and control of the fund, created an unenforceable executory trust.

Another line of cases, which represents the weight of authority, holds the deposit to be sufficient of itself to vest the title in the beneficiary, and that a declaration of trust may be completed though the pass book is retained by the depositor. Thus, in *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, the following facts are presented: A deposit was made in a savings bank, the depositor declaring at the time that she wanted the account to be in trust for a certain person. A pass book, which the depositor retained, was issued, stating that the account was in trust for such person. The money remained in the bank until the depositor's death, except one year's interest, which was drawn out. The *cestui que trust* was ignorant of the trust until after the depositor's death. In an action by the beneficiary to recover possession of the pass book, and to recover the deposits, the court held that the transaction was a valid and sufficient declaration of trust, and passed the title to the deposits, that the retention of the pass book was not inconsistent with the completeness of the gift, and that notice to the *cestui que trust* was not necessary.

APPPEAL by the defendant executors from a judgment of the Circuit Court for Putnam County in favor of the defendant *cestui que trust* in an interpleader proceeding to determine the right to a fund deposited by Giles Burlingame in the plaintiff bank. Affirmed.

The facts are stated in the opinion.

Messrs. T. B. Davis, Higbee & Mills, Robinson & Robison, and N. A. Franklin, for appellants:

The delivery must be absolute.

Huey v. Huey, 65 Mo. 689; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 327, 17 S. W. 319; Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; Re Soulard, 141 Mo. 642, 43 S. W. 617; Týgard v. McComb, 54 Mo. App. 85; Tomlinson v. Ellison, 104 Mo. 105, 16 S. W. 201; Pitts v. Weakley, 155 Mo. 109, 55 S. W. 1055; Flanders v. Blandy, 45 Ohio St. 108, 12 N. E. 321; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Wadd v. Hazelton,

137 N. Y. 215, 21 L. R. A. 693, 33 Am. St. Rep. 707, 33 N. E. 143; Gartside v. Pahlman, 45 Mo. App. 160; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250; Clark v. Clark, 108 Mass. 522; Sherman v. New Bedford Five Cents Sav. Bank, 138 Mass. 581; Nutt v. Morse, 142 Mass. 1, 6 N. E. 763.

There was neither a complete gift nor a trust shown by the evidence.

Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Doty v. Willson, 47 N. Y. 580; Gallagher v. Donahy, 65 Kan. 341, 69 Pac. 330; Funston v. Twining, 202 Pa. 88, 51 Atl. 736.

Mrs. Miller declares upon a gift. She can have no relief upon the theory of a trust.

Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Wadd v. Hazelton, 137 N. Y. 215, 21 L. R. A. 693, 33 Am. St. Rep. 707, 33 N. E. 143; Williams v. Chamberlain, 165 Ill.

But in *Cunningham v. Davenport*, 147 N. Y. 43, 32 L. R. A. 373, 49 Am. St. Rep. 641, 41 N. E. 412, it was held that an irrevocable trust in favor of another was not established by a deposit in a savings bank of the depositor's own money, in his own name, which he afterwards changed to his own name as trustee for his brother, when the depositor stated that he changed the account back to his own name three days after the death of his brother, who was never informed of the deposit, and that he never intended to give his brother the money. In some jurisdictions this case is cited as modifying the New York doctrine, but none of the New York cases cite it to that effect. But some of the New York cases distinguish it on the ground that the beneficiary died before the donor, and that the latter declared he never intended to create a trust. The intention, under the New York cases, is deemed a material element, and a presumption of intention to create a trust in such a case is held rebuttable by the depositor's statements to the contrary. *Re Barefield*, 82 App. Div. 465, 81 N. Y. Supp. 843.

The case of *Booth v. Oakland Bank of Savings*, 122 Cal. 25, 54 Pac. 370, is very similar to *HARRIS BKG. CO. v. MILLER*. A depositor in her lifetime changed a deposit in a bank so as to make it payable to the individual order of either of her sisters, or of herself, for the purpose, orally made known to the bank, of arranging the account so that her sisters could draw it at her death, and have the immediate benefit of it without probate; she then addressed a letter to them, stating what she had done, and that upon her death they could draw the residue remaining in the bank. The court held that a valid trust was created, although it was not in writing, and that the power of the trustor to draw the funds did not affect the validity of the trust as to the remainder, and that her possession of the 1 L.R.A. (N.S.)

bank book until her death was immaterial. The court also held that under the statute the beneficiary need not be informed of the trust, or express an acceptance of it; as a demand by the beneficiaries upon the bank is sufficient acceptance.

In *Milholland v. Whalen*, 89 Md. 212, 44 L. R. A. 205, 43 Atl. 43, it was held that a deposit in a savings bank in trust for the owner of the money and another person, as joint owners, subject to the order of either, and the balance, at the death of either, to belong to the survivor, constitutes a valid declaration of trust, which transfers to the trustee the legal title for the benefit of the survivor as to the balance of the fund remaining in the bank at the death of either, even though the settlor retains possession of the bank book. In the case of *Hoboken Bank for Savings v. Schwoon*, 62 N. J. Eq. 503, 50 Atl. 490, the same doctrine was applied. The court held that a complete declaration of trust was established where one who had a deposit in a bank signed a statement directing that the deposits should be placed in the name of another jointly with herself, and that either of the parties, or the survivor of them, was at liberty at any time to draw any or all of the deposit, and thereafter a new pass book was issued to her, containing the same directions, which she placed in the hands of a friend, with the instructions to deliver it to the other after her death.

In *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 32 L. R. A. 377, 51 Am. St. Rep. 382, 33 Atl. 836, the facts show that the depositor retained the bank book until his death, and that he never communicated to the *cestui* his intention as to the deposit. The court held that the words "in trust for" in the entry of a savings bank deposit, with the same form used on the depositor's book, is sufficient to create a *prima facie* trust which will be a complete trust in favor of the donee, where all the donor's declarations and

210, 46 N. E. 250; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. 321; 1 *Perry*, Tr. 5th ed. §§ 96, 97; *Pitts v. Weakley*, 155 Mo. 109, 55 S. W. 1055; *Antrobus v. Smith*, 12 Ves. Jr. 39.

A trust, whether in regard to real or personal property, must, under the statute of frauds, be manifested in writing, by clear and unequivocal evidence.

Woodford v. Stephens, 51 Mo. 433; *Mt. Calvary Church v. Albers*, 174 Mo. 331, 73 S. W. 508; *State ex rel. Rife v. Hawes*, 177 Mo. 360, 76 S. W. 653.

Messrs. Wilson & Clapp, and *A. W. Mullins*, for respondent:

There was a completed trust created in favor of Mrs. Miller.

1 *Perry*, Tr. 5th ed. § 86; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Re Soulard*, 141 Mo. 642, 43 S. W. 617; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365; *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916; *Smith v. Darby*, 39 Md. 268; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62, 51 Atl. 249; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 32 L. R. A. 377, 51 Am. St. Rep. 382, 33 Atl. 836; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447; *Re Gaffney*, 146 Pa. 49, 23 Atl. 163; *Brooke's Appeal*, 109 Pa. 188; *Atkinson's Petition*, 16 R. I. 413, 3

L. R. A. 392, 27 Am. St. Rep. 745, 16 Atl. 712; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659.

The subject-matter being personalty, the trust may be created without any writing, but by oral declarations alone.

28 Am. & Eng. Enc. Law, 2d ed. p. 870; *Re Soulard*, 141 Mo. 662, 43 S. W. 617; *Lane v. Ewing*, 31 Mo. 75, 77 Am. Dec. 632; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Hon v. Hon*, 70 Ind. 135.

Where a trust has been once perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary.

28 Am. & Eng. Enc. Law, 2d ed. p. 899; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Light v. Scott*, 88 Ill. 239; *Smith v. Darby*, 39 Md. 268; *Willis v. Smyth*, 91 N. Y. 297.

Gantt, J., delivered the opinion of the court:

On July 25, 1901, *Giles Burlingame*, of Putnam county, Missouri, died testate at said county, and on July —, 1901, his will was duly probated, and letters testamentary were issued to the defendants *William Johnson* and *James E. Davis*, who were duly qualified and are acting as such executors of said estate. On August 26, 1902, the *Harris Banking Company* filed its peti-

acts are consistent with the presumption arising from the entry itself. The court said that "it is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if perchance he so does it as to transfer the real or equitable title to the *cestui*. . . . He may retain the legal title, giving him the control, but for the benefit of the *cestui*, according to the terms of the trust."

In *Sayre v. Weil*, 94 Ala. 466, 15 L. R. A. 544, 10 So. 546, the court held that a trust is complete and irrevocable when a person makes a deposit of money to the credit of himself as trustee for certain children named, and nothing remains in him but the mere naked legal title.

In *Atkinson's Petition*, 16 R. I. 413, 3 L. R. A. 392, 27 Am. St. Rep. 745, 16 Atl. 712, it was held that a deposit of money in a bank in the name of another, with depositor's name as trustee following it, and a statement by him to the other that he had made the deposit, which would belong to the other at his death, constituted a deposit in trust, which would be valid although the depositor retained the deposit books until his death. The same view was taken in *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, and in *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69.

In *Gaffney's Estate*, 146 Pa. 49, 23 Atl. 163, the court held that a *prima facie* trust was established in favor of the beneficiary, although he never had possession of the 1 L.R.A. (N.S.)

bank book, where one deposited money to the credit of himself as trustee, and the money remained until his death.

In *Blasdel v. Locke*, 52 N. H. 238, it was held that a gift *inter vivos* was not completed. The facts showed that a deposit was made in a savings bank in the name of one who was the niece of the depositor, the latter intending that it should be a gift, but retaining the bank book until her death. During the depositor's last illness she informed her niece of the gift for the first time. In an action by the beneficiary against the bank to recover the deposit, the court held that the deposit created a trust in favor of the niece, and her acceptance of it rendered her title absolute, although there was no delivery of the bank book.

In *Robertson v. McCarty*, 54 App. Div. 103, 66 N. Y. Supp. 327, it was held that a deposit by one in trust for his brother created an irrevocable trust in the entire deposit, although the depositor retained possession of the bank book, and the beneficiary did not know of the trust until after the donor's death. Cases to the same effect are: *Millard v. Clark*, 80 Hun, 141, 29 N. Y. Supp. 1012; *Jenkins v. Baker*, 77 App. Div. 509, 78 N. Y. Supp. 1074; *Beaver v. Beaver*, 117 N. Y. 421, 6 L. R. A. 403, 15 Am. St. Rep. 531, 22 N. E. 940; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487.

tion in the circuit court of Putnam county, stating that it was and still is a banking corporation, with its banking house in the town of Harris, Sullivan county, Missouri; that for several years prior to his death said Burlinggame had kept a considerable sum of money upon deposit in plaintiff's bank, bearing interest; that on May 22, 1901, the plaintiff issued to said deceased a certificate of deposit for \$8,080.91, which was dated June 11, 1901, and which said Burlinggame on said May 22, 1901, by written indorsement, assigned to Helen A. Miller: that plaintiff is informed and believes said Burlinggame delivered said certificate of deposit to said Helen A. Miller soon after said assignment and before his death; that plaintiff is informed and believes that said certificate of deposit was in the possession of said Burlinggame at the time of his death, and whether he held the same for himself or for Helen A. Miller plaintiff does not know; that said Helen A. Miller claimed same as her absolute property, but said executors inventoried same as the assets of the estate of said Burlinggame, and refused to deliver it to her; that said executors, on the one hand, and the said Helen A. Miller, on the other hand, are now each demanding plaintiff to allow amount due on said certificate of deposit and were threatening to sue the plaintiff if the sum was not paid to each of them, respectively, in full; that plaintiff was ready and willing to pay the amount due on said certificate of deposit to the party legally entitled thereto, or to pay the sum into court for such party as shall be adjudged entitled to the same; that it would be unsafe for plaintiff to pay the sum to either claimant without its being judicially determined to which of the claimants it should be rightfully paid,—and prayed that said Helen A. Miller and the said executors be required to interplead, setting up their respective claims to said certificate in order that it might be judicially determined to whom plaintiff should pay the sum, and for all proper relief. At the October term of said court, 1902, Helen A. Miller filed her interplea, alleging that she was the owner and rightfully entitled to the said certificate of deposit and the fund evidenced thereby, and that the said Giles Burlinggame had no right, title, or interest therein; that on or about the — day of —, 1894, at the special solicitation of the said Giles Burlinggame, said Helen A. Miller moved from her home at Springfield, Missouri, to the residence of said Giles Burlinggame and his twin brother, Miles Burlinggame, both of whom were old and infirm, living alone, both being bachelors and her cousins, and undertook to keep house, wait on, and nurse them: that said Miles was then, and has continued to

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be, without means of support, and was living off the bounty of his brother, the said Giles Burlinggame, and that solely at the solicitation of said Giles Burlinggame she entered upon the work, service, and duties she had so assumed, and from that date continued in the discharge of the duties in keeping house, waiting on, and nursing said Burlinggames, until the death of said Giles Burlinggame on July 25, 1901; that in recognition of the kindness she had so shown said Giles Burlinggame and his brother, and because of the work and the labor so performed, and the care and the attention she had bestowed upon said Burlinggames during all that period, the said Giles Burlinggame, having deposited in the plaintiff's bank the sum of \$8,080.91, and having received the said certificate of deposit therefor from said bank, gave the same and the right to have and receive said money so on deposit to said Helen A. Miller, and indorsed and signed said certificate of deposit to her on May 22, 1901, and that certificate of deposit is now wrongfully withheld from her by said Johnson and Davis, executors of the will of said deceased, because they, as such executors, have no right thereto and no interest in said fund. Wherefore she prays judgment for said sum of \$8,080.91, and that the plaintiff bank be required to pay the same to her, and that the court will make such orders and render such judgment as may be proper. On the same day Johnson and Davis, the executors, filed their petition as interpleaders, and admitted that they were the executors of the last will and testament of Giles Burlinggame, deceased, and alleged that said banking company duly issued its certificate of deposit to said deceased on date June 11, 1901, for the sum of \$8,080.91, bearing 3 per cent interest to maturity only; that said certificate ever afterwards remained the property of said Burlinggame, and was his property at his death; that said money was due from said banking company to said Burlinggame, with all interest thereon, and was wholly unpaid at his death, and was a part of the assets of his estate; that said certificate was duly taken possession of by them, as executors of the last will of said deceased, and duly inventoried by them as assets of said estate, and they are now the owners and holders thereof as such, and said certificate and said sum of \$8,080.91, with all interest, is now due, for which they pray judgment, and that this court order the same paid to them, and for all proper orders. On January 13, 1903, Helen Miller filed her answer to the petition of said executors as follows: "That it is true that said executors were duly qualified and are now acting as such executors, and that the deceased was a resident of

Putnam county at the date of his death, July 25, 1901. That said executors obtained possession of said certificate of deposit from her, and afterwards improperly and wrongfully inventoried same as assets of said estate. Denies that said certificate of deposit was the property of said deceased at the time of his death, but that same was then her property and has been her property since the assignment thereof, as alleged in her interplea. That upon making said deposit in said bank, and making the assignment of said certificate to her on the back of same, the said Giles Burlinggame declared to the officers in charge of said bank that the said certificate of deposit belonged to this interpleader, Helen A. Miller, and for said bank to pay the money evidenced by said certificate to her and to no other person, and then and thereby placed said funds in said bank, and left the same therein in trust for the sole use and benefit of the said Helen A. Miller, and prayed judgment as asked in her interplea." On the same day the executors filed their answer to the interplea of Helen A. Miller, and alleged that the deceased, at his death, had and held the said certificate of deposit for \$8,080.91, and that these defendants have had, and still have possession thereof ever since the death of said deceased, and denied all the other allegations in the petition of said Helen A. Miller, and prayed judgment as in their interplea. The cause was tried by the court without a jury on January 13 and 14, 1903, upon the foregoing pleadings, and judgment was rendered for Helen A. Miller, interpleader, and the plaintiff bank was ordered and adjudged to pay said sum of \$8,080.91 to her, and the costs were adjudged against the executors, Johnson and Davis. Within due time, the executors filed their motion for new trial and in arrest of judgment, which was overruled, and thereupon the executors in due form appealed to this court.

On the part of the interpleader Helen A. Miller the evidence was as follows: Overton Harris testified that he resided at Harris, Missouri; was a farmer and banker. He knew Giles Burlinggame twenty-five or thirty years. He died in about one month after his last visit to our town on June 13, 1901. Witness was, at the time of giving his evidence, and had been, president of the Harris Banking Company for three years. At the time of his death Giles Burlinggame had \$8,080.91 on deposit in the bank. He had been a depositor for several years. The certificate of deposit for \$8,080.91 was drawing 3 per cent for twelve months. At the time he made this deposit Burlinggame told me and my son, Cliff Harris, the cashier of the bank, that he wanted to wind up his

business, and asked us to fix this deposit so that Helen A. Miller could be the absolute owner of said property. We told him that he could make an indorsement on the back of it and sign it over to her. Cliff wrote the indorsement and handed the certificate to him, and Giles Burlinggame signed the same. He then said, "This winds up my business, with the exception of about \$3,500" that he had on deposit in a Lucerne bank, which amount he expected to bring down and fix the same way that he had the \$8,080.91; that he wanted her to have this last amount as well as the first he had given her. On June 13th, 1901, he came back to Harris to our bank and brought \$500. I asked him if he wanted a time certificate for it. He said "No;" that he would be down in a few days and bring the balance; he would then fix it as he did the other. He said for us to pay this to no one but Helen Miller. Just about a year before he made this deposit, his deposit ne made at that time was \$7,855.26. He told us at that time, in case of his death, that Helen Miller would come to the bank for said amount, and, upon identification, to pay her the same; but at the last time of making the deposit, after signing the indorsement of the certificate, he told us then to pay it to no one but her. My son made the indorsement on the certificate, and he (Burlinggame) signed it and afterwards put it in his pocket. He said it belonged to Helen A. Miller. After stepping out of the bank we sat down in front of the bank, Mr. Burlinggame taking his certificate out of his pocket, and asked me if I would hold the certificate. I told him I would rather not. He then put the certificate back into his pocket. He told me at different times he wanted her to have it, that she had been keeping house for him for six or seven years, and that he didn't want John, his brother, nor Phil Burlinggame's heirs, to have any of his estate; that his twin brother, Miles, that lived with him, was wholly incompetent to manage his affairs; and that he had the utmost confidence in Mrs. Helen Miller of taking care of himself and his twin brother and his blind sister. He further said, if his twin brother was to get hold of it, him being a drunkard, that they would soon get it away from him. He said that Phil Burlinggame's heirs, he thought, had been furnishing him some money now, as he had come home several times drunk, and that he was going to fix his affairs so the parties furnishing him this money to get drunk on would have to lose it.

On cross-examination he was asked:

Q. Did you write this letter of June 11, 1901?

A. I signed it. It was written at my dic-

tation. At the time I wrote this letter I had a chance to make a loan of \$5,000, and, as Mr. Burlingame had told me a few weeks before he intended to bring the \$3,500 down and make a time deposit of it to Helen Miller, as he had the other, I figured that in doing so we could carry the loan.

Said letter read as follows:

Harris Banking Company,
Harris, Mo., June 11, 1901.

Giles Burlingame, Esq.,
Lucerne, Mo.

Dear Sir:-

Regarding the matter we were talking about, I wish you would come down this week, if possible, as we have a chance now to make a nice \$5,000 loan on 1,000 acres of land. This is a loan we want to make, and, if we use your funds in making it, we want to have them soon. I think now that I will have to be away from home next week, and, if your health is good, you had better come down this week. Please answer and let us know when you will be down. I will be at home all this week.

Very truly yours,
O. Harris.

C. R. Harris testified as follows: "I reside at Harris, Missouri, and am a son of Overton Harris, and cashier of the Harris Banking Company, and have been for five years." He testified that Giles Burlingame had been a depositor in their bank ever since he had been cashier, that he would come around about the 1st of June to collect his interest on his old certificate and renew it, or make a new deposit. He came down on May 22, 1901,—the certificate matured June 11th; said he wanted to wind up his business; wanted to leave his money to Mrs. Miller; that he wanted to leave some more money in connection with his time certificate he was then carrying; plus the accrued interest. The other amount was about \$3,500 he then had in the bank at Lucerne, his home bank. He would bring that down in small sums, to leave the impression he was loaning it. "We arranged his new certificate upon his request, payable to himself, for \$8,080.91, at 3 per cent for twelve months. He said he wanted this, as he had previously instructed us, so that Helen A. Miller could draw it at the time of his death; that he wanted her to have it, and asked how he could fix the paper, and my father and myself suggested that he just assign it, like any other negotiable instrument, to her. I prepared the assignment and he signed it. He said we were to pay it to no one else but Helen A. Miller: that it was her property, as he had instructed 1 L.R.A. (N.S.)

us previously. He instructed us frequently. The year before, when he came to renew his deposit and collect his interest, he told us he was getting old and might die at any time, and that, in case he did die, Mrs. Miller would present the certificate for payment; that Mrs. Miller would visit Mrs. Titus [his sister], and Mrs. Titus would identify her." Burlingame then asked Overton Harris, president of the bank, to hold the certificate for Mrs. Miller, and he declined, and Burlingame put the certificate back into his pocket.

Frank C. Miller testified he was a son of Mrs. Helen A. Miller, interpleader; that some twelve years, he said, before his mother went to live with Giles Burlingame, he had a conversation with Giles Burlingame, in which the latter said to him: "I would like to have your mother come and live with me, or, in other words, take care of me. I am getting old. I will give her all I have. Do you think she would come?" "I said, 'I do not know,' but said I would write to her about it; and he said, 'All right,' he wished I would. He said there was only two women in the world he cared anything about, and one of them was my mother. That was about all of the conversation at that time. I wrote her the statement he made to me. I suppose he was about sixty-five years old at that time."

Thos. Scott testified: "My name is Thomas Scott; age, fifty-four years; residence, Wintersville, Sullivan county, Missouri; occupation, farmer. I have known Giles Burlingame for ten years. I saw him at Harris the latter part of May, 1901. I told him I had a life policy in the Woodmen, and had come to have it changed, and he said he had come to get his business fixed up; that he got Cliff Harris to write out a certificate for a little over \$8,000, that he was going to give it to his housekeeper, Mrs. Miller, that she had been keeping house for him for six or seven years; and I said that was more than I was able to give mine. About three weeks later I seen him at Harris again. I said, 'Did you give her that money, a little over \$8,000?' and he said, 'Yes, sir.' 'How did she take it when you gave it to her?' He said it did not surprise her at all, as he had said he had told her that he was going to give it to her before he got all his business straightened up and was going home. In the first conversation he said he got Cliff Harris to write out the certificate of deposit, and that he was going to take it home and give it to her. That's what he told me. The next, I asked him if he had given it to her, and he said, 'Yes, sir.'"

Mrs. Miller also read in evidence a passage from the inventory filed by the said

executors, as follows: "Certificate of deposit No. 132, issued by the Harris Banking Company, of date June 11, 1901, bearing interest at the rate of 3 per cent per annum, for the sum of \$8,080.91; interest due on the above to date, \$40.60." In parenthesis: "(Above certificate indorsed to Helen A. Miller.)" Also read in evidence said certificate as follows: "\$8,080.91. Hartis Banking Company, Harris, Missouri, June 11, 1901. Giles Burlinggame has deposited in this bank eight thousand and eighty dollars and ninety-one hundredths, subject to the order of himself on the return of the certificate properly indorsed. [Signed] C. B. Harris, Cashier, No. 132. This certificate is not subject to check. Three per cent interest to maturity only;" and on the back the following indorsement: "For value received I hereby assign this certificate to Helen A. Miller, and authorize her to draw the same. [Signed] Giles Burlinggame."

S. S. Johnson, a tenant of Burlinggame, testified that he saw him in June, 1901, about a week after Burlinggame had got back from Harris; told him he was getting old—he ought to have his business fixed up; and Burlinggame said he had it fixed up right here, and put his hand on his left breast. Witness could see the bulk of something there about the size of a bill book. Burlinggame said he aimed for Mrs. Miller to have the biggest part of it (his estate); that he wanted his brother Miles and his blind sister to be taken care of; that he had the papers fixed up, but he didn't aim to turn them over; that she (Mrs. Miller) might die first and leave him out, or throw him out; that Mrs. Miller was to have the money in the bank after his death, and he the interest on it for his own support; that she was to draw it after his death, but he wanted the use of the money and the interest on it while he lived; the bulk of his property he would leave to Mrs. Miller; that he had already fixed it and mentioned as having it in his pocket.

Charles Burlinggame, nephew of the deceased, testified he was at his uncle's a few days before his death. "He had something like a little book, wrapped up in a piece of leather, and he was very weak and tried to sew that into his bosom. Mrs. Miller offered to help him, and he said, if he wanted any help, he would ask for it. I was there the day the executors got the papers. Mrs. Miller said they came and got Giles' papers, and that there was a certificate of deposit for \$500 among them, and she gave it to them. She did not mention the \$8,000 certificate."

A. H. Lowry testified: "I was at Burlinggame's the morning he died. A few minutes before he died Mrs. Miller said for me to

take charge of the papers in his shirt pocket and give them to her,—that was Burlinggame's request. She said there was a paper in there that really belonged to her; that he had showed it to her, but that he wanted to keep it in his possession to draw the interest on it. I don't know whether she said it was a paper or certificate. I went and got Uncle Billy Wilson, and amongst us we took the papers off. As I remember the book, it was a kind of leather slip, and it was in his shirt pocket. They seemed to be stitched in with some kind of thread or twine. Mr. Wilson took the book out of his pocket and handed it to Mrs. Miller. She did not open it or say anything at the time. I was at the inventory. Mrs. Miller said Burlinggame showed her this certificate of deposit and said that he wanted to keep it; that he might want to draw the interest on it; that he wanted to retain it, so that he could get the interest on it."

James E. Davis, executor, testified he was at the inventory; that "Mrs. Miller said that, when Burlinggame came from Harris, he showed her the certificate of deposit; and my impression is that he told her that at his death it was hers,—that he would keep it and draw the interest while he lived. There was a will and some notes, and a memorandum of deposit of \$500, in that book. They were all inventoried. I believe I heard Mrs. Miller say something about the paper being hers at his death. I think she said that he would keep it until his death and he would draw the interest. She said that he had shown it to her when he came from Harris, and said that it was hers at his death, but that he would keep it until his death and draw the interest."

William Johnson, one of the executors, testified that he was sent for, and Mrs. Miller got the papers. "She said they were on Mr. Burlinggame's body. She named about them being pinned on or sewed on his shirt or on his breast, and says that he said that he would keep them right there. A day or two afterwards we went back to get the papers. Mrs. Miller handed them to Mr. Currey, and he opened the papers and this certificate was among them. She said he was giving her that to take care of Miles—that certificate she was claiming; that he was afraid, if Miles got it into his possession at his death, these other brothers and folks would get the proceeds from Miles. She said he expected to get it all arranged by the 1st of September, following,—this arrangement in regard to Miles, giving her the certificate,—and would get all arranged by September. She said that was the package as it came off Mr. Burlinggame's body. She never claimed it was hers. She said it ought to be hers."

Dr. Parish testified: "I was at Burlingame's the night he died. He was very sick and kept holding his hand on his left breast. I asked him if anything was hurting him, and I thought he mentioned his money. I noticed a bulk in his shirt, and it looked like it was sewed in. After his death I asked Mrs. Miller what had become of those papers, and she said, 'We called in some parties and took them off.'" In rebuttal, William Wilson, a witness for Mrs. Miller, testified that Mrs. Miller said that, when Burlingame came home from Harris, he took out that certificate and handed it to her, and told her he wanted her to read it, and he said, 'Now, that is yourn, but I want the use of it while I live.' I was at Burlingame's directly after his death, and found a bundle of papers sewed up in his shirt pocket. I ripped the pocket open and took the papers out. I didn't notice the papers. They were tied up with a twine string, solid,—all in a bunch,—and I handed them to Lowry, and he handed them to Mrs. Miller and told her to put them away, and she put them in her trunk. After the burial she asked me to open the package. She did not want to hold it. I found the two certificates,—one for \$8,080.91, and one for \$500,—some notes payable to Burlingame, and the will, and about \$95 in cash. And she said that Burlingame had them in his pocket while he lived, and had her sew them in. She said that he wanted her to wear them on her person, and she did not like to do it; that he put them in his pocket when she did not want to take them, and put them in there and had her sew them in, and I came in while she was sewing them in, and saw her sewing them."

1. This is an equitable proceeding by the plaintiff banking company, as a stakeholder, seeking the protection of a court of equity against rival claimants to the certificate of deposit issued by it. As the plaintiff is in the position of a mere stakeholder, claiming no right in the subject-matter, but being liable to be vexed by two or more suits by the different claimants of the said certificate at the same time, the jurisdiction of equity is well established. 2 Story, Eq. Jur. §§ 806, 821; Hathaway v. Foy, 40 Mo. 540. The issue is a simple one, to wit: Who is the rightful owner of the said certificate? Mrs. Helen A. Miller, on the one hand, or the executors of the last will of Giles Burlingame, deceased, on the other hand? The facts are few and not complicated. It is not disputable that the deposit of \$8,080.91 in the plaintiff bank, of date June 11, 1901, was originally made by the said Giles Burlingame in his own name, and a certificate of deposit issued directly to him. Mrs. Miller asserts title to the said certificate and

the fund which it represents on two grounds: First, an executed gift *inter vivos*; and, second, an executed parol trust created by Giles Burlingame in her favor to the said fund. The executors insist that the gift was invalid for want of a delivery of the certificate after the assignment thereof on its back to Mrs. Miller, and that there was no evidence of any intention to create a trust in said fund in favor of Mrs. Miller. The learned circuit court made a special finding of facts, and found that the evidence established a valid executed gift *inter vivos* from the said Burlingame to Mrs. Miller, and that, by his assignment of the deposit certificate to Mrs. Miller and his subsequent acts, relinquished all control over the said certificate of deposit, to hold the same as the property of Mrs. Miller. The first inquiry, therefore, must be as to the propriety of this finding of the circuit court. The question is one of equity, and the finding and conclusion of the circuit court are open to review by this court; and while it has been the uniform practice of this court to defer in a large measure to the judgment of the circuit court on a question of fact, on account of its superior advantage in weighing the testimony of the witnesses, yet, where the evidence is practically undisputed, as it is in this case, this court has never abdicated its right to weigh the testimony and draw its own conclusion as to the equitable rights of the parties litigant.

Addressing ourselves, then, to the question whether the facts developed on trial establish a valid executed gift *inter vivos* from Giles Burlingame to Mrs. Helen A. Miller, the testimony, in our opinion, establishes, first, that Giles Burlingame deposited \$8,080.91 of his own money in plaintiff's bank on the 22d day of May, 1901, and took a certificate of deposit therefor in his own name; and at the same time he indorsed on the back of said certificate the following words: "For value received I hereby assign this certificate to Helen A. Miller, and authorize her to draw the same. Giles Burlingame." And at the time of the execution of said assignment the said Giles Burlingame directed the plaintiff banking company not to pay said deposit to anyone else, but to pay the same to Helen A. Miller; and requested Overton Harris, the president of the said banking company, to hold the said certificate of deposit, but the said Harris declined to do so; that thereupon the said Burlingame replaced said certificate in his pocket, and returned to his home with it in his possession. As to what occurred between Giles Burlingame and the interpleader, Mrs. Helen A. Miller, in regard to said certificate of deposit after his return to his home, Mrs. Miller was not competent

to testify, and we are forced to accept the evidence as to her statements of what occurred by proof *aliunde*. It is conceded on all hands that when Giles Burlinggame died this certificate of deposit, together with another for \$500, and his will, were found on his person, wrapped in a leather bag and sewed to his shirt, and was turned over to his executors by Mrs. Miller soon after his death. Mrs. Miller told the witness Lowry, while Burlinggame was *in articulo mortis*, that it was Burlinggame's request that she should take charge of the papers in his shirt pocket; that there was a paper in there that really belonged to her; that he (Burlinggame) had showed it to her, but that he wanted to keep it in his possession to draw the interest on it. He further testified that he was present at the making of the inventory, and on that occasion Mrs. Miller said that Burlinggame showed her this certificate of deposit, but said that he wanted to keep it; that he might want to draw the interest on it; that he wanted to retain it, so that he could get the interest on it. James E. Davis, one of the executors testified that he was present at the making of the inventory, and Mrs. Miller said that, when Burlinggame came from Harris, he showed her the certificate of deposit, and his impression was that he told her that at his death it was hers; that he would keep it and draw the interest while he lived. William Johnson, the other executor, testified that he was sent for after Burlinggame's death, and Mrs. Miller got the papers and turned them over to him. He said they were on Mr. Burlinggame's body when he died,—pinned on or sewed on his shirt,—and said that he said that he would keep them right there; that, when he opened the package, the certificate in controversy was among them. William Wilson testified that Mrs. Miller said that when Mr. Johnson, the executor, came down there and got the papers, Mrs. Miller asked if he thought he ought to take the certificate that was signed over to her, but he said that, as it was found among the other papers, he thought he ought to take it to Unionville with him, but that he thought it ought to be sent back to her; that Mrs. Miller said that, when Mr. Burlinggame came back from Harris, he took out that certificate and handed it to her to read it, and said, "Now, that is yours, but I want to use it while I live." Mr. Wilson further testified that "after the burial of Mr. Burlinggame, Mrs. Miller requested me to open the bundle or package of papers," and he found this certificate among other papers in it; that Mrs. Miller said to him that Mr. Burlinggame had them in his pocket while he lived, and she sewed them in; that he wanted her to take them and wear them on her person, and she did 1 L.R.A. (N.S.)

not like to do it. Mr. Clifton R. Harris testified that at the time the certificate of deposit was issued Mr. Burlinggame said he wanted this fixed, so that Helen A. Miller could draw it at the time of his death. That Giles Burlinggame intended to give Mrs. Helen A. Miller the certificate of deposit, or rather the fund which it represented, at some time, does not admit of doubt. Courts are ever desirous of carrying out and effectuating the intention of parties as manifested by their agreements or declarations of trust, and we will do so whenever it can be done consistently with the established rules of law. To constitute a valid gift *inter vivos*, there must be an intention to give and a delivery to the donee, or to someone for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient, unless made with an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given. *Re Soulard*, 141 Mo., loc. cit. 657, 43 S. W. 617; *Dunn v. German American Bank*, 109 Mo. 97, 18 S. W. 1139; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201. A gift cannot be made to take effect in the future. Such a transaction would only amount to a promise to make a gift in the future, and, being without consideration, is void. *Spencer v. Vance*, 57 Mo. 429; *School District v. Sheidley (School District v. Stocking)* 138 Mo. 672, 37 L. R. A. 406, 60 Am. St. Rep. 576, 40 S. W. 656.

In view of these well-settled principles of law, can it be said that Giles Burlinggame made an unconditional gift and delivery of the certificate of deposit in this case to Mrs. Miller? While we think it is plain from his conversation with the Messrs. Harris at the time of the execution of the certificate of deposit by them that it was his intention to give Mrs. Miller this fund, and while the assignment fully corroborates their testimony as to the intention which he expressed at the time, the physical fact that Giles Burlinggame retained this certificate of deposit in his own possession until his death stands admitted and conceded. Not only this, but the claim asserted by Mrs. Miller to the executors, and to the witnesses who were present at the time of Mr. Burlinggame's death, falls short of a claim that Mr. Burlinggame had parted absolutely with the present and future dominion and right of control over the certificate of deposit. Her evidence falls short of a statement of

an unconditional delivery to her. On the contrary, she says that he showed it to her and permitted her to read it, but said he wanted to keep it in his possession to draw the interest on it; that it would be hers at his death, but he would keep it and draw the interest while he lived. Her own witness, Mr. William Wilson, says that she told him that Mr. Burlingame handed the certificate to her and told her that he wanted her to read it, and said, "Now, that is yours," but he wanted the use of it while he lived. We cannot escape the conclusion that this evidence does not establish a valid executed gift *inter vivos*. In our opinion, the retention by the deceased of the actual possession of the certificate of deposit, with the expressed intention of reserving to himself the right to collect and retain the interest accruing thereon, negatives the claim of an unconditional gift. The authorities above cited from this court are supported by numerous others, and by the great weight of authority, both in England and in the United States.

2. Notwithstanding the conclusion we have reached that the transaction by Mr. Giles Burlingame cannot be enforced as an executed gift *inter vivos*, her contention that it can be enforced as an executed express trust in her favor remains to be determined. In her defense to the interplea of the executors, she asserts that at the time he deposited said fund in said bank said Burlingame declared to the officers of said bank that said certificate belonged to interpleader, Helen A. Miller, and directed said bank to pay the money evidenced by said certificate to her alone, and no one else, and thereby placed the same in said bank in trust for the sole use and benefit of said interpleader, Helen A. Miller. To this claim of an executed trust, objections are made by counsel for the executors.

It is first insisted that the claim of executed trust cannot be maintained, for the reason that it must have been evidenced by a writing, and cannot be established by parol evidence. Mr. Perry, in his learned and exhaustive treatise on Trusts, in the first volume (§ 86) thus states the doctrine: "There does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner, in the absence of a statute, has entire control of it. He can sell and transfer it without writing and by parol; and, if he can transfer it by parol, there is no reason why he may not by parol transfer it upon such lawful terms and to such uses and trusts as he may desire. It has been so ruled in express decisions in the United States. When a person *sui juris*, orally or in writing, explicitly or impliedly, declares that he holds personal

property . . . for another, he thereby constitutes himself an express trustee." Section 3416, Rev. Stat. 1899, in force at the date of the making of the deposit and the assignment of the certificate therefor, in this case is to all intents and purposes identical with §§ 7 and 9 of the English Statute of Frauds of 29 Charles II. By its terms personal chattels are not included within it, and such has been the uniform judicial construction of these sections in our sister states. *Gilman v. McArdle*, 99 N. Y., loc. cit. 456, 457, 52 Am. Rep. 41, 2 N. E. 464; *Thacher v. Churchill*, 118 Mass., loc. cit. 110; *Patterson v. Mills*, 69 Iowa, 758, 28 N. W. 53; *Cobb v. Knight*, 74 Me., loc. cit. 257; *Danser v. Warwick*, 33 N. J. Eq., loc. cit. 135, 136; *Roach v. Caraffa*, 85 Cal., loc. cit. 445, 25 Pac. 22. The English cases fully sustain this view. *Benbow v. Townsend*, 1 Myl. & K. 506; *Jones v. Lock*, L. R. 1 Ch. 25. Such, unquestionably, was the opinion of this court in *Lane v. Ewing*, 31 Mo. 86, 77 Am. Dec. 632.

But we are cited to two decisions of this court holding that an express trust cannot be created by parol, under § 3416, Rev. Stat. 1899. *Mt. Calvary Church v. Albers*, 174 Mo. 331, 73 S. W. 508; *State ex rel Rife v. Hawes*, 177 Mo. 360, 361, 76 S. W. 653. The announcement of this rule in *Mt. Calvary Church v. Albers*, 174 Mo. 331, 73 S. W. 508, was predicated on the decisions in *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66, and *Woodford v. Stephens*, 51 Mo. 448. A careful reading of both decisions will demonstrate that neither supports the proposition that an express trust as to personal property cannot be created by parol. Each of said cases involved a claim of trust to real estate alone, and, of course, the language used had reference alone to the subject-matter; to wit, real estate. The statement in *State ex rel. Rife v. Hawes* is based upon *Mt. Calvary Church v. Albers*. The writer, who is responsible for the statement in the *Hawes Case*, is convinced that this statement of the law as to the creation of a trust in personalty is opposed by the unbroken line of authority in England and in the United States, and has no hesitancy in taking this first opportunity of confessing his error. He is still of opinion that *Mt. Calvary Church v. Albers* and *State ex rel. Rife v. Hawes* were both correctly ruled on all other points, and that it was not necessary to have announced that a trust in personalty could not be created by parol. We think those cases are in conflict with the earlier decisions in *Lane v. Ewing*, 31 Mo. 86, 77 Am. Dec. 632, and *Huetteman v. Viesselmann*, 48 Mo. App. 582. In the latter case it was conceded by both parties that a trust in respect to personalty need not be proved by a writing; and such,

we are satisfied, is the general understanding of the bar of this state. Accordingly we hold that the trust, if any, in favor of Mrs. Helen A. Miller, can be established by parol evidence, and we must decline to follow the rulings to the contrary in *Mt. Calvary Church v. Albers*, 174 Mo. 331, 73 S. W. 508, and *State ex rel. Rife v. Hawes*, 177 Mo. 360, 76 S. W. 653.

But it is further urged that this assertion of a trust is antagonistic to the claim of an executed gift *inter vivos*, and we are cited to the language of the court of appeals of New York, in *Young v. Young*, 80 N. Y. 437, 36 Am. Rep. 634, approved in *Re Soulard*, 141 Mo. 650, 43 S. W. 617, to the effect that "it is well settled that equity will not interpose to perfect a defective gift or voluntary settlement made without consideration. If legally made, it will be upheld, but it must stand as made, or not at all. When, therefore, it is found that the gift which the deceased attempted to make failed to take effect for want of delivery or a sufficient transfer, and it is sought to supply this defect and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to. . . . It is established as unquestionable law that a court of equity cannot, by its authority, render that a perfect gift which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust merely on account of that imperfection." Conceding and agreeing to this statement, it does not follow that, because a party is not able to establish a perfect gift *inter vivos*, he or she may not show a perfect, valid trust, and have it enforced. The decision in *Soulard's Case* is a complete refutation of such a position. In that case it was ruled there was no valid gift, and yet it was held that a valid express trust had been created, and it was enforced. Judge Macfarlane, speaking for this court, said: "As has been said, the transaction in question does not amount to a perfect gift. That is evident from the terms of the settlements themselves. Yet it is evident that the donor intended to make a complete disposition of the property, by which the income should be paid to himself during life, the proceeds of the notes, when paid, should be reinvested under his direction, the beneficiaries should have no power to dispose of the principal during his life, but at his death they should have the principal fund absolutely, whether then in bonds, notes, or money. We must assume that the donor intended to do what these settlements show he attempted to do. If the settlements, together with what was done under them, amounted to a valid executed trust, then they should be carried out in favor of the beneficiaries." In *Hallowell* 1 L.R.A. (N.S.)

Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249, the case was one of interpleader in equity, just as in the suit at bar, and the interpleader set up a gift *inter vivos*, subject to a parol trust for his children, or, if not a gift, then a trust created by the donor in favor of interpleader's children. The supreme court of Maine held, as this court did in *Soulard's Case*, that the evidence did not establish a valid gift *inter vivos*, but that it did sustain a valid executed trust, and enforced it. The court said: "It still remains to inquire whether he created a valid trust. We think he did. It is true, if the transaction was intended as a gift in *presenti*, but was imperfect as for want of delivery, a trust cannot now be substituted for the gift. If it was intended to be a gift *inter vivos*, whether it was perfect or imperfect, it was not a trust. *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840. On the other hand, if the transaction was not intended to be a gift, it might constitute a trust." The pleadings of Mrs. Miller in this case are tantamount to the pleading of the interpleader in *Hallowell Sav. Inst. v. Titcomb*, and the evidence was offered to sustain her right to the deposit in the alternative. The cause was and is one of equity, and, as a court of equity, we think there was sufficient assertion of a trust to justify the circuit court and this court in determining whether there was an executed trust in her favor to the deposit in controversy, and, if so, enforce it in her favor.

We recur, then, to the main proposition in this case, and this is, Did the evidence establish an executed parol trust as to this certificate of deposit for the benefit of Mrs. Miller? If a complete, valid, executed trust is established, it will be enforced, notwithstanding it is purely voluntary. *Leeper v. Taylor*, 111 Mo., loc. cit. 324, 19 S. W. 955; *Pom. Eq. Jur.* 2d ed. §§ 996, 997; *Re Soulard*, 141 Mo. 660, 43 S. W. 617. It is a well-settled law that no particular words are necessary to declare a trust. If the language sufficiently expresses an intention to create a trust, that will be sufficient. This is recognized by all the authorities. *Perry, Tr.* § 82. The donor or trustor may accomplish this result "by actually transferring the property to the persons for whom he intended to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, or if he declares himself a trustee for those purposes." Giving full credence to the witnesses who testified to the statements of Mrs. Miller as to what occurred between Mr. Burlingame and herself on his return from Harris with the certificate of deposit in his pocket and the assignment indorsed thereon, together with

the testimony of the Messrs. Harris, we think no other rational conclusion can be drawn than that Mr. Burlingame intended that Mrs. Miller should have the fund represented by the certificate of deposit at his death. This is made entirely clear by his consulting Mr. Overton Harris as to the method he should pursue—to use his own language—"so that Helen A. Miller could be the absolute owner of said property," and "that in case of his death she could come to the bank for said amount, and, upon identification, the bank was to pay her the same, and to pay it to no one but her." By the execution of the assignment on the certificate, he further evidenced his intention. Had he delivered her the certificate thus indorsed, no doubt could exist that it would have been a perfect gift of this fund *inter vivos*; but his retention of the certificate, and his expressed intention to her that he desired to keep it and draw the interest on it during his lifetime, negatived the idea of a gift *in presenti*. He did not intend to divest himself of all beneficial interest in the deposit. He then had two purposes in view,—one, to secure to her the amount of the deposit after his death, and the other, to retain for himself the interest on it during his lifetime. Moreover, he notified both his debtor, the Harris Bank, and the beneficiary of the trust, Mrs. Miller, that he had thus constituted himself a trustee for these purposes. In unequivocal terms he told Mrs. Miller and the Messrs. Harris that this fund was set aside for Mrs. Miller at his death. In *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 69, 51 Atl. 252, it is said: "The creation of a trust is but the gift of the equitable interest. An unequivocal declaration as effectually passes the equitable title to the *cestui que trust* as delivery passes the legal title to the donee of a gift *inter vivos*. One may constitute himself trustee by mere declaration. *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 32 L. R. A. 377, 51 Am. St. Rep. 382, 33 Atl. 836. . . . In the case at bar there were both deposit and declaration.

By this statement we are not to be understood as holding that a voluntary executory agreement to create a trust could be enforced, but that, by a declaration of an executed trust, after the donor had done all he could, so that nothing remained to be done, then the trust was executed. Looking at the substance of things, and not mere forms, we are constrained to hold that this was a valid execution of a trust as to this fund for Mrs. Miller. In *Soulard's Case*, 141 Mo. 663, 43 S. W. 617, it was said: "It is true he retained a beneficial interest in the property, the right during his life to the interest and income therefrom, and reserved the right to direct the reinvestment of the proceeds. 1 L.R.A. (N.S.)

But these are parts of the declared purposes of the trust. The trustee could as well make the income payable to himself for life as to any other party." In *Stone v. Hackett*, 12 Gray, 227, the income of the property was to be paid to the donor during life, and upon his death the principal was to be divided among various charities, and the validity of the trust was upheld. In *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272, a voluntary trust was sustained which allowed the donor to receive, not only the income, but such part of the principal as she might need during her life. "Three things," it has been said, 'must concur to raise a trust,—sufficient words to create it, a definite subject, and a certain and ascertained object;' and to these requisites may be added another; *viz.*, that the terms of the trust should be sufficiently declared." *Bispham, Eq. § 65*. In this case the deceased donor said to Mrs. Miller, after showing her the certificate duly assigned to her, and after she had read it, "Now, that is yours, but I want the use of it while I live." This statement is fully corroborated by the testimony of the Messrs. Harris as to his inquiry now he could make it her absolute property, and, when advised to accept a certificate and then indorse it to her, he did so, and then and there directed them not to pay it to anyone else. This was not a mere executory promise, but, considered altogether, was a declaration of a trust in favor of Mrs. Miller in the present tense, and doubtless considered by Giles Burlingame as a completed transaction, inasmuch as when it was done, and his directions given to his bankers to pay it to no one else, he said that it was her property,—not that he intended to give it to her, but it was now hers, subject only to the right in himself to receive the interest thereon. He further declared that he was winding up his business, and he unquestionably regarded that as to this fund he had made a final disposition of it by creating a trust, of which he himself was the trustee, for Mrs. Miller. In *Gerrish v. New Bedford Inst. for Savings*, 128 Mass., loc. cit. 159, 35 Am. Rep. 365, it was said: "There is in the case at bar no formal written declaration. But no particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally, if the property be personal, that it is held in trust for the person named. *Ex parte Pye*, 18 Ves. Jr. 140; *Wheatley v. Purr*, 1 Keen, 551; *McFadden v. Jenkyns*, 1 Hare, 458; *Milroy v. Lord*, 4 De G. F. & J. 264. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery." In that case the court

commented upon the effect of notice to the donee, and said: "Notice to the donee is, indeed, not necessary, when other acts or declarations of the donor are sufficient and complete in themselves, but where the transaction is capable of two interpretations, and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would in most cases be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust." In this case the donor not only gave notice to the donee, and announced to her, in view of the deposit and the assignment in writing to her, that it was hers, and that he was holding it for her until his death, but he went further, and notified the bankers who owed the deposit that it was her absolute property, and not to pay it to anyone but her.

In view of the able and exhaustive discussion of the law applicable to this class of cases in the Souldard Case, 141 Mo. 642, 43 S. W. 617, it seems a work of supererogation to extend this opinion further by the citation of precedents. In our opinion, the facts of this case establish a clear, executed parol trust by Giles Burlingame in favor of Mrs. Miller to the deposit of \$8,080.91, represented by the certificate of deposit issued by the Harris Banking Company to Giles Burlingame, and by him assigned to Mrs. Miller. This trust was a clear recognition of the debt of gratitude which the donor owed to Mrs. Miller for the invaluable services which she had rendered him and his twin brother in his old age, when he had no wife or children or other near relative to minister to his wants. As already said, that it was his intention that she should have this fund does not admit of a reasonable doubt. And in our opinion his acts and declarations to secure it to her by creating a trust in her favor, of which he was the trustee himself, were amply sufficient to meet all the requirements of the law; and in carrying out and effectuating his intention no violence or injustice has been done any other person.

While in our opinion the Circuit Court erred in holding it a valid gift *inter vivos*, all the facts are before us as a court of equity, and the judgment and decree of the Circuit Court is affirmed, notwithstanding the reason upon which it is based is not approved.

All concur.

1 L.R.A. (N.S.)

NEW HAMPSHIRE SUPREME COURT.

HIRAM H. BARKER et al.
v.
CHARLES B. BARKER.

(.... N. H.)

1. Trustees—removal of.

Unsuitable trustees may be removed from the exercise of the office, in the sound discretion of the court.

2. Same—change in number.

Equity may change the number of trustees from that designated by the originator of the trust if changed conditions in the estate render it necessary.

3. Same—interest of trustee.

The removal of a trustee is not prevented by the fact that he will thereby be deprived of the opportunity of passing upon his own qualification to take a benefit under the terms of the trust.

(October 3, 1905.)

EXCEPTIONS by petitioners to rulings of the Superior Court for Strafford County changing the trustees under the trust established by the will of Hiram Barker, deceased. Overruled.

The facts sufficiently appear in the opinion.

Messrs. Alfred S. Hayes and William S. Bangs, for petitioners:

The testator having manifested an intention to confide the management and dis-

Case Note.—Much conflict of opinion exists as to the power to change the number of trustees designated in the instrument creating the trust. An increase in number was allowed where the instrument did not disclose a contrary intention in *Plenty v. West*, 16 Beav. 356; *D'Adhemar v. Bertrand*, 35 Beav. 19; *Meinertzhagen v. Davis*, 1 Colly. Ch. Cas. 335, 8 Jur. 973; *Birch v. Cropper*, 2 De G. & S. 255; *Re Welch*, 3 Myl. & C. 292; *Sands v. Nugee*, 8 Sim. 130, and *Re Gregson*, L. R. 34 Ch. Div. 209.

The number has in like manner been decreased to a number not less than two in *Emmet v. Clark*, 3 Giff. 32; *Re Bathurst*, 2 Smale & G. 169, 18 Jur. 568. And a decrease was held to be valid, though improper, in *Reid v. Reid*, 30 Beav. 388. And two trustees were appointed in place of three, on its being clearly made to appear that it was impossible to find a third person to act, in *Bulkeley v. Eglington*, 1 Jur. N. S. 994.

The remaining trustees have also been appointed on the death or retirement of one of them in place of the original trustees, under the English trustee act of 1850, § 32, in *Re Harford*, L. R. 13 Ch. Div. 135; *Re Stokes*, L. R. 13 Eq. 333, and *Re Shipperdson*, 49 L. J. Ch. N. S. 619.

But such an appointment was refused in *Re Aston*, L. R. 23 Ch. Div. 217, and *Re Col-*

bursement of the trust estate to a board of seven, this discretion so reposed in the trustees will not, without strong reason, be interfered with by the courts.

Brock v. Sawyer, 39 N. H. 547; *Portsmouth v. Shackford*, 46 N. H. 423; *Morton v. Southgate*, 28 Me. 41; *Edgerly v. Barker*, 67 N. H. 443, 32 Atl. 766; *Cram v. Cram*, 63 N. H. 35; *Perry*, Tr. 5th ed. §§ 275-279; *Lewin*, Tr. 1st Am. ed. chap. 25, § 28; *Re Fowler*, [1886] W. N. 183; *Re Leon* [1892] 1 Ch. 348; *Re Lees* [1896] 2 Ch. 508; *Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, 2 Jur. N. S. 349; *Ex parte Tunstall*, 15 Jur. 645; *Re Dickinson*, 1 Jur. N. S. 724; *Massachusetts General Hospital v. Amory*, 12 Pick. 445; *Atty. Gen. v. Barbour*, 121 Mass. 568; *Dixon v. Homer*, 12 Cush. 41; *Greene v. Borland*, 4 Met. 330; *Hammond v. Granger*, 128 Mass. 272; *Beach, Trusts & Trustees*, § 385; *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46; *Wilkinson v. Parry*, 4 Russ. Ch. 272; *Hulme v. Hulme*, 2 Myl. & K. 682.

Messrs. Streeter & Hollis, for respondent, *Charles B. Barker*:

The number of trustees to be appointed by the court or by the donee of a power is to be determined by construction of the instrument creating the trust, and by regard to surrounding circumstances.

28 Am. & Eng. Enc. Law, 2d ed. p. 970; 2 Pom. Eq. Jur. § 1087; *Lewin*, Tr. 11th ed. p. 803; *Re Chetwynd* [1902] 1 Ch. 692; *Birch*

v. Cropper, 2 DeG. & S. 255; *Sitwell v. Heron*, 14 Jur. 848; *Lonsdale v. Beckett*, 4 DeG. & S. 73; *Re Tunstall*, 4 DeG. & S. 421; *Plenty v. West*, 16 Beav. 356; *D'Adhemar v. Bertrand*, 35 Beav. 19; *Reid v. Reid*, 30 Beav. 388; *Re Bathurst*, 2 Smale & G. 169; *Re Harford*, L. R. 13 Ch. Div. 135; *Re Shipperdson*, 49 L. J. Ch. N. S. 619; *Re Leon* [1892] 1 Ch. 348; *Physic's Estate*, 2 Phila. 278; *Disbrow v. Disbrow*, 46 App. Div. 111, 61 N. Y. Supp. 614; *Force v. Force* (N. J. Eq.) 57 Atl. 973.

The jurisdiction of courts of equity to remove and appoint trustees is merely ancillary to their paramount duty to see that trusts are properly executed.

Letterstedt v. Broers, L. R. 9 App. Cas. 371; *May v. May*, 167 U. S. 310, 42 L. ed. 179, 17 Sup. Ct. Rep. 824.

It may be exercised whenever the interests of the trust require, and in whatever manner the exigencies of the trust demand.

2 Pom. Eq. Jur. 1st ed. §§ 1086, 1087; 2 Story, Eq. Jur. 1287; 2 Beach, Trusts & Trustees, § 387; 28 Am. & Eng. Enc. Law, 2d ed. p. 978; *Letterstedt v. Broers*, *supra*; *Re Anson*, 85 Me. 79, 26 Atl. 990; *Murdock v. Elliot*, 77 Conn. 247, 58 Atl. 718; *Scott v. Rand*, 118 Mass. 215; *Re McGillivray*, 138 N. Y. 308, 33 N. E. 1077; *Austin v. Austin*, 18 Neb. 306, 25 N. W. 116; *Ex parte Knust*, Bail. Eq. 489.

yer, 50 L. J. Ch. N. S. 79, and under the similar provision in the act of 1893, § 25, in *Re Chetwynd* [1902] 1 Ch. 692. In this last case, however, one of the four original trustees was permitted to withdraw, without the appointment of a new trustee in his place, under another section of such act of 1893.

But when the instrument creating the trust discloses an intention that the number shall remain unchanged it can neither be increased (*Ex parte Davis*, 2 Younge & C. Ch. Cas. 468, 7 Jur. 430) nor diminished (*Nicholson v. Smith*, 3 Jur. N. S. 313, 26 L. J. Ch. N. S. 312; *Massachusetts General Hospital v. Amory*, 12 Pick. 445, and several cases referred to below, where the attempt was made to appoint a single trustee in place of a larger number).

The point on which the courts seem to be most nearly in harmony is that trust property ought, if possible, to be prevented from coming into the hands of a single trustee. A trustee in addition to the sole trustee appointed by the will was, on this theory, appointed on the petition of the beneficiaries, in *Re Brackenbury*, L. R. 10 Eq. 45, and *Grant v. Grant*, 34 L. J. Ch. N. S. 641.

And two trustees of a small property were appointed on the death of a sole trustee in *Re Tunstall*, 4 De G. & S. 421, and a co-trustee of the survivor was appointed on the death of one of two trustees, under a will 1 L.R.A. (N.S.)

devising the trust property to the survivor of them, in *Dixon v. Homer*, 12 Cush. 41, and *Force v. Force* (N. J. Eq.) 57 Atl. 973.

The appointment of a single trustee in place of a larger number originally appointed has also, for the same reason, been refused (*Re Ellison*, 2 Jur. N. S. 62),—especially where the instrument creating the trust discloses an intent that the larger number shall continue to act (*Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46; *Hulme v. Hulme*, 2 Myl. & K. 682; *Lonsdale v. Beckett*, 4 De G. & S. 73), unless some very special reason to the contrary has been shown (*Proudfoot v. Tiffany*, 11 Grant, Ch. (U. C.) 461; *Kingsmill v. Miller*, 15 Grant, Ch. (U. C.) 171).

But a larger number may be reduced to one with the assent of all the parties (*Greene v. Borland*, 4 Met. 330), or if it is shown that it will be more beneficial to the parties interested (*Sitwell v. Heron*, 14 Jur. 848).

Such a reduction, even if improper, is valid (*West of England & S. W. Dist. Bank v. Murch*, L. R. 23 Ch. Div. 138), and vests the property in the sole trustee (*Hammond v. Granger*, 128 Mass. 272).

A sole trustee has also been appointed where, by the instrument creating the trust, the property was to devolve on the survivor of the trustees originally appointed. *Physic's Estate*, 2 Phila. 278.

The absence of misconduct does not preclude a removal.

28 Am. & Eng. Enc. Law, 2d ed. p. 979; 2 Story Eq. Jur. § 1288; Letterstedt v. Broers, *supra*; May v. May, 5 App. D. C. 552, 41 L. R. A. 767, 167 U. S. 310, 42 L. ed. 179, 17 Sup. Ct. Rep. 824; Scott v. Rand, 118 Mass. 215; Wilson v. Wilson, 145 Mass. 490, 1 Am. St. Rep. 477, 14 N. E. 521; Re Brown (Me.) 19 Am. Law Rev. 437; Quackenboss v. Southwick, 41 N. Y. 117; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. 614, Affirmed in 167 N. Y. 606, 60 N. E. 1110; Russak v. Tobias, 12 N. Y. Civ. Proc. Rep. 390; Re Morgan, 63 Barb. 621, Affirmed in 66 N. Y. 618; Myers's Estate, 205 Pa. 413, 54 Atl. 1093; Mazelin v. Rouyer, 8 Ind. App. 27, 35 N. E. 303; Dorsey v. Thompson, 37 Md. 25; Austin v. Austin, 18 Neb. 306, 25 N. W. 116; Ketchum v. Mobile & O. R. Co. 2 Woods, 532, Fed. Cas. No. 7,737.

The power of the court is exercised, not to defeat or destroy the trust, but to preserve it.

Rolfe & R. Asylum v. Lefebvre, 69 N. H. 238, 45 Atl. 1087; Weld v. Weld, 23 R. I. 311, 50 Atl. 490; Conkling v. Washington University, 2 Md. Ch. 497; Burroughs v. Gaither, 66 Md. 171, 7 Atl. 243; Curtiss v. Brown, 29 Ill. 201; Gavin v. Curtin, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523; Marsh v. Reed, 184 Ill. 263, 56 N. E. 306; Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942; Ruggles v. Tyson, 104 Wis. 500, 48 L. R. A. 809, 79 N. W. 766, 81 N. W. 367; Meddis v. Bull, 13 Ky. L. Rep. 767, 18 S. W. 6; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; 2 Beach, Trusts & Trustees, § 473; 28 Am. & Eng. Enc. Law, 2d ed. p. 994.

Courts of equity always remove a trustee selected by the testator, where he proves incompetent or unfit.

Curtiss v. Brown, 29 Ill. 230; Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11, 55 Atl. 468; May v. May, 5 App. D. C. 552, 41 L. R. A. 767.

Mr. Elmer J. Smart for Clara B. Berry.

Mr. George E. Cochrane, guardian, *in propria persona*.

Bingham, J., delivered the opinion of the court:

We have here an estate which the testator understood, when he made his will, was worth \$800,000, and which in the early years of the trust produced a net income of \$20,000. In a period of eighteen years it has shrunk, from one cause or another, including payments to trustees and appropriations to beneficiaries, to about \$200,000, and now yields an income of less than \$5,000, after deducting taxes and incidental expenses, but not including trustees' fees, miscellaneous 1 L.R.A. (N.S.)

expenses of management, and necessary repairs. The testator provided in his will for a board of six trustees, and that his son Hiram should be added to the number upon his complying with certain standards of sobriety and habits of living for a specified period. For the greater part of ten or eleven years prior to January 20, 1904, the trust was managed by seven trustees, and the sum paid annually for their services was \$4,500 and expenses incurred in holding meetings of the board. The resignations of the four trustees who were not of the Barker family, having been previously tendered, were then accepted. Since that time the petitioners and the defendant Charles B. Barker have managed the trust. The petitioners ask for the appointment of four trustees to fill the vacancies. The defendant objects to the granting of the request, and asks that the present trustees be removed, and that a single trustee be appointed to execute the trust. The latter request was granted in the superior court, subject to the petitioners' exception. In addition to the estate having been greatly diminished during the existence of the trust, it is found that the only way to prevent its further dissipation is to provide for its administration by a single trustee; that the petitioners persist in attempting to make appropriations to beneficiaries that will in a comparatively short time exhaust the property; that they are not able to agree with the defendant as to the management of the estate and the sums to be appropriated to beneficiaries; that their further continuance as trustee is opposed to the best interests of the estate and the other beneficiaries; that competent trustees cannot be procured to serve with the Barker trustees for \$500 a year, or any reasonable fee; that it is impossible to procure competent trustees to act for a less sum than \$500 a year; that if a board of seven is maintained and such payments are made the beneficiaries will be practically deprived of the net income of the property and the principal fund will ultimately be exhausted; and that in order to carry out the principal intention of the testator, namely, to provide for the support and maintenance of Hiram and his wife and Clara Barker Berry and to preserve the bulk of the estate for the grandchildren, it is necessary that the Barker family no longer continue as trustees.

As we understand the case, the order of removal includes a finding that the present trustees are unsuitable to continue in the management of the trust. Such a finding is not inconsistent with the special findings above enumerated. This being so, and it being found that the only way to prevent the

further dissipation of the estate is to provide for administering it by a single trustee, the question presented is whether, under these circumstances, the superior court, in the exercise of its equity powers, can legally remove the present trustees and make the order reducing the number from seven to one. The petitioners concede that the superior court has full equity powers in all cases of trusts (Pub. Stat. 1901, chap. 205, § 1; Walker v. Cheever, 35 N. H. 339; Wells v. Pierce, 27 N. H. 503), but contend that the order of the court in this instance is not within the limits of those powers, and is unauthorized and illegal from the fact that it was the intention of the testator that seven trustees, one of whom was to be his son, should manage the trust, and that to remove the present board, of which the son is a member, and reduce the number to one, is in contravention of this known and expressed intent. The defendant admits that, as a rule, in such matters the wish of the creator of the trust, when ascertained, is to be followed, but contends that the rule is subject to the qualification that when it is shown to be necessary for the effectual performance of the trust that there should be a change in the number, because that fixed by the creator of the trust is excessive or insufficient, a court of equity has power to cause the number to be reduced or increased to meet the necessities of the case, and that, if any or all of the trustees are unsuitable, it can order their removal, always being governed by a sound judicial discretion. The latter view meets our approval. It cannot be doubted but that the superior court, as a court of equity, has the power to remove trustees who become unsuitable for the execution of a trust. Under such circumstances power of removal is also conferred by statute upon the probate court. Pub. Stat. 1901, chap. 198, § 8. In this particular the jurisdiction of the two courts is concurrent. Bowditch v. Banuelos, 1 Gray, 220, 228, 229. It is the duty of a court of competent jurisdiction, upon the institution of proper proceedings before it and its being made to appear that trustees appointed to execute a trust are unsuitable, to remove them. Adams v. Adams, 64 N. H. 224, 9 Atl. 100. Trustees, whose relations to their cotrustees or the beneficiaries are such as to interfere with the proper management of the estate may be regarded as unsuitable, and removed. Wilson v. Wilson, 145 Mass. 490, 1 Am. St. Rep. 477, 14 N. E. 521; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614; Loring's Trustee's Handbook, 20. An instance of this is when trustees unreasonably disagree with their cotrustees in matters involving their joint

discretion. Swale v. Swale, 22 Beav. 584; Stott v. Lord, 31 L. J. Ch. N. S. 391; Loring's Trustee's Handbook, 47. And, while a court of equity is reluctant to change the number of trustees from that designated by the creator of the trust, yet it seems to be in accordance with reason and authority that it may do so when, by reason of changed conditions in the estate, the number designated by the creator has become excessive or insufficient, and it is necessary to reduce or increase the number in order to effectuate the execution of the trust. Re Anson, 85 Me. 79, 88, 89, 26 Atl. 996; Force v. Force (N. J. Eq.) 57 Atl. 973; Austin v. Austin, 18 Neb. 306, 309, 22 N. W. 116; Birch v. Cropper, 2 De G. & S. 255; Re Dickinson, 1 Jur. N. S. 724; Sitwell v. Heron, 14 Jur. 848; Re Chetwynd [1902] 1 Ch. 692; Lettstedt v. Broers, L. R. 9 App. Cas. 371; Re New [1901] 2 Ch. 534; Lewin, Tr. 11th ed. 803; 2 Beach, Tr. § 387; 2 Story, Eq. Jur. § 1287; 3 Pom. Eq. Jur. 3d ed. §§ 1086, 1087; 28 Am. & Eng. Enc. Law, 2d ed. p. 970. In Edgerly v. Barker, 66 N. H. 434, 452, 28 L. R. A. 328, 31 Atl. 900, the court, in construing the will, said: "A dominant idea of the residuary clause and of the whole will is that the testator's grandchildren shall have the bulk of his estate. Not less dominant or less manifest is his determination that C. and H. shall not have it. . . . In his mind the main point evidently was the extent to which he disinherited C. and H. and put their children in their places. . . . After years of observation and reflection his unchanged judgment was that the welfare of his issue required an absolute provision for the comfort of C. and H. during their lives, a conditional appropriation of \$30,000 for H., other special appropriations (including one for education), and a devise of the remainder to the grandchildren. In this manner, and to this extent, he was convinced it was his duty to modify the operation of the statutory rule of distribution. His exercise of testamentary power to this end was his primary and leading purpose." The order of the superior court does not contravene this primary and leading purpose, for it is not probable the testator intended that, if any or all of the six trustees designated in his will should subsequently become unsuitable, they should be continued in the trust, or that, if Hiram was added to the board and became unsuitable for reasons other than those specified in the will, he should not be subject to removal the same as any other trustee would be for a like cause. And it is equally improbable that he intended the number of trustees should not be reduced if, by reason of changed conditions in the estate, the

number became excessive, so that it was impossible to effectuate his primary purpose without a reduction.

Another contention made by the petitioners is that the order of the court deprives Hiram of the opportunity of passing upon the question whether he has complied with the condition imposed as to sobriety and good conduct, upon which the second and third instalments of the gift of \$30,000 are predicated, and is in violation of the intention of the testator that he should be permitted to pass upon this question with the other trustees. We do not think that the will provides that he should have the right to pass upon his own qualifications with the other trustees; and, as we understand the law, he would not be entitled to pass upon questions in which he is directly interested as a beneficiary, and involving an exercise of discretion, but that such questions should be passed upon by the other trustees alone. *Rogers v. Rogers*, 111 N. Y. 228, 234, 237, 18 N. E. 636; *Woodward v. James*, 115 N. Y. 346, 357, 22 N. E. 150.

Exception overruled.

All concur.

KANSAS SUPREME COURT.

JOHN H. ABERCROMBIE, Plff. in Err.,
v.

J. N. SIMMONS et al.

(.... Kan.)

1. Railroad—alienation of right of way.

A railroad company purchased a strip of land for a right of way, the line of which had been surveyed and staked out, but no part of the railroad had been built, and in the deed the land was described as a part of a certain quarter section "lying within 50

Headnotes by JOHNSTON, Ch. J.

Case Note.—The court, in *ABERCROMBIE v. SIMMONS*, in holding that a railroad company takes a mere easement, and not a title in fee, under a deed conveying to it land for purposes of a right of way, and that the title reverts to the grantor upon the abandonment of the road, even though the deed contains covenants of warranty, confined its decision to cases where the contract of conveyance shows that it "was sold and received for use as a right of way," and did not pass upon the power generally, of railroads, to purchase land in fee. The decision as thus restricted is supported by the authorities, as will appear from an examination of the following cases in addition to those cited by the court:

The law attaches to a conveyance of a railroad right of way in perpetuity a condition that it shall be kept up and operated

feet of the main track of the railroad." Within a few days after the execution of the deed, a map and profile of the railroad was made by the company, and subsequently filed. Held, that the deed was not void because of indefiniteness in the description.

2. Deed—ambiguity—construction.

In construing a doubtful description in a conveyance, the court will keep in mind the position of the contracting parties, the circumstances under which they acted, and interpret the language of the instrument in the light of these circumstances.

3. Deed—right of way—estate conveyed.

An instrument which is in form a general warranty deed, conveying a strip of land to a railroad company for a right of way for a railroad, will not vest an absolute title in the railroad company; but the interest conveyed is limited by the use for which the land is acquired, and, when that use is abandoned, the property will revert to the adjoining owner.

(June 10, 1905.)

ERROR to the District Court for Mitchell County to review a judgment in favor of defendants in an injunction brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Frank A. Lutz and F. J. Knight, for plaintiff in error:

The law presumes conclusively that the power of conveyance was rightfully used for the purposes enumerated in the statute.

School Dist. No. 15 v. Allen County, 22 Kan. 568; *Ryan v. Leavenworth, A. & N. W. R. Co.* 21 Kan. 366; *Yates v. Van De Bogert*, 56 N. Y. 526; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 79 Am. Dec. 347; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623.

The company could sell the land for the

ated; and a conveyance, by the railroad company, of a part of the right of way for a private use, constitutes an abandonment, and the land reverts to the grantor. *Louisville & N. R. Co. v. Covington*, 2 Bush. 526.

A railroad company acquires only an easement in its right of way, and cannot sink and operate oil wells thereon under an instrument granting to the company a full and free right of way for the construction and use of the road, and containing a covenant to execute and acknowledge, when required, a deed in fee simple. *Lockwood v. Ohio River R. Co.* 43 C. C. A. 202, 103 Fed. 243.

The Supreme Court of the United States has passed upon the question, and held that a railroad company does not have a title in fee in its right of way, so as to subject the same to sale under execution, under a deed

purpose of aiding in the construction, maintenance, and accommodation of its railway.

McClure v. Missouri River, Ft. S. & G. R. Co. 9 Kan. 383.

A deed by a railroad company of land purchased in fee simple for a right of way is not void until so declared in proceedings by the state.

Chamberlain v. Northeastern R. Co. 41 S. C. 399, 25 L. R. A. 139, 44 Am. St. Rep. 717, 10 S. E. 743; Chambers v. St. Louis, 29 Mo. 567; Runyan v. Coster, 14 Pet. 122, 10 L. ed. 382; Silver Lake Bank v. North, 4 Johns. Ch. 370; Burns v. Milwaukee & M. R. Co. 9 Wis. 457; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Smith v. Sheeley, 12 Wall. 358, 20 L. ed. 430; People v. Mauran, 5 Denio, 389; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623.

Where a purchase of real estate has been lawfully made by a corporation, it does not cease to be legal, nor does the corporation cease to have a right to hold or convey the property thus acquired, merely because the object which induced the purchase has been

conveying the land to it and its successors and assigns, describing the property as a right of way, although the habendum was, to have and to hold the same to the company, its successors and assigns, to its "own proper use, benefit, and behoof forever, in fee simple," as the words "in fee simple" do not enlarge what is otherwise the limited character of the grant. East Alabama R. Co. v. Doe, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869.

Under a deed conveying land in consideration of a stipulated sum, and reciting that the grantors do "hereby grant and convey unto . . . its successors and assigns for right of way and for operating its railroad only," the grantee takes an easement only; and a conveyance of a part of the land by the grantee to another railroad company for its right of way constitutes an abandonment of the land so conveyed, and the grantor is entitled to compensation for its use by the other railroad company. Blakely v. Chicago, K. & N. R. Co. 46 Neb. 272, 64 N. W. 972.

But in Ballard v. Louisville & N. R. Co. 9 Ky. L. Rep. 523, 5 S. W. 484, the court, in construing a deed as an entirety, held that the grantee took a title in fee, on the ground that the land acquired was for railroad purposes generally, and the consideration paid was a considerable one, although on the face of the deed it was entitled "deed of right of way," and that one call of the description of the premises was for the "east edge of right of way." The grant was to the railroad company of so much of the grantor's lands in the county as is required "for the use of the road of said

company," with habendum, "to have and to hold the same to said grantees and their assigns forever," with covenants of warranty. The court placed its decision distinctly upon the ground that, from the terms of the deed, the shape of the land, and the necessities of the railroad, the grant was for purposes other than that of a right of way. From this it will be inferred that the decision would have been different had the grant been for a right of way.

1 Waterman, Corp. p. 632; Old Colony R. Corp. v. Evans, 6 Gray, 25, 66 Am. Dec. 394. Messrs. Burnham & Dashiell, for defendants in error:

A railroad company will not be allowed to divest itself of any of its property, franchises or rights that will in any manner tend to prevent it from carrying on the business for which it was organized, without legislative permission being clearly given it so to do.

1 Jones, Real Prop. in Conveyancing, § 142; Thomas v. West Jersey R. Co. 101 U. S. 75, 25 L. ed. 950; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094.

There is a fundamental distinction between a fee-simple title to lands held by a quasi-public corporation for certain and specific purposes, and a fee-simple title held by individuals for private uses, or even by corporations for general purposes.

Norton v. London & N. W. R. Co. L. R. 9 Ch. Div. 623; New York C. & H. R. R.

company," with habendum, "to have and to hold the same to said grantees and their assigns forever," with covenants of warranty. The court placed its decision distinctly upon the ground that, from the terms of the deed, the shape of the land, and the necessities of the railroad, the grant was for purposes other than that of a right of way. From this it will be inferred that the decision would have been different had the grant been for a right of way.

Some additional light may be thrown on the question by adverting to the rule that the granting clause of a deed is controlling in case of conflict between it and the habendum. So that a deed granting particular land to a railroad company for a particular purpose is limited to that purpose, even though the habendum uses broader language. In 3 Washburn on Real Property, 6th ed. § 2357, the author, in speaking of the effect of a repugnancy between the granting part of the deed and the habendum, says that the office and purpose of the habendum—that is to say, the part of the deed which begins with the words "to have and to hold"—is to "limit and define the estate which the grantee is to have in the property granted.

. . . It is not an essential part of a deed; and Chancellor Kent declares that it has degenerated into a mere useless form. If the granting part of the deed contain proper words of limitation, the habendum may be dispensed with altogether; and of so little importance is it deemed, compared with the words of the grant, that, if the habendum is clearly repugnant to the grant, it is treated as of no validity or effect."

Co. v. Aldridge, 135 N. Y. 95, 17 L. R. A. 516, 32 N. E. 50.

The plaintiff cannot come into a court of justice asking to be put into possession of real estate under a deed that is void.

Swan v. Scott, 11 Serg. & R. 155; 10 Cyc. Law & Proc. p. 1166; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

Johnston, Ch. J., delivered the opinion of the court:

This was an action of ejectment to recover a strip of land 100 feet wide, running through a quarter section of land, which had been obtained from Joseph Simmons by the Chicago, Kansas, & Western Railroad Company, and was subsequently sold by the railroad company to John H. Abercrombie. In 1887 the railroad company surveyed and staked out a route for a railroad through Mitchell county, and on July 13th of that year, when about to begin construction of the railroad over the land owned by Joseph Simmons, it purchased from him the strip of land, and the conveyance which he made was in form a general warranty, wherein the property was described as "all the lands in the southwest quarter of section 15, township 9 south, of range 7 west, lying within 50 feet of the center line of the main track of said railroad, and containing 6.23 acres, more or less." A week later, and on July 20, 1887, the railroad company made a map and profile of the route intended to be adopted, which was subsequently filed in the office of the county clerk. The railroad was never constructed, nor even graded, over the Simmons land. The entire quarter section was inclosed and cultivated by Joseph Simmons while he lived, and it has remained in the exclusive possession of J. N. Simmons and Laura Simmons, who became the owners of the tract. The railroad company, however, paid taxes on the strip of land until April 28, 1898, when it executed a deed purporting to convey the strip to the plaintiff, describing it as it was described in the deed from Simmons to the railroad company. Later, and in 1903, the plaintiff asserted a claim of ownership to the strip of land through the quarter section, and, as it was denied, he brought this proceeding to recover it. The trial court upon the facts, which were mainly agreed to, found that the strip of land was conveyed by Simmons and received by the railroad company for use as a right of way for a railroad; 1 L.R.A. (N.S.)

and, further, that the plaintiff was not entitled to recover.

It is insisted by the plaintiff that the railroad company acquired an absolute title to the strip of land, and that nothing less was conveyed to him. The defendants contend, first, that the deed of Simmons to the railroad company was so indefinite in description of the property conveyed as to be defective; and, second, that, if the description be held to be sufficient, and the instrument valid, it did not convey anything more than a right of way, and hence, when it was not used for that purpose, it reverted to the original owner, or to those holding under him.

First, as to the attack upon the validity of the deed for indefiniteness. It is claimed that it was impossible to locate or identify the land from the description given; that the description of a part of a quarter section "lying within 50 feet of the main track of the railroad" furnished no means of identification where in fact no railroad had been built. The agreed facts, however, show that, prior to the execution of the deed, the company contemplated the construction of a railroad over this land, and had actually surveyed and staked out a route and line. The map and profile of the route was in the course of preparation, and was completed a few days later, and this was the one which was filed with the county clerk. The company was negotiating for land upon which to construct and operate a railroad. It had marked out on the face of the land the line or track which it proposed to build. The owner sold it to the company for that purpose, and obviously both parties contracted with reference to these facts. In construing a doubtful description in a conveyance, the court must keep in mind the position of the contracting parties, the circumstances under which they acted, and interpret the language of the instrument in the light of these circumstances. When so construed, we may fairly say that, as the only way of locating the strip was by a resort to the line which had been surveyed and staked out by the company as the statute authorized, the parties contracted with reference to this survey, and it may be looked to as a part of the description. Under the principle that that will be considered certain which can be made certain, we can look not only to the survey, but also to the map and profile made by the company. In *Denver, M. & A. R. Co. v. Lockwood*, 54 Kan. 586, 38 Pac. 794, the court considered a description in a deed which was attacked for indefiniteness, which purported to convey 50 feet on each side of a center line of a route which had been surveyed, staked, and located; and it was said that "the law will not declare a deed void

for uncertainty when the light which contemporaneous facts and circumstances furnish renders the description definite and certain," and, following this rule, held the deed to be valid. *Tucker v. Allen*, 16 Kan. 312; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22; *Thompson v. Motor Road Co.* 82 Cal. 497, 23 Pac. 130; *Pennsylvania R. Co. v. Pearsol*, 173 Pa. 496, 34 Atl. 226; *Crafts v. Hibbard*, 4 Met. 438; *Oxford v. White*, 95 N. C. 525; *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786; *Armstrong v. Mudd*, 10 B. Mon. 144, 50 Am. Dec. 545; *Lohff v. Germer*, 37 Tex. 578; *McPike v. Allman*, 53 Mo. 551.

Was the interest which the railroad company acquired by the deed one which it could convey to plaintiff? The general rule is that, in the absence of charter or statutory restrictions, corporations may take, hold, and convey land for any purpose not inconsistent with those for which they were created. It is competent for the legislature to prescribe the purpose for which land may be acquired and held by corporations, and in this state the legislature has conferred on such corporations the power "to take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance, and accommodation of its railway; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only, and to purchase and hold, with power to convey, real estate, for the purpose of aiding in the construction, maintenance, and accommodation of its railway." Gen. Stat. 1901, § 1316. Aside from this provision, there is in the same section authority given to enter upon the lands of others for the purpose of selecting and surveying a route for a proposed railway, and in that connection to lay out a road not exceeding 100 feet in width, and a greater width where the proper construction of the road requires it. It is provided, too, that a map and profile of the route intended to be adopted shall be made, and that notice shall be given to all occupants of lands on the designated route which have not been purchased or donated. Gen. Stat. 1901, §§ 1318, 1319. There is another provision for obtaining land for a right of way by compulsory process under the power of eminent domain. Gen. Stat. 1901, §§ 1359-1365. The statutes recognize that land for a right of way may be acquired by purchase as well as by compulsory proceedings. And, when so acquired for that purpose, does the railroad company hold a higher or better right than where it is acquired by virtue of eminent domain? May a railroad company purchase a strip of land, extending a great distance through the country and over many farms, abandon the enterprise, and then sell

the strip to those who will put it to a wholly different use; one which might be both obnoxious and menacing to the adjoining owners? Where an absolute and unqualified fee-simple title is acquired by a railroad company, it may, of course, in the absence of express or implied restrictions, be conveyed to another. After stating this rule, Judge Elliott remarks: "But where there is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the company, but vests such an estate—usually an easement—as is requisite to effect the purpose for which the property is required. Where the grant is of 'surplus real estate,' as it is often called,—that is, of real estate not forming part of the railroad or its appendages,—a deed effective to vest a fee in a natural person will vest that estate in a railroad company." 2 Elliott, *Railroads*, § 400. The fact that the deed contains covenants of warranty, or that the right acquired is designated as a fee, is not necessarily controlling. In *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342, consideration was given to a conveyance of a strip of land which was described as a right of way for a railroad between certain points, and, although the instrument was in the form of a warranty deed, it was held that an absolute title was not conveyed. In *Cincinnati, I. St. L. & C. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470, there was a deed releasing and quitclaiming to a railroad company a right of way 80 feet wide through a certain tract of land, and it was held that the company did not acquire the fee of the land. In the opinion it was remarked that "it does not follow that, because a railroad company may take an estate in fee or a right of way of a defined width, it does take such an estate or such a right of way, for parties may by their contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire." In *Hill v. Western Vermont R. Co.* 32 Vt. 74, it is said that "a contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must, of necessity, carry the implication of such limitation upon the estate to be conveyed." In *Norton v. London & N. W. R. Co.* L. R. 9 Ch. Div. 623, the railroad company acquired a fee to a strip of land for a right of way. A question arose as to the right of the railroad company to erect a blind or barrier to obstruct the view from a building of an adjoining owner, and it was held that, although the company held the fee to its right of way, it held it "in that qualified manner in which land taken for particular purposes

is taken," and that "they had only a right to the fee simple of the land for the purpose for which they acquired it, namely, the construction and perpetual working of the railway," and for that reason the right to build the barrier and obstruct the plaintiff's view was denied. In the same case it is also held that an abandonment of a portion of the right of way operates to vest that portion in the owner of the adjoining land. In *New York C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 95, 17 L. R. A. 516, 32 N. E. 50, a dispute arose between a landowner, who had conveyed land along a water front, in fee, to a railroad for a right of way, and the railroad company, whether such owner of the land not conveyed was a riparian owner, or whether the right had passed to the railroad company. The decision was against the railroad company, and the court held that, although the railroad company received title to its right of way "in fee simple by the voluntary grant of the former owners, yet by the provisions of the statute it holds such real estate and can use it only for the purposes expressed in its charter,—that of the maintenance, construction, and accommodation of the railroad. For this purpose only the land can be used; and, although the title granted to the company is a fee, yet, as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute. The conveyance to the railroad of the strip in question is in its effects entirely unlike the conveyance to a private individual in fee simple. In the latter case it may well be the grantor even of so narrow a strip would lose his character of riparian owner and the grantee would acquire it. But when we consider the purpose of the conveyance to the railroad and the limitations to its use which the statute itself placed upon the company, it becomes entirely plain that the grantor ought not to lose his character of riparian owner where he retains the property immediately adjoining that which he conveys." In *Chouteau v. Missouri P. R. Co.* 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, land was conveyed to a railroad company by general warranty deed for railroad purposes, and it was held that the company did not acquire a fee in the land; and, further, that the conveyance by the husband extinguished the inchoate right of dower of the wife in the land, although she did not join in the conveyance. In effect, this was a following of the ruling made in *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426. In *Uhl v. Ohio River R. Co.* 51 W. Va. 106, 41 S. E. 340, there was a contract for the execution of a deed conveying a strip of land for a right of way in fee simple, and it was held 1 L.R.A. (N.S.)

that the words "right of way" in a grant to a railroad company means an easement, and does not pass the absolute title, and that the railroad company did not take oil or other minerals under the land. The supreme court of Iowa in *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315, held that a contract which recited that certain land was to be conveyed to a railroad company for a right of way, and also that it should be conveyed by deed in fee simple, was a contract for a right of way merely, and not for a fee-simple title to the land. See also *People v. White*, 11 Barb. 26; *Cleveland, C. C. & I. R. Co. v. Coburn*, 91 Ind. 557; *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* 62 N. J. L. 254, 42 L. R. A. 572, 41 Atl. 759.

Now, as we have seen, the deed and those things to which we may look in its interpretation plainly show that the strip was sold on the one part and purchased on the other as and for a right of way for a railroad. This use, being within the contemplation of the parties, is to be considered as an element in the contract, and limits the interest which the railroad acquired. It took the strip for a specific purpose, and could hold it so long as it was devoted to that purpose. Whether the right of way purchased should be designated as an easement or as a qualified or determinable fee, may not be very important. A right of way, although commonly designated as an easement, is an interest in land of a special and exclusive nature, and of a high character. In speaking of its character, the Supreme Court of the United States said: "A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128. We there said (p. 183, 172 U. S., p. 407, 43 L. ed., and p. 133, 19 Sup. Ct. Rep.) that if a railroad's right of way was an easement it was 'one having the attributes of the fee,—perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.'" *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 570, 49 L. ed. 312, 323, 25 Sup. Ct. Rep. 133, 141. Whatever its name, the interest was taken for use as a right of way, it is limited to that use, and must revert when the use is abandoned.

We are not called upon to decide, nor do we intend to express an opinion, as to the rule applicable where lands are purchased or obtained without regard to the use to be made of them, or where there is nothing in the contract or conveyance indicating that they have been purchased for a right of

way. Lands may be acquired by donation or by voluntary grant for aid in the building of railroads, and railroad companies may doubtless acquire lands for various uses in connection with railroad business which could not be taken by virtue of eminent domain, and as to these different rules may apply. It is intended to confine the decision to cases where the contract or conveyance shows that it was sold and received for use as a right of way for a railroad.

The conclusion is that the plaintiff acquired no interest in these lands by the attempted conveyance of the railroad company to him, and, therefore, that the judgment of the District Court must be affirmed.

All the Justices concur, except Clark A. Smith, J., who, having been of counsel, did not sit.

KANSAS SUPREME COURT.

WILLIAM M. MEFFERT, Plff. in Err.,
v.

E. B. PACKER et al., State Board of Medical Registration and Examination.

(66 Kan. 710.)

1. Medicine—license to practice—revocation.

The state, in the exercise of its police power, in the interest of the health, good government, general welfare, and morals of the people, may prescribe the qualifications of persons desiring to practice medicine, and may create a board whose duty it shall be to hear and determine any complaint made

Headnotes by GREENE, J.

Case Note.—The affirmance of this decision without discussion by the Federal Supreme Court (195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790) must be taken as sanctioning the application of the same reasoning, as to the existence of due process of law, to the revocation of a license and to the initial granting of the license by an administrative board or committee created by the legislature for these purposes; and also as an assent to the opinion of the Kansas court and to that of the Minnesota supreme court in *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123, quoted in the MEFFERT CASE, that there is no possible distinction between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise are in each case identical, viz., to exclude an incompetent or unworthy person from the practice of medicine. Therefore, the same body which may be vested with power to grant, or refuse to grant, a license may also be vested with the power to revoke.

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against any person holding a physician's license, and revoke such license for any cause provided for in the statute. Such board while so acting is not a judicial tribunal, and is not governed by the technical rules applicable to law courts. In the absence of fraud, corruption, or oppression, the findings of the board are conclusive upon this court.

2. Same—existing licenses—*ex post facto* law.

Where the statute prescribes the qualifications of a physician, and proscribes the grossly immoral, and authorizes the cancellation of any certificate issued to such persons, the application of this law to one whose habits were grossly immoral before the passage of the law is not in the nature of a punishment, and therefore the statute is not *ex post facto*, but has in view only the qualifications of the physician and the protection of public morals.

3. Police power—effect of Federal Constitution.

That clause in § 1, art. 14, of the Constitution of the United States, "Nor shall any state deprive any person of life, liberty, or property without due process of law," is not a limitation upon the police power of the state to pass and enforce such laws as, in its judgment, will inure to the health, morals, and general welfare of its people.

(April 11, 1903.)

ERROR to the District Court for Shawnee County to review a judgment in favor of defendants in a proceeding to enjoin the enforcement of an order made by them. Affirmed.

The facts are stated in the opinion.

Messrs. J. Jay Buck, A. L. Redden, and W. N. Smelser, for plaintiff in error:

The authorities sustaining the validity of such statutes, where the question as to their constitutionality has arisen from the exercise of the power to exclude a physician from practice by the refusal of the board to grant the necessary license, are numerous. *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; and a collection of authorities in *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750.

It may be remarked that all of these cases are clearly analogous in principle with the MEFFERT CASE, for the refusal of an examining board to grant a license newly made requisite by statute is as much a revocation of a pre-existing right to practise as its direct action in revoking a license granted under some law requiring it. The question as presented by the latter situation, however, has arisen infrequently in the courts.

Foremost among the few decisions upon

The legislature could not, and did not, confer upon said board the power, under any circumstances or condition, to revoke the license of the respondent upon the facts before the board.

Ex parte Cox, 63 Cal. 21.

If the legislature could lawfully confer upon said board the power, under some circumstances, to revoke a license, such revocation should not be had, except upon some showing which should be based upon some evidence.

Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237.

If the accused was convicted on incompetent and wholly insufficient evidence, the proper appellate tribunal, by whatever name called, constituted anywhere on this continent, would restore to him that of which he had been wrongfully deprived. All the evidence was in writing, and this court can weigh it as well as the triers or the district court.

Hegwer v. Kiff, 31 Kan. 440, 2 Pac. 553.

Plaintiff had an absolute vested right to a certificate and license from this board, and could have compelled the same by mandamus.

State ex rel. Hathaway v. State Bd. of Health, 103 Mo. 22, 15 S. W. 322; State Bd. of

Pharmacy v. White, 84 Ky. 626, 2 S. W. 225.

Depriving a man of his profession, his office, is a high exercise of judicial power.

Re Huron, 58 Kan. 154, 36 L. R. A. 822, 62 Am. St. Rep. 614, 48 Pac. 574.

This proceeding in Kansas is criminal in its nature, and, under § 10, art. 1 of the United States Constitution, no *ex post facto* law could be utilized by the prosecution.

Re Peyton, 12 Kan. 398; Re—1 Hun, 321; Fetcher v. Daingerfield, 20 Cal. 430; Klingensmith v. Kepler, 41 Ind. 341; Re Attorney, 83 N. Y. 164; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; Dickens's Case, 67 Pa. 169, 5 Am. Rep. 420; Ex parte Smith, 28 Ind. 47; Redman v. State, 28 Ind. 207; Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686; Re Cahill, 66 N. J. L. 527, 50 Atl. 119; State v. Foreman, 3 Mo. 603; People ex rel. Mulford v. Turner, 1 Cal. 144, 52 Am. Dec. 295; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; People ex rel. Noyes v. Allison, 68 Ill. 151.

No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

People v. Marx, 99 N. Y. 380, 52 Am. Rep. 34, 2 N. E. 29; Live Stock Dealers' & Butch-

the question as thus presented is that of State ex rel. Chapman v. State Medical Examiners, already mentioned and sufficiently treated in the opinion.

State ex rel. Feller v. State Medical Examiners, 34 Minn. 391, 26 N. W. 125, decided at the same time, assumes the correctness of the Chapman Case.

The constitutionality of a statute intrusting the trial of physicians and the revocation of their licenses for gross ignorance or misconduct in their profession, or for immoral conduct or habits, to county medical societies, was sustained, and the expulsion of a member by the action of one of such societies upheld, in Re Smith, 10 Wend. 449; the court stating that the constitutional provision for due process of law does not prohibit the establishment of various tribunals exercising powers of a judicial nature for purposes other than the administration of civil or criminal justice.

The statute of Rhode Island expressly provides for an appeal from the decision of the state board of health to the appellate division of the state supreme court, upon the revocation of a license. This is held in State Bd. of Health v. Roy, 22 R. I. 538, 48 Atl. 802, to provide due process of law, though no trial by jury could be secured under it.

In England the action of the general council of medical education and registration, taken in good faith after due inquiry, by which a medical practitioner is adjudged to have been guilty of infamous conduct in a 1 L.R.A. (N.S.)

professional respect, cannot be reviewed by the courts. Ex parte La Mert, 33 L. J. Q. B. N. S. 69; Allbutt v. Medical Education & Registration, L. R. 23 Q. B. Div. 400.

However, that due process of law is not accorded where notice is not given to the practitioner of the proceedings to revoke seems to be recognized. Besides the *dicta* to this effect in State ex rel. Powell v. State Medical Examining Board, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238, and in People use of State Bd. of Health v. McCoy, 125 Ill. 289, 17 N. E. 786, a direct decision on this point is found in State v. Schultz, 11 Mont. 429, 28 Pac. 643, where a revocation by the state board of medical examiners without notice was held void as subverting "the most precious right of the citizen." Reasonable notice of the charge preferred against the defendant, and of the time and place of the trial thereof, is necessary, even where there is no provision therefor, by the statute authorizing the proceeding.

Again, the general terminology of the statutes which generally allow the commission to enforce or revoke a license for "unprofessional or dishonorable conduct" has led some of the courts to remark, in connection with the granting of licenses,—and the remarks are equally applicable to the revoking,—that those words are to be taken to mean such conduct as would, in common judgment, be deemed unprofessional or dishonorable. While there is broad ground for the exercise of discretion under these terms, any arbitrary or unjust interpreta-

ers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408; Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; State v. Julow, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; People v. Gillison, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; First Nat. Bank v. Sarlls, 129 Ind. 201, 13 L. R. A. 481, 28 Am. St. Rep. 185, 28 N. E. 434; Coe v. Schultz, 47 Barb. 64; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694.

It was the plain duty of the district court to grant a temporary injunction; and prejudicial error to refuse it.

School Dist. No. 23 v. McCoy, 30 Kan. 268, 46 Am. Rep. 92, 1 Pac. 97; 7 Am. & Eng. Enc. Law, p. 832; People v. Canal Board, 55 N. Y. 393; Staples v. Rossi, 7 Idaho, 618, 65 Pac. 67; Stockdale v. Ullery, 37 Pa. 486, 78 Am. Dec. 440; Cohen v. Delavina, 104 Fed. 946; Philadelphia Ball Club

v. Lajoie, 202 Pa. 210, 58 L. R. A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Covert v. Bray, 26 Ind. App. 671, 60 N. E. 709; McConnell v. Arkansas Brick & Mfg. Co. 70 Ark. 568, 69 S. W. 559; Hatfield v. DeLong, 156 Ind. 207, 51 L. R. A. 751, 83 Am. St. Rep. 194, 59 N. E. 483; State ex rel. Voight v. Hoeflinger, 31 Wis. 258; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Columbian Athletic Club v. State, 143 Ind. 99, 28 L. R. A. 727, 52 Am. St. Rep. 407, 40 N. E. 914.

Any law which would permit an inquiry, in the case at bar, reaching back to any conduct previous to the adoption of the law, is clearly *ex post facto*.

Re Peyton, 12 Kan. 398; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 578; United States v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; Re Evans, 22 Utah, 366, 53 L. R. A. 952, 83 Am. St. Rep. 794, 62 Pac. 913; 3 Am. & Eng. Enc. Law, pp. 757, 758; State v. Atwood, 11 Wis. 423.

Any misconduct complained of must be in connection with professional conduct.

People ex rel. Noyes v. Allison, 68 Ill. 151; People ex rel. Hughes v. Appleton, 105

tion of them by the commission will be redressed at the suit of the injured physician in the courts of law. State ex rel. Hathaway v. State Bd. of Health, 103 Mo. 22, 15 S. W. 322.

While recognizing the validity of a statute so general in terms, the court, in People use of State Bd. of Health v. McCoy, held void a revocation thereunder, which had been made without notice and upon unsustainable charges. The court takes occasion to remark that such a statute does not give the board a right to revoke from mere caprice or without cause. "The right of the citizen to practise his profession, for which he has expended time and money to qualify himself, is too important to be taken away from him without some reasonable cause. It must be for some act or conduct that would, in the common judgment, be deemed 'unprofessional' or 'dishonorable.'"

A direct decision against the validity of so hazy a provision is found, however, in Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L. R. A. 415, 63 S. W. 785, where an injunction was granted against the attempted revocation of a license under a statute authorizing the state board of health to revoke for "unprofessional conduct of a character likely to deceive or defraud the public." Prefacing its decision by the statement of the well-recognized principle that the license to practise is a "right" or "estate" of which the possessor cannot be deprived without due process of law, the court, while admitting the power of the legislature to provide 1 L.R.A. (N.S.)

for the revocation of a license where the acts or conduct which shall justify the same are specified in the statute, holds the provision in question simply void for uncertainty. "As the statute does not advise him beforehand as to what is unprofessional conduct, he could not knowingly or intentionally be guilty of it. The legislature, in effect, has attempted to commit to the state board of health the right, after the physician has done some act, to determine what its effect is to be; and if, in its judgment, he should be deprived of the right to practise his profession, it can inflict the punishment upon him by revoking his license."

The court, on the other hand, admits the validity of the statute as to the refusal to grant licenses, though such refusal may be based upon the same grounds. This seems inconsistent with its holding as to revocation, as there is no distinction between the two phases of the question. On the whole, the decision seems to be against the spirit of the decisions above noted, and of the many cases upholding the validity of such a provision in connection with the granting of licenses.

See, for a refusal to convict a physician, whose certificate had been revoked, of a misdemeanor for practising "without first having procured a certificate," Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237.

Ill. 474, 44 Am. Rep. 814; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *Anonymous*, 7 N. J. L. 162.

Messrs. C. C. Coleman, Attorney General. and Clad Hamilton, for defendants in error.

The element of good character is a prerequisite to the right to practise medicine. That has been the fixed policy of the law-makers of this country.

Thompson v. Hazen, 25 Me. 108; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 327, 50 Am. Rep. 575, 20 N. W. 238; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; *State v. Call*, 121 N. C. 646, 28 S. E. 517; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *State v. Wilcox*, 64 Kan. 789, 68 Pac. 634; *People v. Hasbrouck*, 11 Utah, 292, 39 Pac. 918.

If moral character is a commonly and ordinarily received qualification for the practice of medicine, the board should have the same general right to pass upon it as it has to pass upon other qualifications. This is such a power as may properly be vested by the legislature in a medical examining board.

State v. Dent, 25 W. Va. 1, Affirmed in 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 193; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 389, 26 N. W. 123; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *State ex rel. Burroughs v. Webster*, 150 Ind. 621, 41 L. R. A. 212, 50 N. E. 750; *State Bd. of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *People ex rel. Sheppard v. Illinois State Dental Examiners*, 110 Ill. 180; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; *People use of State Bd. of Health v. Blue Mountain Joe*, 129 Ill. 377, 21 N. E. 923.

There is no vested right to practise either the medical or legal profession free from supervision and regulation by the state.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442; *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Philbrook v. Newman*, 85 Fed. 139; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Re Smith*, 10 Wend. 449; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *State v. Creditor*, 44 Kan. 566, 21 Am. St. Rep. 306, 24 Pac. 346; *People v. Fulda*, 52 Hun, 65, 4 N. Y. Supp. 947.

So long as the board honestly exercised its discretion, and committed no abuses of it, there can be no just ground of complaint against the action of the board.

Philbrook v. Newman, 85 Fed. 139; *People L.R.A. (N.S.)*

ple ex rel. Colorado Bar Asso. v. Webster, 28 Colo. 223, 64 Pac. 207; *Bar Asso. v. Randal*, 158 N. Y. 216, 52 N. E. 1106; *Lynch v. Chase*, 55 Kan. 377, 40 Pac. 666; *School Dist. No. 23 v. McCoy*, 30 Kan. 268, 46 Am. Rep. 92, 1 Pac. 97.

The board had a right to receive evidence at the hearing which would not have been competent if offered on the trial of the case in a court of law.

Traer v. State Medical Examiners, 106 Iowa, 559, 76 N. W. 833; *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 588.

Greene, J., delivered the opinion of the court:

This is a proceeding in error to reverse the judgment of the district court of Shawnee county, refusing to grant a temporary injunction prohibiting the State Board of Medical Registration and Examination from placing of record and enforcing an order theretofore made, revoking the license of William M. Meffert to practise medicine and surgery in Kansas.

The statute under which the proceedings were had is chapter 254, p. 445, Laws 1901. (Gen. Stat. 1901, §§ 6669-6677). and is entitled "An Act to Create a State Board of Medical Registration and Examination, and to Regulate the Practice of Medicine, Surgery, and Osteopathy in the State of Kansas, Prescribing Penalties for the Violation Thereof, and Repealing Chapter 68 of the Session Laws of 1870." The board consists of seven members. The only provision of this law specially involved in this litigation is that part of § 2, p. 446, which reads: "All persons engaged in the practice of medicine on the date of the passage of this act shall, within four months from the date of such passage, apply to the board of registration and examination for a license to practise. . . . The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause."

The petition in this action contains, as exhibits, copies of the accusations made against plaintiff in error to the State Board of Medical Registration and Examination. It appears that at a meeting of the citizens of Emporia a committee of three was appointed to formulate charges against plaintiff in error, and present them to the State Board of Medical Examiners for the purpose of having his license revoked. These charges, while not as formal or specific as would be required in an information or an indictment, were ample to challenge the attention of the board, and to notify the plaintiff in error

of the nature of the accusations made against him. Among these exhibits were a resolution passed by the board of education of the city of Emporia, discharging one of its female teachers for associating with the plaintiff in error; a statement "that he was a man notorious in Emporia for his immorality;" a request, signed by eighteen practising physicians and surgeons of Emporia, stating that "we have ground to believe that he is grossly immoral, and we know that he is guilty of other unprofessional conduct of such a degree that we will not meet in consultation or recognize him as a member of the medical profession;" another request signed by the pastors of nine of the churches of Emporia, and another signed by thirty-eight of the business men of Emporia, each stating that Meffert was grossly immoral, and asking that his license to practise medicine be revoked; an affidavit of O. M. Wilhite, charging the plaintiff in error with numerous acts unprofessional, grossly immoral, and criminal. Copies of these charges and complaints were served on plaintiff in error, and a notice informing him when such charges would be heard.

Upon the hearing the plaintiff in error appeared with his counsel. Affidavits and oral testimony were introduced by both parties. The board found that plaintiff in error was grossly immoral, and revoked his license to practice medicine or surgery in Kansas. Proceedings were then instituted in the court below perpetually to enjoin the board from entering such order or otherwise enforcing the same. A demurrer was filed to the petition, which was sustained, from which this proceeding was prosecuted.

It is alleged in the petition that "said board has no power or authority to revoke said license and said certificate, for the reason that this plaintiff has a vested interest in his calling and profession, and the practice thereof, and he cannot be deprived of the same except by the judgment of a court of competent jurisdiction, duly rendered, for offenses and actions committed by himself that pertain and relate to the practice of his said profession, and that have been committed since the 21st day of March, 1901, and are of the nature and character that would warrant, and for which the law authorizes, a revocation of his license and certificate; and said board is not a judicial body, and has no power or right to act in a judicial capacity, and any and all acts and attempts on their part to so act are a nullity and void." There are no allegations of fraud, corruption, or oppression on the part of the board in its proceedings, and we think the questions presented for our determination are involved in the allegations of the petition quoted.

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One of the rights reserved to the state is to determine the qualification for office, and the conditions upon which citizens may exercise the various callings and pursuits within its limits. This power was recognized in England more than 300 years ago, and has been the law of that country ever since. *Bonham's Case*, 8 Coke, 114a. In *Dent v. West Virginia*, 129 U. S. 114, 122, 123, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231, 233, the court said: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure, them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end, it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning, upon which the community may confidently rely." A surfeit of authority might be cited, holding that the state, in the exercise of its police power, may prescribe the qualifications which a physician must possess before entering upon the practice of medicine or surgery. *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Thompson v. Hazen*, 25 Me. 104; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *State v. Call*, 121 N. C. 643, 28 S. E. 517; *People v. Hasbrouck*, 11 Utah, 291, 39 Pac. 918; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *State v. Wilcox*, 64 Kan. 789, 68 Pac. 634.

The State Board of Medical Registration and Examination is not a judicial tribunal. While it may be said to act quasi judicially, it is only a ministerial board, and performs no judicial functions. It is classed with such boards as the county boards of equalization, boards for the examination of applicants for teachers' certificates, city councils in granting and refusing a business or occupation license, and numerous other boards of similar character. Such boards perform no judicial functions, are not judicial tribunals, and have never been classed as such. *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081; *State Bd. of Health v. Roy*, 22 R. I. 538, 48 Atl. 802.

It is contended that the procedure before the board in the admission and rejection of evidence was violative of the rights of Meffert, in that the evidence received and acted upon was made up largely of unsup-

ported accusations, hearsay, and street rumor, and was not sufficient to sustain the findings. The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation. It is subversive of the morals of the people and degrading to the medical profession for the state to clothe a grossly immoral man with authority to enter the homes of her citizens in the capacity of a physician. It was the intention of the legislature to adopt a summary proceeding by which the morals of the people and the dignity of the profession might be protected against such a possibility, without being embarrassed by the technical rules of proceedings at law. In the case of *Lynch v. Chase*, 55 Kan. 367, 40 Pac. 666, many questions similar to those presented by plaintiff were involved. Chapter 239, p. 361, Laws 1889, provided for the appointment of committees by the governor, lieutenant governor, and speaker of the house, to investigate the affairs of state institutions and conduct of said officers. Under this law a committee was appointed to investigate the affairs of the State Penitentiary, and the conduct of S. W. Chase, the warden of that institution. An investigation was had, and the committee found and reported several acts of official misconduct and insufficiency in office, and recommended his removal. The governor ordered his removal, and immediately appointed Lynch to succeed him. Upon a refusal to surrender the office Lynch prosecuted a proceeding in quo warranto. It was held that "a summary proceeding of this character is not like a common-law trial, nor are the same precision and accuracy required as in a trial before a court;" that "the allegation that the testimony was insufficient to sustain the findings is without force; that the evidence was heard and considered by a tribunal created for that purpose, and the duty of determining its sufficiency belongs to that tribunal, and not to the court." The same question was involved in *School Dist. No. 23 v. McCoy*, 30 Kan. 268, 46 Am. Rep. 92, 1 Pac. 97, and decided against the contention of plaintiff in error. Meffert was timely notified of the charges preferred against him, the time when a hearing would be had, and was given ample opportunity to refute such charges. The findings by the board are conclusive upon this court.

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It is contended that the immoral conduct with which plaintiff in error was charged was not practised by him in the line of his profession, and therefore was not cognizable by the board. The law is not that the board must find that such person has been grossly immoral with his patients, but that he is grossly immoral in his general habits. We only mention this contention to condemn it. The object sought is the protection of the home of the sick and distressed from the intrusion therein, in a professional character, of vicious and unprincipled men—men wholly destitute of all moral sensibilities. It is not the purpose of the lawmakers to clothe a man with a certificate of moral character, and send him out to prey upon the weak and unsuspecting,—upon those who would be entirely at his mercy,—and quietly await the accomplishment of that which observation and experience have taught us is certain to follow, before depriving such person of the indorsement which gave the opportunity to commit such wrong. The law disqualifies one guilty of a felony. It would hardly be contended that the felony for which a license may be revoked must have been committed upon a patient, or against the property of a patient, or while such physician was attending a patient.

It is further contended that the right of a physician to practise his profession is a property right, of which he cannot be deprived without due process of law, which plaintiff in error construes to mean the judgment of a constitutionally created court. We have seen that it is within the police power of a state to prescribe the qualifications of one desiring to practise medicine, and also to provide for the creation of a board or tribunal to make the examination and determine whether the applicant for a license to follow this profession possesses the required qualification, and if so, to issue to him such license. It must follow that the state may confer upon the same board or tribunal the power to revoke such license if it should thereafter be made to appear that the license should not have been issued, or if, for any reason, the holder thereof since its issuance has become disqualified. The argument is that to deprive a physician of his right to practise medicine otherwise than by a judgment of forfeiture by a judicial tribunal is without due process of law, and is in violation of § 1, art. 14, of the Constitution of the United States, which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law." This constitutional provision is not a restriction or limitation on the police power of the state to pass and

enforce such laws as, in its judgment, will inure to the health, morals, or general welfare of its people. Such power is reserved to the state, which has been so recognized by all courts since the adoption of this amendment. In *People v. King*, 110 N. Y. 418, 423 1 L. R. A. 293, 294, 6 Am. St. Rep. 389, 392, 18 N. E. 245, 246, it is said: "But, as the language of the constitutional prohibition implies, life, liberty, and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action, or controlling individual conduct, which, by common consent, do not transcend the limitations of the Constitution. This legislation is under what, for lack of a better name, is called the police power of the state—a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community; and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts cannot interfere." In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, the court, in speaking upon this subject, used the following language: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." In *Mugler v. Kansas*, 123 U. S. 623, 665, 666, 31 L. ed. 205, 211, 212, 8 Sup. Ct. Rep. 273, 299, the court said: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations." The principle that no person shall be deprived

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of life, liberty, or property without due process of law was embodied, in substance, in the Constitutions of nearly all, if not all, of the states at the time of the adoption of the 14th Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . 'By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government.'" To the same effect are *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, and *Re Rahrer* (*Wilkerson v. Rahrer*), 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

In *Cincinnati v. Steinkamp*, 54 Ohio St. 284, 291, 43 N. E. 490, the court, in speaking of the act to regulate the construction of buildings within cities of the first class and first grade, and to provide for the appointment of an inspector of buildings, said: "This section does not abridge the exercise of the police power of the states, nor limit the subjects upon which they may legislate." In *Leisy v. Hardin*, 135 U. S. 127, 34 L. ed. 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 690, Mr. Justice Gray, in speaking of the exercise of the police power of the state, said: "Among the powers thus reserved to the several states is what is commonly called the police power,—that inherent . . . power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty, and crime." This contention is very aptly and forcibly answered by the supreme court of Minnesota in *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 389, 390, 26 N. W. 123, 124, where it is said: "The radical fallacy in this chain of argument is the assumption that the revocation of such a license is the exercise of judicial power. 'Due process of law,' or 'the law of the land' (which means the same thing), is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive, as well as the judicial, department of government. When it is declared that a person shall not be deprived of his property without 'due process of law,' it means such an exercise of the powers of government as the

settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. . . . It has never been held that the granting, or refusing to grant, such a license as this, was the exercise of judicial power; . . . and in fact this is not claimed in this case; and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is in each case identical, *viz.*, to exclude an incompetent or unworthy person from this employment. Therefore the same body which may be vested with the power to grant, or refuse to grant, a license may also be vested with the power to revoke. The statutes of all the states are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackmen, draymen, pawnbrokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained, and, indeed, rarely questioned."

Another contention is that the state board of medical examiners had no power to revoke the license theretofore issued, because the acts for which the commission was revoked, if committed at all, were committed before the passage of the law creating the board, and therefore as to such acts the law is *ex post facto*. Conceding that the evidence introduced before the state board of medical examiners related to acts of immorality occurring before the passage of the law creating the board, does it follow that the law is *ex post facto*, as applied to plaintiff in error? An *ex post facto* law is one that imposes a punishment for an act that was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed, etc. The revocation of a license to practise medicine for any of the reasons mentioned in the statute was not intended to be, nor does it operate as, a punishment, but as a protection to the citizens of the state. Such requirements go to his qualifications, and, where the qualification imposed is reasonable, one has no right to complain that he is deprived of the right to practise his profession because he has not conformed to such reasonable regulations. The legislature has empowered the different cities of the state to assess a business license tax upon nearly all kinds of trades, professions, business, and occupations, upon the payment of which, and in some instances the conformity to other rea-

sonable regulations, the city issues to such persons a license to carry on such business, occupation, profession, or trade; and for the nonperformance of such condition, or nonpayment of the stipulated license, such permission may be canceled or withheld. It has never been thought that the withholding or revocation of such license was in any sense a punishment. If the revocation were intended as a punishment, there might be force in this argument, but, since the only purpose of the law was to require a certain standard of morals of the physician, the argument is without force.

Our attention has been called to the cases of *Cummings v. Missouri*, 4 Wall. 277, 316-319, 18 L. ed. 356, 360-362, and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. The same questions were involved in those two cases, and in rendering the opinion in the latter case the principles announced in the former were generally relied on. Mr. Cummings was a Catholic priest, and was indicted and convicted of teaching and preaching as a minister of that religious denomination without taking what was known as the "test oath." Mr. Justice Field, in delivering the opinion of the court, said: "The oath prescribed by the Constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed constitute offenses of the highest grade; to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offenses in the laws of any state, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny, not only that he has ever 'been in armed hostility to the United States, or to the lawful authorities thereof,' but, among other things, that he has ever, 'by act or word,' manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in rebellion, or has ever harbored or aided any person engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever entered or left the state for the purpose of avoiding enrolment or draft in the military service of the United States, or, to escape the performance of duty in the militia of the United States, has ever indicated, in any terms, his disaffection to the government of the United States in its contest with the Rebellion. Every person who is unable to take this oath is declared incapable of holding, in the state, 'any office of honor, trust, or profit under its authority, . . . or of acting as a professor or teacher in any educational institution, or in any common or other

school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation,' . . . [or to] 'be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages.' " The severest punishment was prescribed for violation of those provisions of the Constitution. On page 318, 4 Wall. and page 361, 18 L. ed., the court said: "The oath thus required is, for its severity, without any precedent that we can discover." On page 319, 4 Wall., and page 361, 18 L. ed., the court states the fact upon which it held this law unconstitutional and void, as follows: "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character with success.' It is evident from the nature of the pursuits and professions of the parties placed under disabilities by the Constitution of Missouri that many of the acts from the taint of which they must purge themselves have no possible relation to their fitness for those pursuits and professions. . . . The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified, or not, for their respective callings, or the trust with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment, except by depriving the parties who had committed them of some of the rights and privileges of the citizen." It was held that, as this law was intended as a punishment for past offenses, and not to prescribe a qualification for duties to be performed or callings to be pursued, it was *ex post facto*, and therefore void. In these particulars it is easily distinguishable from the case under consideration, and is not an authority for the contention of plaintiff in error. We have not overlooked the language used by this court in *Re Peyton*, 12 Kan. 405, wherein the court, speaking of a disbarment proceeding, said: "The whole thing is in the nature of a criminal forfeiture." Counsel for plaintiff in error seek to apply the principle there announced to the proceeding before the board in this case. We are not prepared to say that the language there used does not express the law as applicable to disbarment proceedings, under § 393, Gen. Stat. 1901, which reads: 1 L.R.A. (N.S.)

"An attorney or counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge, or a party to an action or proceeding, or brings suit or commences proceedings without authority therefor, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action." It appears that disbarment for the reasons mentioned in said section is in the nature of a punishment, which differentiates the law of disbarment from the revocation of a physician's license because disqualified.

We are of the opinion that the petition states no ground for equitable relief, and there was no error committed by the court below in sustaining the demurrer to the petition.

The judgment is affirmed.

All the Justices concur except Cunningham, J., not sitting.

Petition for rehearing denied.

Affirmed by Supreme Court of United States November 14, 1904.

KENTUCKY COURT OF APPEALS.

B. F. MARK, Admr., etc., of H. R. Mark,
Deceased, et al., Appts.,
v.

JOSIE BOARDMAN.

(... Ky.)

Decedent's estate—claim for services.

A woman taking her brother into her

Case Note.—The doctrine established by the authorities is that, when relatives live together as members of one family, or as one household, the right to compensation for board and personal services does not exist in the absence of an express contract; but, when such relation does not exist, an implied contract to pay may arise. Thus, in *Disbrow v. Durand*, 54 N. J. L. 343, 33 Am. St. Rep. 678, 24 Atl. 545, the facts show that a brother and sister lived together for more than twenty years, until the brother's death. The sister, who was a widow, had no means of subsistence, and refused to live with her son, preferring to live with her brother as his housekeeper. There was no proof that the subject of compensation for her services was ever discussed or contemplated by either of them. In denying the sister's right to recover for her services, the court said: "In order to recover for the services, the plaintiff must affirmatively show, either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is, that the household family relationship is presumed to abound in reciprocal acts of kindness and good will,

home, and, without benefit to herself, nursing and performing other menial services for him during his last illness, is entitled to an allowance of their value out of his estate, although there was no express contract that payment should be made.

(November 23, 1905.)

A PPEAL by defendants from a judgment of the Circuit Court for Montgomery

County in favor of plaintiff in an action brought to settle the estate of H. R. Mark, deceased, and to establish a claim against it. Affirmed.

The facts are stated in the opinion.

Mr. L. Apperson, for appellants:

Where the relation of brother and sister exists, the law implies no contract to compensate for services rendered by one per-

which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered."

In *Keller v. Stuck*, 4 Redf. 294, it was held that no implied contract for compensation arises when one sister nurses another when the two are living together.

In *Fuller v. Fuller*, 21 Ind. App. 42, 51 N. E. 373, it was held that a brother was not entitled to recover from his sister's estate for board and care, where the evidence showed that she lived with him from the time she was a child until her death at the age of twenty-eight, assisting in the household of her brother's family, which was large, and acting and being treated as a member of the family.

In *Chapman v. Chapman*, 87 Ill. App. 427, the facts show that a merchant received his brother as a visitor, and treated him as a member of the family, and the brother, on his part, performed various kinds of service about the store, such as marking goods, waiting on customers, sweeping out, etc., for ten or eleven months. In an action to recover for such services, the court held that, in the absence of an express agreement, the law would indulge the presumption that what was done for each other by the two brothers was done gratuitously and as the promptings of natural affection.

But in *Shubart's Estate*, 154 Pa. 230, 26 Atl. 202, a presumption against the existence of a contract was held not to exist. In this case a testator provided a fund to pay for the washing, mending, clothing, and boarding of a daughter, who was an idiot, and who was living in the family of her brother. Three and a half years before her death she became afflicted with paralysis and total blindness, and was entirely helpless. The court held that the compensation for boarding, etc., did not include nursing and personal attendance, and that there was no presumption from the relationship of the parties, that of brother and sister, that the services were voluntary, and not done in expectation of payment. The proof in this case showed that the brother did not receive his sister as a member of his family, but that he expected compensation for his services. The court said that, as between

brother and sister, there is no presumption that they live together as members of a family, and that the family relation must be proved by the party asserting it.

The same rule is stated in *Curry v. Curry*, 114 Pa. 367, 7 Atl. 61, where the court said: "The performance and receipt of services generally raises an implied promise by him who receives to compensate him who performs, but the implication may be rebutted. When the parties are parent and child, or members of the same family, the relationship excludes the implication of a promise. In all cases except that of parent and child there must be evidence beyond the relationship that the creation of no debt was intended. Where the parties are brother and sister, the sister claiming compensation for her services, the burden of showing family relationship, or other cause, to exclude the implication of his promise to pay for the services, is upon the brother." In this case the claim of the sister to compensation was sustained.

But in *O'Brien's Estate*, 17 Phila. 456, it was held that there is no presumption of an implied contract to pay for board, furnished by a sister to an invalid brother during a visit to her, nor for board furnished at a subsequent time, when he returned, with his nurse, to his sister's home, and remained there until his death, where it appeared that he was neither charged, nor intended to be charged, as a boarder during the first visit, and when he returned in the following year to die there was nothing to apprise him that he was to stand upon a different footing, and it was not contemplated during the brother's lifetime to make any claim for board; the claim apparently originating in a moment of disappointment over the contents of his will. This case is, nevertheless, in harmony with the other Pennsylvania cases holding that there is no presumption, from the relationship between a brother and sister, that services performed by one for the other are voluntary and without expectation of payment. The court expressly says: "His relationship to the claimant did not exempt him from liability. The law, sensitive to the instincts of humanity, will not, it is true, where express proof of a contract is wanting, treat the reciprocal dealings of a child and his parent as the subjects of barter; but in all remoter degrees of kinship it holds to the presumption that a promise to pay accompanies the receipt of a benefit." But the facts of this case were held to take it out of the general rule.

son to another when the parties stand in such relation.

Price v. Price, 101 Ky. 28, 39 S. W. 429; *Hartman's Appeal*, 3 Grant, Cas. 271; *Hall v. Finch*, 29 Wis. 278, 9 Am. Rep. 559; *Reynolds v. Reynolds*, 92 Ky. 556, 18 S. W. 517; *Wayman v. Wayman*, 15 Ky. L. Rep. 374, 22 S. W. 557.

A brother is entitled to recover for services in nursing, rendered his sister, who came to his house in failing health, not at his invitation, but of her own seeking. The court said that she came to her brother's house as to a hospital, and therefore the claim for services rests upon an implied assumption. *Lillich's Estate*, 9 Pa. Co. Ct. 25.

So, in *Silvius's Estate*, 3 Lack. Legal News, 84, the court sustained the right of one to receive compensation who left her own family to the care of others, and came, upon request, strictly as a nurse to care for her sister, who had undergone an operation.

In Kentucky a statute requires proof of an express contract before a relative will be allowed to recover for board and lodging furnished a decedent in his lifetime. But this statute does not apply to nursing in old age or in sickness. *Thomas v. Arthur*, 7 Bush, 245; *Schuster v. White*, 106 Ky. 319, 50 S. W. 242.

The right to recover for nursing is sustained in *Dance v. Magruder*, 26 Ky. L. Rep. 220, 80 S. W. 1120. In this case a sister nursed and cared for an aged brother during his last illness, and the court sustained her right to recover, because it appeared that the brother was incapable, on account of the ravages of disease, of making a contract with reference to payment of services received from her.

In *O'Connor v. Beckwith*, 41 Mich. 657, 3 N. W. 166, the court held that an implied promise to pay for services was created where one lived much of his time with his sister, by whom his washing and ironing were done, and who cared for him when sick. In this case decedent, in his lifetime, repeatedly said that he would pay for all that had been done for him.

In *Spencer v. Spencer*, 181 Mass. 471, 63 N. E. 947, which was an action for personal services rendered by an unmarried sister to her brother, it appeared that she lived with him as his housekeeper for a while, for pay, but when he became sick she continued to work for him, receiving no compensation, but earning money by working out, which she used in her brother's family. The court held that it did not matter whether the brother expected to pay for services, or not, and that it was not necessary, in order to bind him, that he should have believed that his sister expected pay, if as a reasonable man he should have understood from what he knew that such was the expectation.

In *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835, it was held that the mere fact that parties are brothers is not sufficient to raise a presumption that valuable services

Mr. Robert H. Winn, for appellee:

Where the decedent recognized his obligation, there need have been no intention to charge him.

Barnett v. Adams, 26 Ky. L. Rep. 622, 82 S. W. 406.

For nursing, laundry work, etc., the law implies a contract to pay.

performed by one for the other are gratuitous, where both are grown men, each married and having for years managed his own individual affairs, and there are no facts showing dependence of the one upon the other. In this case a man went without his family to his brother, and was received as a guest, and remained a number of weeks, during which time he commenced superintending the erection of some houses which the brother was building, living part of the time in one of the brother's houses, but taking his meals with his brother until his family came, when he lived entirely at his own home. The services were continued for several months after he ceased to live with his brother as a guest, and he put much labor and time into the enterprise. The court held that, although it might be admitted that while he was stopping at his brother's house and taking his meals there he must be regarded as a guest, and that any incidental services that he might then render to his brother would be regarded simply as offices of kindness, for which no pay was expected, he was entitled to recover for the services performed after he left his brother's family.

The general rule as to the liability of decedents' estates for services rendered by a relative is well stated in vol. 18, *Cyclopedia of Law & Procedure*, p. 412, as follows: "The courts regard with suspicion and disfavor claims brought against a decedent's estate for personal services rendered by relatives, especially where the latter are members of his immediate family or household, as the presumption is that such services, between persons occupying such relations, are intended to be gratuitous; and hence, claims against the estate of a decedent, made by near relatives for personal services, require stronger proof to establish them than ordinary claims by strangers. The rule does not, however, prevent a recovery by a person standing in such relation to a decedent for services rendered where there was an express contract or promise to pay, or where the circumstances are such as to clearly show a mutual intention that the services should be paid for, and thus raise an implied contract; and where, although the decedent and the claimant were relatives, the relation was not such as imposed any special obligation on the claimant of support of, care for, or tenderness toward, the decedent, a claim for compensation will be more favorably regarded, and in a suitable case upheld,—especially where decedent and claimant did not live together."

Thomas v. Arthur, 7 Bush, 245; Turner v. Moberly, 14 Ky. L. Rep. 623; Frailey v. Thompson, 20 Ky. L. Rep. 1179, 49 S. W. 13; Dance v. Magruder, 26 Ky. L. Rep. 220, 80 S. W. 1120; Durr v. Durr, 26 Ky. L. Rep. 855, 82 S. W. 581; Galloway v. Galloway, 24 Ky. L. Rep. 857, 70 S. W. 48.

Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

2 Bl. Com. p. 443; 1 Parsons, Contr. 9th ed. p. 4; Dodson v. McAdams, 96 N. C. 149, 60 Am. Rep. 408, 2 S. E. 453.

Nunn, J., delivered the opinion of the court:

Appellee and H. R. Mark, deceased, were brother and sister. Appellant B. F. Mark is the administrator, and the other appellants are the decedent's brothers, sisters, nieces, and nephews. H. R. Mark died a bachelor and without a will on August 9, 1901. On October 17, 1900, he left his home, and went to the home of the appellee, and lived with her until his death. During this time he was addicted to the use of both morphine and whisky, and frequently became drunk, and he was in the last stages of consumption. With these three afflictions combined, it made it very unpleasant for those about him, and especially for the appellee, who was compelled to nurse and care for him. He apparently at times had no control over the action of his kidneys and lower bowels, or at least he permitted nature to take its course in his bedroom, and he coughed and expectorated constantly upon the floor and walls of the room. She fed and prepared extra dishes for him, washed his sheets, and changed his linen, and performed other menial labor for him, which consumed a great portion of her time. Appellee was a widow, with five boys of tender years, and the presence of deceased at her home was of no benefit to her, but a positive detriment. Deceased left personalty of the value of about \$1,200 and a valuable farm. Appellee instituted this action to settle his estate and presented a claim for \$591 for board, nursing, care, and attention furnished and rendered by her to the decedent as stated. Her claim was contested by the administrator and some of the heirs. She did not prove any express contract for the payment to her for these things, and the court upon the trial adjudged that she was not entitled to recover anything on her claim for board by reason of the inhibition of § 2178. Ky. Stat., but allowed her \$350 on her claim for nursing and other menial labor performed for him, and credited that sum by \$102, the value of some colts and calves given by H. R. 1 L.R.A. (N.S.)

Mark to some of the children of appellee. From this judgment appellants have prosecuted this appeal.

They contend that she was not entitled to any part of her claim, and refer to the cases of Reynolds v. Reynolds, 92 Ky. 556, 18 S. W. 517; Wayman v. Wayman, 15 Ky. L. Rep. 374, 22 S. W. 557; Price v. Price, 101 Ky. 28, 39 S. W. 429; Lowe v. Webster, 19 Ky. L. Rep. 1208, 43 S. W. 217; and Frailey v. Thompson, 20 Ky. L. Rep. 1179, 49 S. W. 13,—in support of their position. It will be observed in all, or nearly all, of these cases that the parties received a direct benefit or advantage in being or residing together, and in most of them the parties making the charge resided in the household of the persons whose estate was sought to be charged. Most all cases denying recompense, under such circumstances, are those where there has been a mutuality of benefit. In the case at bar there was no mutuality of benefit. The benefit was all upon the side of H. R. Mark, the deceased. The allowance by the court of that portion of appellee's claim for nursing, etc., was proper under the circumstances proved in this case. See Thomas v. Arthur, 7 Bush, 245; Turner v. Moberly 14 Ky. L. Rep. 623; Frailey v. Thompson, *supra*; Dance v. Magruder, 26 Ky. L. Rep. 220, 80 S. W. 1120; Durr v. Durr, 26 Ky. L. Rep. 855, 82 S. W. 581; and Galloway v. Galloway, 24 Ky. L. Rep. 857, 70 S. W. 48.

For these reasons, the judgment of the lower court is affirmed.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

WILLIAM STARK, Jr., By Next Friend,
Plff. in Err.,
v.

MUSKEGON TRACTION & LIGHTING
COMPANY.

(.... Mich.)

Electric wires—injury by—proximate cause.

The act of a boy in seizing a broken telephone wire to receive a shock is the proximate cause of an injury resulting to him therefrom, and not the violation of the

Case Note.—Contributory negligence preventing a recovery was held to exist also in *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 1, where a minor, a young man of seventeen, deliberately, after wrapping his hand in a handkerchief, took hold of a live wire in spite of warnings from bystanders, and was instantly killed. Such negligence is deemed not only concurrent, but the sole

municipal ordinance as to the manner of stringing the electric light wire which charged the broken one, nor the fact that the wire was imperfectly insulated; and the fact that the boy was not aware of the risk is immaterial.

(October 31, 1905.)

ERROR to the Circuit Court for Muskegon County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Ostrander, J.:

Two errors are assigned upon the record, both of which make the single point that it was error for the court to direct a verdict for defendant. The record contains the substance of all the testimony given upon the trial. The injury complained about was received August 30, 1903. The plaintiff is a lad, ten years old in April, 1903. Defendant is a Michigan corporation, owning a plant for developing electricity for lighting and other purposes, and at the date in question was operating its plant and wires connected therewith, including a system of wires supported by poles on and over Spring

immediate cause of the accident. Upon the contention that negligence could not be imputed to an infant, the court states that the question is not one of age, but of intelligence and maturity. "The presumption there is that an infant under the age of fourteen years is *prima facie* incapable of exercising sufficient judgment so as to be chargeable with contributory negligence; and whether the evidence in a particular case is sufficient to rebut the presumption is always a question of fact, for the jury, and not of law, for the court."

It is upon the same principle, but with a different result, that the court proceeds in *Macon v. Paducah Street R. Co.* 110 Ky. 680, 62 S. W. 496, where the jury found that a lad of twelve was not guilty of contributory negligence in taking hold of a live wire after warnings of the danger. A street railroad company is there held liable for injuries resulting from contact with a live wire which had been hanging for two weeks or more from the guy wires used by it to sustain its trolley wire in place.

So the court in *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66, refused to disturb the finding of the jury that a boy "not yet arrived at the state of manhood" was not negligent in attempting to remove a live wire from the street, after he had been cautioned against the danger by comrades.

Contributory negligence was denied as a matter of law, however, in *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344, where 1 L.R.A. (N.S.)

street, in the city of Muskegon. The case made by the declaration is, in substance, that the wires of defendant were, at the place of the accident, carried too near the ground, and were not insulated; that on the same poles, and under the defendant's wires, certain telephone wires were carried; that the condition and position of the wires permitted contact, or that contact occurred between the telephone wires and the other and uninsulated wire; and "that the injuries complained of were caused by the defective and unsafe construction and maintenance of such wires and the defective and unsafe stringing of the wires of the [defendant] at the place aforesaid, and in permitting and maintaining said wire too near the surface of the ground at the place aforesaid, and in allowing the wires herein designated as telephone wires to be and remain on and connected with the poles on which was strung the wires through which the defendant was transmitting a dangerous electrical current." It is alleged that plaintiff, without fault on his part, and without any knowledge of the danger, came in contact with the telephone wire which, owing to carelessness and negligence of defendant, was at the time charged with electricity, and was injured. There is no dispute about

the deceased, a ten-year-old newsboy, as he walked home along the street, grasped a wire hanging down from a tree, and within easy reach from the sidewalk, and was killed by the current which it carried by reason of its crossing a trolley wire. "A child," says the court, "is held to such care and prudence as is usual among children of his age and capacity."

The duty of any persons conducting live wires through the streets is not limited to keeping their own wires out of the way of people who may travel thereon, but extends to the prevention of the escape of the electricity through wires brought in contact with their own, and of its transmission thereby to anyone using the streets. In the preceding case the owner of the broken wire was held liable. In *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570, 54 Am. St. Rep. 262, 33 S. W. 426, a street railroad was held liable for the injury of a lad who, while at play, happened to step upon a live telephone wire which, after breaking, lay for a couple of days across the trolley wire, and carried its current to the injured boy. There was no claim of contributory negligence on the plaintiff's part.

The same principle is applied in *Macon v. Paducah Street R. Co.*, where the fact that the wire, which had become live by crossing the trolley wire of the defendant, belonged to a telephone company, was deemed immaterial.

Generally on liability for injuries by electric wires in highways, see note in 31 L. R. A. 566.

the facts. No testimony was introduced on the part of defendant. At the pole near which the injury was received, the wires of defendant were supported on arms, two wires each side of the pole and some distance away from the pole. One witness, the father of the plaintiff, testified that they were 19 feet and 8 inches, and another that they were 20 feet and 9 inches, above the ground. Two feet below these wires, supported by single brackets with glass insulators, were two telephone wires, about 3 inches from the pole. They were not directly under the electric light wires, one was above the other, and they were several inches apart. There is no testimony showing or tending to show that the defendant's wires or the telephone wires were not properly and securely placed and supported, or that they were, in position, dangerous or likely to become dangerous. Plaintiff, with other children, was playing on Sunday afternoon in Spring street. One of the boys, playing with a ball and chain, threw it up to the lower telephone wire, to which it became fastened by reason of the chain winding around the wire. A sister of the boy, using a rake, the teeth of which she hooked into the chain, in her effort to get it down broke the telephone wire. A boy took one end of the broken wire, twisted it about a post, and then carried the end to a tree, up which he climbed to put it over a limb of the tree. The other end of the broken wire was made a plaything by the children, who, plaintiff aiding, swung it in the air against the wires of defendant, apparently for the purpose of making and hearing the wires rattle. "They would get hold of the end of it and get it back and form a loop, swing it around in a half-oval shape, and let go of it and strike the electric light wire to hear it rattle." "They would get hold of the end of it and then leave it somewhat slack, and then swing it round and round, and as they let it go it would fly up and hit the other wires and rattle. They were out there engaged in that play probably half an hour." In this way they finally threw the telephone wire over the electric light wires, or one of them. "At the time Willie Stark [the plaintiff] threw the wire up over the electric wire, I had hold of the long piece of wire. When Willie Stark threw the short piece of wire up over the electric light wire, then I got a shock in the long piece of wire that I had hold of." The boy who first felt the current told the others, another boy tried it, and received a shock. The plaintiff, proposing to try the experiment, was asked by his sister and another not to do so. Saying, "Watch me; I am not afraid," he took the wire and received the injuries for causing which he seeks to charge defendant. After 1 L.R.A. (N.S.)

the injury, on that day and the next day, persons noticed that in spots or small places there was no covering, no insulation on the electric light wire over which the telephone wire had been thrown. It is supposed, by at least one witness, that the telephone wire rested finally upon one of the bare or uncovered spots on the electric light wire, at a point where it was spliced; that the current was carried into the adjoining house from which a telephone had been a short time before removed, leaving the wires supplying the telephone in place with their ends of bare copper twisted together, the current passing out and into the wire described as the long end of the wire which had been carried first to a post and then to a tree, and so, when he seized it, to the person of the plaintiff. Counsel for plaintiff offered in evidence an ordinance of the city of Muskegon, approved December 4, 1889, § 2 of which is: "All such poles and wires shall be put up under the supervision of the chief engineer of the fire department of said city, but no wires shall be put up over the fire alarm telegraph wires, nor shall any wires be put up within 25 feet of the ground in any street, alley, or other public ground of said city." The declaration does not allege disobedience of the ordinance as negligence, but avers the duty to suspend wires at a reasonably safe distance from the ground. It was not more, probably considerably less, than an hour after the time the wire was broken that plaintiff was injured.

Messrs. Turner & Turner and Cross, Lovelace, & Ross, for plaintiff in error:

It was defendant's duty to keep the wires perfectly insulated, and to exercise the utmost care to maintain them in this condition.

Joyce, *Electric Law*, § 445; Keasbey, *Electric Wires*, §§ 237-254; Kraaz v. Brush Electric Light Co. 82 Mich. 457, 46 N. W. 787; McLaughlin v. Louisville Electric Light Co. 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851; Clements v. Louisiana Electric Light Co. 44 La. Ann. 695, 16 L. R. A. 43, 32 Am. St. Rep. 348, 11 So. 51; Willey v. Boston Electric Light Co. 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395; Giraudi v. Electric Improv. Co. 107 Cal. 120, 28 L. R. A. 596, 48 Am. St. Rep. 114, 40 Pac. 108; Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

To create a proximate cause it is sufficient if the defendant might have foreseen that some injury might result from his act or omission.

Southwestern Tele. & Teleph. Co. v. Robinson, 16 L. R. A. 545, 1 C. C. A. 684, 2 U. S. App. 205, 50 Fed. 810; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 52, 19 L. ed.

67; Ahern v. Oregon Teleph. & Teleg. Co. 24 Or. 276, 22 L. R. A. 635, 33 Pac. 403, 35 Pac. 549; Mitchell v. Raleigh Electric Co. 129 N. C. 166, 55 L. R. A. 398, 85 Am. St. Rep. 735, 39 S. E. 801; Haynes v. Raleigh Gas Co. 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; City Electric Street R. Co. v. Conery, 61 Ark. 381, 31 L. R. A. 570, 54 Am. St. Rep. 262, 33 S. W. 426; Western U. Teleg. Co. v. State, 82 Md. 293, 31 L. R. A. 572, 51 Am. St. Rep. 464, 33 Atl. 763; Lundeen v. Livingston Electric Light Co. 17 Mont. 32, 41 Pac. 995; United Electric R. Co. v. Shelton, 89 Tenn. 423, 24 Am. St. Rep. 614, 14 S. W. 863; McKay v. Southern Bell Teleph. Co. 111 Ala. 337, 31 L. R. A. 589, 56 Am. St. Rep. 59, 19 So. 695.

The ordinance was a contract with each and every inhabitant of the city. The defendant's standard of duty was fixed by it, and it is the same under all circumstances, and its omission is negligence.

Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43, 32 Am. St. Rep. 348, 11 So. 51; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Northern P. R. Co. v. Sullivan, 3 C. C. A. 506, 10 U. S. App. 473, 53 Fed. 219; Mitchell v. Raleigh Electric Co. 129 N. C. 166, 55 L. R. A. 398, 85 Am. St. Rep. 735, 39 S. E. 801; Union P. R. Co. v. McDonald, 152 U. S. 202, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Kinney v. Koopman, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119, 22 So. 593; Tobey v. Burlington, C. R. & N. R. Co. 94 Iowa, 256, 33 L. R. A. 496, 62 N. W. 761; Flater v. Fey, 70 Mich. 644, 38 N. W. 656.

Messrs. Nims, Hoyt, Erwin, Sessions, & Vanderwerp, for defendant in error:

The injury could not have been foreseen as the natural and probable result of the slightly defective insulation of an electric light wire securely fastened 2 feet above the telephone wire, and 20 feet above the ground.

Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744.

The wrongdoer is responsible only for such injurious results as could have been foreseen by the exercise of reasonable diligence and prudence as the reasonable, natural, and probable consequence of his wrongful act.

Powers v. Thayer Lumber Co. 92 Mich. 533, 52 N. W. 937; Consolidated Electric Light & P. Co. v. Koepf, 64 Kan. 735, 68 Pac. 608; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L. R. A. 399, 69 Pac. 338; Leeds v. New York Teleph. Co. 178 N. Y. 118, 70 N. E. 1 L.R.A. (N.S.)

219; Nelson v. Narragansett Electric Lighting Co. (R. I.) 67 L. R. A. 116, 58 Atl. 802; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199; Elliott v. Allegheny County Light Co. 204 Pa. 568, 54 Atl. 278; Ahern v. Oregon Teleph. & Teleg. Co. 24 Or. 276, 22 L. R. A. 635, 33 Pac. 403, 35 Pac. 549; Cooley, Torts, 2d ed. pp. 76 *et seq.*

Ostrander, J., delivered the opinion of the court:

It is not apparent that the requirement, by ordinance, that wires should be supported 25 feet above the ground was based upon any idea of safety of the public. Failure to comply with this provision of the ordinance is not the negligence charged. If it was, it is not to be presumed that it caused or contributed to the injury complained about. See, also, as to the right of this plaintiff to complain of the violation of the ordinance, Flanagan v. Sanders (Mich.) 101 N. W. 581. Whether or not the wires of defendant were exposed before the telephone wire was broken does not appear, nor does it appear whether it is possible, or, observing proper rules, usual, to prevent some exposure of copper wire of the size and kind, in the making of splices. Whether the substance with which the wires were covered could or probably would be removed by being struck by the telephone wire, as it was swung against it, does not appear. It is, however, decisive of the case that plaintiff has conclusively shown a condition and relation of things which, as to himself and the public generally, was safe and harmless if not interfered with, has shown neither invitation nor inducement warranting or excusing interference, and has just as conclusively proved an interference, participated in by himself, the character and the results of which were not to be reasonably apprehended or guarded against. Whether or not, under the circumstances of this case, we apply the term "trespasser" to one of plaintiff's years (Trudell v. Grand Trunk R. Co. 126 Mich. 73, 53 L. R. A. 271, 85 N. W. 250; Henderson v. Detroit Citizens' Street R. Co. 116 Mich. 368, 74 N. W. 525), he was certainly a wrongdoer, who, but for his acts of wrongdoing, would not have been injured. Indulging the presumption that plaintiff was not aware of the danger of seizing the telephone wire does not operate, of itself, to charge defendant with responsibility for what occurred. Neither the distance of defendant's wires from the ground, nor the fact, if it is a fact, that one of them was defective as to insulation, can be said to be the proximate cause of the injury.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA *ex rel.* EDWARD
T. YOUNG, Attorney General, Appt.,
v.

VILLAGE OF KENT *et al.*, Respts.

(.... Minn.)

1. Quo warranto—matter of right.

When the attorney general of the state, acting in his official capacity as the chief law officer of the state, exhibits an information in the nature of quo warranto to the district court, and asks that a writ issue, directed to a municipal corporation, requiring it to show cause why its franchise should not be declared null and void, the court has no discretion, but must grant leave to file the information as a matter of course, and direct the writ to issue. Upon the return, it is the duty of the court to try the issues of law and fact presented thereby, and to determine the same upon the merits according to rules of law applicable thereto.

2. Same—application to supreme court.

When an application in a proceeding of this character is made by the attorney general to the supreme court, instead of to the district court, that court will exercise the

Headnotes by ELLIOTT, J.

Case Note.—That the rule authorizing the filing of an information without leave of court in proceedings instituted by the attorney general, *ex officio* and without any relator, and authorizing the issuance of the writ as a matter of right in such cases, is generally adhered to in the absence of statutes modifying the rule, is shown by an examination of the authorities.

When the commonwealth, through her attorney general, applies for a writ of quo warranto, she is entitled to it without a previous rule to show cause. It is not to be presumed that the law officer of the commonwealth would apply for this high prerogative writ for personal or private ends. He is supposed to be impartial, and to seek only the vindication of the rights of the state. It is not so in the case of a private relator, who is usually put to his rule to show cause. It might not be so where the attorney general merely allows private counsel to use his name, as is sometimes done to procure the writ. But when the attorney general, or his recognized deputy, assumes the responsibility, the writ should issue in the first instance. *Com. ex rel. Atty. Gen. v. Walter*, 83 Pa. 105, 24 Am. Rep. 154.

The writ of information in the nature of a writ of quo warranto is in the nature of a writ of right where the proceedings are instituted by the attorney general by virtue of the inherent authority of his office. *State v. Brown*, 5 R. I. 1.

The attorney general may, without leave of court, file an information in quo warranto praying that a building and loan association be ousted of its franchises and

discretion given it by statute, and determine whether it is a case in which the writ should issue out of that court. If, in its judgment, the application should have been made to the district court, leave to file the information will be denied.

(November 17, 1905.)

A PPEAL by relator from an order of the District Court for Wilkin County dismissing a petition for a writ of quo warranto to determine the validity of the organization of the defendant village. Reversed.

The facts are stated in the opinion.

Messrs. Edward T. Young, Attorney General, Edward Valentine, and Jones & King, for appellant:

Where a court, having full and complete jurisdiction of the subject-matter of this proceeding, exercises its discretion, and, by a formal order, directs the issuance of a writ of quo warranto, it exhausts its discretion, and nothing remains possible for it to do in the premises except to try and determine the issues of fact and of law.

High, *Extr. Legal Rem.* § 606; *State ex rel. Heatherly v. Shank*, 36 W. Va. 230, 14 S. E. 1001; *People ex rel. Swigert v. Golden Rule*, 114 Ill. 45, 28 N. E. 383; *People*

corporate privileges. *State ex rel. Walker v. Equitable Loan & Invest. Asso.* 142 Mo. 325, 41 S. W. 916. The court here states that this rule is the settled law of Missouri, and cites a long list of Missouri cases in support of its decision.

At common law the attorney general, *ex officio*, has the right either to sue out a writ of quo warranto or to bring an information in the nature of a quo warranto, without leave of court. *Atty. Gen. v. Sullivan*, 163 Mass. 448, 28 L. R. A. 455, 40 N. E. 843, *Citing Goddard v. Smithett*, 3 Gray, 116; *Com. v. Allen*, 128 Mass. 308.

Leave of court is not necessary to enable a district attorney to institute proceedings in the nature of quo warranto to prevent the unlawful exercise of a corporate franchise. *People ex rel. Jerome v. State University*, 24 Colo. 175, 49 Pac. 286.

On the filing of an information, the writ issues upon the demand of the attorney general, against a person holding a public office, to inquire into his title thereto; and the court cannot inquire into his motives in instituting such proceedings. *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190.

Leave of court is not necessary to the filing of an information in the nature of a quo warranto by the attorney general *ex officio*. *State ex rel. Miller v. Seymour*, 67 N. J. L. 482, 51 Atl. 719.

The attorney general has the right, *ex officio*, where the proceedings are instituted without any relator, to file an information as of course, without leave of court. *State ex rel. Lloyd v. Elliott*, 13 Utah, 200, 44 Pac. 248.

ex rel. Jerome v. State University, 24 Colo. 180, 49 Pac. 286.

No leave of court is required.

High, Extr. Legal Rem. § 603; State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; State ex rel. Probstfeld v. Sharp, 27 Minn. 38, 6 N. W. 408; 17 Enc. Pl. & Pr. p. 448; State ex rel. Dowdall v. Dahl, 69 Minn. 108, 71 N. W. 910.

At common law the attorney general had the right, *ex officio*, to sue out such a writ.

17 Enc. Pl. & Pr. p. 444; State ex rel. Wetzel v. Tracy, 48 Minn. 497, 51 N. W. 613.

Messrs. J. W. Mason and Purcell, Bradley, & Divet, for respondents:

The writ of quo warranto is a writ of discretion, and not a writ of right.

Spelling, Inj. & Extr. Rem. §§ 1777, 1867; High, Extr. Legal Rem. §§ 604-606; 17 Enc. Pl. & Pr. p. 444; State ex rel. Dowdall v. Dahl, 69 Minn. 108, 71 N. W. 910.

When the writ is issued without the citation of respondents by an order to show cause, the court can exercise the same discretion upon a motion to quash that it could exercise upon the original application.

17 Enc. Pl. & Pr. pp. 447, 453; Gilroy v. Com. 105 Pa. 484; Com. ex rel. Fisher v. Kistler, 149 Pa. 350, 24 Atl. 216; Murphy v. Farmers' Bank, 20 Pa. 415; Com. ex rel. McLaughlin v. Cluley, 56 Pa. 270, 94 Am. Dec. 75; Com. ex rel. Atty. Gen. v. Dillon, 81 Pa. 46; People ex rel. Swigert v. Golden Rule, 114 Ill. 34, 28 N. E. 383; State ex rel. Eckhart v. Hoff, 88 Tex. 297, 31 S. W. 290; Spelling, Inj. & Extr. Rem. § 1857; State ex rel. McNulty v. Porter, 58 Iowa, 19, 11 N. W. 715; Stat. 9 Anne, chap. 20.

The court has the same discretionary control over the proceedings when prosecuted by the attorney general as when prosecuted on the relation of an individual.

Lamoreaux v. Ellis, 89 Mich. 146, 50 N. W. 812; State ex rel. Dowdall v. Dahl, 69 Minn. 108, 71 N. W. 910; State ex rel. Probstfeld v. Sharp, 27 Minn. 38, 6 N. W. 408; State ex rel. Bell v. Moriarty, 82 Minn. 68, 84 N. W. 495; State ex rel. Simpson v. Dowlan, 33 Minn. 536, 24 N. W. 188; People ex rel. Warfield v. Sutter Street R. Co. 117 Cal. 604, 49 Pac. 736; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; State v. Leatherman, 38 Ark. 81; State ex rel. West v. Des Moines, 96 Iowa, 521, 31 L. R. A. 186, 59 Am. St. Rep. 381, 65 N. W. 818; State ex rel. Douglas v. School Dist. No. 108, 85 Minn. 230, 88 N. W. 751.

Elliott, J., delivered the opinion of the court:

This is an appeal by the state of Minnesota L.R.A. (N.S.)

sota from an order of the district court vacating and setting aside an order permitting the institution of proceedings in quo warranto against the village of Kent and its officers and trustees. The writ was issued upon an information exhibited by the attorney general of the state, acting *ex officio* on behalf of the public, and not upon the relation of a private relator. It recited that because of certain irregularities, therein fully set forth, the village had never been legally incorporated, and that the pretended incorporation had no force or effect. The writ was duly issued on May 17, 1905. On June 5th the respondent moved to dismiss the information and writ on the grounds (1) that the court had no jurisdiction in the premises, and (2) that the cause of action was not a proper case for quo warranto in the district court, and that, by reason of special and exceptional circumstances involving the corporate existence of a municipal corporation and the interest and convenience of the public, application for said writ should have been made to the supreme court of the state. The writ had been made returnable on that date, and a motion seems then to have been made to dismiss the information on the grounds (1) that it was not a proper case for quo warranto in the district court, and (2) that the order permitting the issue of the writ had been "inadvertently made without consideration and without the court having exercised any discretion therein." The motion was granted on both grounds. The state contends that the trial court erred in granting this motion, because (1) it had full and complete jurisdiction, and (2) the attorney general had the right to institute the proceedings without the consent of the court, and (3) even if the court had any discretion in the matter, having once issued the writ, its discretion was exhausted, and it was then its duty to hear and determine the cause upon the merits.

1. We do not understand counsel for the respondent to seriously contend that the district court was without jurisdiction to entertain and determine this proceeding. Rev. Stat. 1851, chap. 80, § 1, abolished the writ of quo warranto and proceeding upon information in the nature of quo warranto; but that statute was repealed by chapter 122, Gen. Stat. 1866, which revived the writ as a common-law writ to be issued in a proper case by the district court, as the court of general original jurisdiction, the historical successor of the court of King's bench. State ex rel. Whitcomb v. Otis, 58 Minn. 275, 59 N. W. 1015; State ex rel. Whitcomb v. Lockerby, 57 Minn. 411, 59 N. W. 495. This court also has original jurisdiction in quo warranto, but the Constitution and statutes recognize the desirability that such proceed-

ings should ordinarily be instituted in the lower courts. Under Gen. Stat. 1894, § 4823, the supreme court will not order the writ to issue when "there is a remedy in some other court which is at all adequate." Gen. Stat. 1894, § 4823 (Gen. Stat. 1878, chap. 63, § 1), which provides for the exercise of the jurisdiction authorized by article 3, § 1, of the Constitution, empowers the supreme court to issue quo warranto writs, "subject to such regulations and conditions as the court may prescribe." These conditions are prescribed in State ex rel. Whitcomb v. Otis, *supra*, where it was said: "This court will not grant such an application if there is a remedy in some other court which is at all adequate, unless under special and exceptional circumstances, as for instance, that there will be great injury or inconvenience to the public by reason of the delay and uncertainty caused by commencing in the lower court and awaiting a final determination on appeal to this court." State ex rel. Simpson v. Dowlan, 33 Minn. 536, 24 N. W. 188; State ex rel. Diepenbrock v. Gates, 35 Minn. 385, 28 N. W. 927; State ex rel. Bell v. Moriarty, 82 Minn. 68, 84 N. W. 495. But it will be noted that it is the discretion of this court, and not that of the district courts, which is referred to in the statute. The jurisdiction of the supreme court being to a certain extent voluntary, it may decline to order the writ to issue in a case which comes within the conditions, even though the district court, under the same circumstances, would have no right to refuse it. The law which confers original jurisdiction upon this court expressly authorizes it to define the conditions under which it will be exercised; but the jurisdiction is conferred on the district courts without any such limitations. Their jurisdiction is complete, and in the exercise thereof they have a judicial discretionary power to grant or refuse leave to file information in the nature of quo warranto when applied for by individuals.

2. It is further contended that, even if the court had any discretion in the matter of allowing the information to be filed and the writ of issue, it was exhausted when the court once exercised its discretion and allowed the information to be filed and the writ to issue, and nothing thereafter remained for it to do but try and determine the issues of law and fact in accordance with the rules of law as in ordinary cases. In People ex rel. Jerome v. State University, 24 Colo. 175, 49 Pac. 286, Mr. Justice Campbell said: "The authorities seem to be unanimous that, when once the discretion of the court in which the proceeding is brought has been exercised and permission 1 L.R.A. (N.S.)

given to relator to file an information, such discretion is exhausted, and may not be recalled; but, on the contrary, the court must then proceed to determine the controversy the same as any other upon the law and the facts."

In Spelling, Inj. & Extr. Rem. vol. 2, § 1777, it is said: "Where, however, the court has, in the exercise of its discretion, permitted the information to be filed, its discretionary power is thereby exhausted, and the issues of fact and law as presented must, at the trial, be determined according to the strict rules of law as in ordinary cases." In State v. Brown, 5 R. I. 1, the court said: "The discretion to allow in such a case the filing of an information of this character is, as we apprehend, all the discretion which courts of . . . authority justify. When the information is filed, all the discretionary power of the court is expended." To the same effect are High. Extr. Legal Rem. § 606; People ex rel. Swigert v. Golden Rule, 114 Ill. 34, 28 N. E. 383; People ex rel. Woodward v. Paisley, 81 Ill. App. 52; Place v. People, 83 Ill. App. 84; State ex rel. Lloyd v. Elliott, 13 Utah, 200, 44 Pac. 248; State ex rel. Heatherly v. Shank, 36 W. Va. 230, 14 S. E. 1001. And see King v. Brown, 4 T. R. 276. Mr. Justice Campbell's statement that the authorities seem to be unanimous is hardly correct, as there are cases which hold that this discretionary control remains with the court until the case is finally determined and that, where leave is improvidently given, the court may, upon the hearing, refuse relief upon the same grounds upon which it might originally have refused leave to file the information. People v. Wild Cat Special Drainage District, 31 Ill. App. 223; People v. Hamilton, 24 Ill. App. 609; State ex rel. Eckhart v. Hoff, 88 Tex. 297, 31 S. W. 290; State ex rel. Atty. Gen. v. Claggett, 73 Mo. 388. We are of the opinion that the court exhausts its discretion when it exercises it upon the preliminary application for leave to file the information. This presumes, however, that the court actually exercises its discretion, and does not deprive it of the right to dismiss the proceedings if it subsequently appears that it acted improvidently or through inadvertence and under a misapprehension of facts. Gilroy v. Com. 105 Pa. 484; Com. ex rel. Fisher v. Kistler, 149 Pa. 356, 24 Atl. 216. Under such circumstances, no judicial discretion is exercised.

3. But has the court any power to refuse to allow the information to be filed in a case such as the record here discloses? This question cannot be answered intelligently without some consideration of the origin and development of the writ of quo warranto and the information in the nature

of the writ of quo warranto, and also of the practice and procedure at common law and under the early English statutes, which were a part of the common law as it was adopted in this country. The historical phase of the subject will be found somewhat extensively presented in State ex rel. Lloyd v. Elliott, 13 Utah, 200, 44 Pac. 248; State v. Ashley, 1 Ark. 304; High, Extr. Legal Rem. 3d ed. § 605; and in Blackstone's Commentaries, bk. 3.

A very brief *résumé* only is sufficient to show beyond the possibility of doubt or cavil that the ancient writ of quo warranto and the information in the nature of quo warranto at common law is and always was a writ of right at the instance of the attorney general *ex officio*, as the representative of the Crown, commonwealth, or state. As said by Chief Justice Comegys, the writ of quo warranto had its existence in the womb of the common law before the time of the Crusades, although never appearing upon the statute books as aided by parliamentary provision for its exercise until the time of the first Richard." State ex rel. Dunlap v. Stewart, 6 Houst. (Del.) 359. It issued out of chancery, and was returnable at first before the King's bench at Westminster, and at a later period before the justices in eyre. When these justices were displaced by the judges on the various circuits, the writ became again returnable before the justices at Westminster. In the unusually felicitous words of Coke, "with justices in eyre this branch lived, and with them it died." This was the ancient writ, a writ of right for the King, against him "who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right." Bl. Com. bk. 3, chap. 12, p. 5. The procedure upon this writ was complicated and cumbersome, and this, in connection with the fact that the judgment was conclusive, even against the Crown, led to its abandonment and the introduction of the information in the nature of quo warranto. The ancient writ was a purely civil proceeding, and the judgment never involved more than seizure of the franchise by the Crown. The information which took its place was a criminal proceeding, and involved fine and imprisonment, as well as the ouster of the defendant from the usurped franchise. It lost this character, however, long before the American Revolution, although the form of a criminal proceeding was retained in England until Stat. 47 & 48 Vict. chap. 61, p. 15, which provided that "proceedings in quo warranto shall be deemed to be civil proceedings whether for the purpose of appeal or otherwise." In some of the states the old form is still retained, and informa-

tions of this character are in form criminal, although in substance purely civil.

The ancient writ thus became obsolete in England, and the proceeding by information in the nature of quo warranto came into use. Informations in the nature of quo warranto were either (1) such as were filed by the attorney general *ex officio* on behalf of the Crown, or (2) those exhibited by the master of the Crown office on the relation of some private individual. The abuse of the right which the master of the Crown office exercised, of filing such informations on his own discretion at the instance of private persons who were not named as relators, led to the enactment of Stat. 4 & 5 Wm. & Mary, chap. 18, which made it necessary for a person who desired to file such an information to obtain permission to do so from the court and enter into a recognizance for the sum of £20. Rex v. Hertford, 1 Salk. 376. This statute was restrictive in its operation, and the purpose was to restrict the powers of the master of the Crown office to vex and oppress the King's subjects. It will be noted that the act in no way restrained or restricted the power of the attorney general when acting *ex officio* on behalf of the general public. It related solely to proceedings sought to be instituted by the master of the Crown office at the instigation of private individuals. This is also true of the famous Stat. 9 Anne, chap. 20, the substance of which has been embodied in so many American statutes relating to the subject of quo warranto. As we have seen, the former act was restrictive, but the statute of Anne was enacted for "rendering the proceedings upon writs of mandamus and informations in the nature of a quo warranto more speedy and effectual; and for the more easy trying and determining the rights of offices in franchises . . . and boroughs." In contrasting these two statutes, Mr. Justice Wilmot, in Rex v. Trelawney, 3 Burr. 1616, said that "the two acts of Parliament (Stat. 4 & 5 Wm. & Mary, chap. 18, and Stat. 9 Anne, chap. 20) relate to quite different objects, and are the reverse of each other. The former restrains the clerk of the Crown in this court [of King's bench] from exhibiting or filing informations without leave of the court in cases where all . . . subjects might, before the making of that act, have made use of his [the King's] name without such leave. The latter lets in everybody who desires it to make use of his name in prosecuting usurpers of franchises; whereas before no subject could have done so; but it provides that these informations (as well as those for misdemeanors) must be under the leave and discretion of the court. Therefore

the court ought not to give such leave without sufficient reason."

We thus find that the common law as we received it provided for the information in the nature of quo warranto in two classes of cases, and that these two classes included (1) those filed by the attorney general *ex officio* on behalf of the Crown, and (2) those allowed by the court to be exhibited by the master of the Crown office at the instance of a private individual. The second class includes (a) those relating to corporate franchises, which were the most numerous, and to which alone Stat. 9 Anne, chap. 20, applied, and (b) all others exhibited at the instance of private relators.

The ancient common-law writ of quo warranto was a writ of right for the King, and issued as of course at the instance of the attorney general. 4 Bl. Com. p. 309; case of Abbot of Strata Mercella, 5 Coke, 40; Rex v. Phillips, 4 Burr. 2090; Rex v. Staverton, Yelv. 190, Bulstr. 54; Whelchel v. State, 76 Ga. 647. After the ancient writ was displaced by the information in the nature of quo warranto, no one, so far as we have been able to discover, ever questioned the right of the attorney general to appear *ex officio* as the representative of the Crown, institute the proceedings without leave of court, and have the questions raised determined on their merits according to the laws applicable thereto. Rex v. Phillips, 3 Burr. 1565, per Lord Mansfield. The early authorities are uniformly to this effect. Thus: "Quo warranto is in the nature of a writ of right for the King, against him who usurps or claims any franchise or liberties to say by what authority he claims them." 7 Comyn's Digest, 190. "It seems to be the established practice at this day not to admit of the filing of any information (except those exhibited in the name of His Majesty's attorney general) without first making a rule on the persons complained of to show cause to the contrary." Bacon's Abr. title "Information" (d). "Informations in the nature of quo warranto," says Cole, "may be divided into two classes: (1) Information exhibited by and in the name of the attorney general *ex officio*, without any relator, and which are filed without leave of the court, or any recognizance being entered into; (2) informations exhibited to and in the name of the Queen's coroner and attorney . . . at the instance of a relator, or relators, which cannot in any case be filed without previous leave of the court." Cole on Information (Law Lib. vol. 46) 91, 113. "*Ex officio* informations are filed by the attorney general in his own name, without any relator, without leave of the court, and without any recognizance." Heard's Short, Extr. Rem. 112. "As regards the necessity of

applying for leave of court before filing the information, a distinction is taken between cases where the proceedings are instituted by the attorney general, *ex officio* and without any relator, and cases where they are brought upon the relation of a private citizen. In the former class of cases the information is filed as of course, without leave of court; but in the latter class the information may be filed only by leave of court first had and obtained for that purpose, and the application is not granted as of course, but rests in the sound discretion of the court." High, Extr. Legal Rem. § 707.

It may be noted in passing that at common law, when the information is filed by the attorney general, no relator need be named (2 Selwyn, N. P. 9th ed. 1165, Buller, N. P. 207; Territory ex rel. Parker v. Smith, 3 Minn. 240, 74 Am. Dec. 749, Gil. 164; Bartlett v. State, 13 Kan. 99; State ex rel. Probstfield v. Sharp, 27 Minn. 38, 6 N. W. 408), and that the mention of a relator under such circumstances is merely surplusage, which will be rejected (Denison, J., in Rex v. William, 1 Burr. 408; People ex rel. Warfield v. Sutter Street R. Co. 117 Cal. 604, 49 Pac. 736). In King v. Trevenen, 2 Barn. & Ald. 479, Chief Justice Abbott said: "Where a corporation acts contrary to the franchises which have been granted to it, and invades the rights of the Crown, the attorney general of his own authority, and without any application to this court for leave, may exhibit an information against them."

Where the common-law procedure prevails either by statutory enactment or adoption by the courts, the authorities in this country uniformly sustain the right of the attorney general to the writ, when the information is filed by him in his official character as the representative of the state. In the recent case of Meehan v. Bachelder, 73 N. H. 113, 59 Atl. 620, Bingham, J., said: "The attorney general *ex officio* has the right to bring an information in the nature of a quo warranto to try the title to a public office, and is not compelled to ask leave of the court." In Vanatta v. Delaware & B. B. R. Co. 38 N. J. L. 282, Mr. Justice Dixon said: "When facts exist which, in the opinion of the attorney general, call for a quo warranto information, he has the right to present it, without leave asked of anyone. In that respect he represents the sovereignty, whose attorney he is. Such a power existed unquestionably at common law, and neither the statute of 9 Anne nor our own statute in any way abridged it. Before 9 Anne quo warranto informations were filed either by the attorney or solicitor general *ex officio*, or by an officer of the court under the direction of the court, at the instance of

parties concerned. Such officer, in the King's bench, was the master of the Crown office. The statute of 9 Anne merely regulated the practice in some cases of this latter class, requiring the parties concerned to be named as relators and to become responsible for costs, etc. Our statute substitutes the attorney general for this master of the Crown office, and extends the range of the act; but in such case the attorney general is only nominally a party, a mere officer of the court, subject to its control. He is not there as attorney general, exercising in the cause that power which such officer had at common law, and which he still wields when he appears *ex officio*." In *State ex rel. Miller v. Seymour*, 67 N. J. L. 482, 51 Atl. 719, it was held that when the attorney general *ex officio* files an information in the nature of a quo warranto, the leave of court to file is not necessary. The court said: "This proceeding must be regarded as under our statute of 1795 (Gen. Stat. p. 2632), which is copied substantially from the statute of 9 Anne, chap. 20." *State v. Paterson & H. Turnp. Co.* 21 N. J. L. 9. And see *State ex rel. Gibbs v. Somers Point*, 40 N. J. L. 517, 10 Atl. 377. In *State ex rel. Lloyd v. Elliott*, 13 Utah, 204, 47 Pac. 248, it was said that an officer representing the state has the right to file an information as of course, without leave of court. In *Com. v. Allen*, 128 Mass. 308, Chief Justice Gray said: "This is an information at common law . . . for the usurpation of an office, which the attorney general has the right to file *ex officio*, in the name and behalf of the commonwealth, at his own discretion, and leave to file which the court has no authority to grant or withhold; and the mention of relators is mere surplussage, and does not affect the validity of the information or the form of the judgment to be rendered thereon." *Atty. Gen. v. Sullivan*, 163 Mass. 446, 28 L. R. A. 455, 40 N. E. 843. In *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080, the court said: "This court has no authority to direct the attorney general to file an information in the nature of a quo warranto. He is not an officer of the court, but an officer of the commonwealth, and in the performance of his official duties he is not subject to the direction of the court. In *Goddard v. Smithett*, 3 Gray, 116, the court explain the practice of the court of King's or Queen's bench in England in directing the master of the Crown office to file an information in the nature of a quo warranto on application of a private person. The court there says: 'But there being no corresponding office or officer in this commonwealth having authority at common law to prosecute in the name and behalf of the public, and at the same time an officer of

this court and subject to its orders and directions, no corresponding practice could prevail here.' The court also says of such an information that, 'when filed by the attorney general, it is done at his own discretion, according to his own view of the rights of the government, without leave of court; nor will the court direct or advise him on the subject.'"

Quo warranto is a writ of right for the commonwealth against one who usurps or claims franchises or liberties. *Com. ex rel. Atty. Gen. v. Dillon*, 81 *Pa. 41; *Com. ex rel. Atty. Gen. v. Walter*, 83 Pa. 105, 24 Am. Rep. 154. In *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190, where the history and use of the writ of quo warranto received elaborate consideration, Mr. Justice Westcott said: "The office of attorney general is, in many respects, judicial in its character, and he is clothed with a considerable discretion. The appropriate and proper function of courts is to hear causes that the citizen of the state may see proper to institute; and there are but few cases in which they can exercise a discretion to refuse to hear them. The attorney general being intimately associated with the other departments of the government, being as well the proper legal adviser of the executive as the legislative department of the government, it is highly proper, whenever the right to a public office is to be tried, that he should be clothed with a discretion in the premises which should be exercised . . . independently of the courts in actions of this character. . . . This discretion is vested in the attorney general. If he exercises it improperly, there is another tribunal, the people, or their grand inquest, the assembly, to punish him." In Missouri it has long been the established rule that the attorney general may, *ex officio*, file an information in the nature of a writ of quo warranto without leave of court as a matter of course. "It is the settled law of this state," said Mr. Justice Sherwood, in *State ex rel. Walker v. Equitable Loan & Invest. Assn.* 142 Mo. 325, 41 S. W. 916, "that such officer can, of his own motion and without leave of this court, file an information in quo warranto, and take all other subsequent and necessary steps to have such cause thus instituted passed upon and determined. *State ex rel. Circuit Atty. v. Bernoudy*, 36 Mo. 279; *State ex rel. Atty. Gen. v. McAdoo*, 36 Mo. 452; *State ex rel. Atty. Gen. v. Steers*, 44 Mo. 223; *State ex rel. Atty. Gen. v. Bishop*, 44 Mo. 229; *State ex rel. Atty. Gen. v. Hays*, 44 Mo. 230; *State ex rel. Atty. Gen. v. Vail*, 53 Mo. 97; *State ex rel. Ewing v. Townsley*, 50 Mo. 107; *State ex rel. Boyd v. Rose*, 84 Mo. 198; *State ex rel. Brown v. Westport*, 116 Mo. 605, 22 S. W. 888; *State ex rel. Brown v.*

McMillan, 108 Mo. 153, 18 S. W. 784. See also Shortt, *Mandamus & Quo Warranto*. 175; High, *Extr. Legal Rem.* 2d ed. § 45, and cases cited. This has been the rule of this state ever since *State v. Merry*, 3 Mo. 278." See also *State ex rel. Crow v. Lindell R. Co.* 151 Mo. 162, 52 S. W. 248; *State ex rel. Atty. Gen. v. Balcom*, 71 Mo. App. 27; *State ex rel. Crow v. Bland*, 144 Mo. 534, 41 L. R. A. 297, 46 S. W. 440; *State ex rel. Dearing v. Berkeley*, 140 Mo. 184, 41 S. W. 732; *State ex rel. Ing v. McSpaden*, 137 Mo. 623, 39 S. W. 81; *State ex rel. Jackson v. Mansfield*, 99 Mo. App. 146, 72 S. W. 471.

The control of the attorney general over such proceedings is recognized in *State ex rel. Warner v. Agee*, 105 Tenn. 588, 59 S. W. 340. See also *People ex rel. Jerome v. State University*, 24 Colo. 175, 49 Pac. 286, and *State v. Delieseline*, 1 M'Cord, L. 52. In *State v. Brown*, 5 R. I. 1, Chief Justice Ames said: "The information in this case was filed by the attorney general by virtue of the inherent authority of his office. . . . It is very true that in cases in which a private relator moves, as he may, to be permitted to use the name of the state for the purpose of inquiring by what warrant an individual holds and exercises a public office, the motion is subject to the regulated discretion of the court. The necessity, the policy of making the inquiry, and even the position and motives of the relator in proposing it, are all matters considered by the court, in the exercise of their discretion in granting such a motion, since a court of justice will not allow the name of the state to be used and its own time to be occupied, improperly or unnecessarily, or merely to feed the grudge of a relator who has no interest in the matter of inquiry, to the disturbance of the public peace." See *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311; *Com. ex rel. Atty. Gen. v. Walter*, 83 Pa. 107, 24 Am. Dec. 154 (leave necessary when the attorney general merely allows private counsel to use his name); *McDonald v. Alcona County*, 91 Mich. 459, 51 N. W. 1114; *People ex rel. Speed v. Hartwell*, 12 Mich. 522, 86 Am. Dec. 70; *State ex rel. Atty. Gen. v. Seattle Gas & Electric Co.* 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

It is thus apparent that, subject to the requirements of particular statutes regulating the procedure in quo warranto, the general rule in this country is substantially that of the common law after *Stat. of Anne*, chap. 20. The only case to which our attention has been called which directly sustains the contention of respondent is *State v. Leatherman*, 38 Ark. 81, in which the court sustained a demurrer to an information exhibited by the attorney general on

the ground that the state had by acquiescence lost the right to question the legal existence of the respondent corporation. It was admitted that to "apply this discretion to proceedings on the part of the state herself, without any private relator," was a departure from the general rule. Other cases cited by the respondent are not in conflict with the rule as we have stated it. *Atty. Gen. v. Erie & K. R. Co.* 55 Mich. 15, 20 N. W. 696, was a proceeding to forfeit the charter of a private corporation and was plainly controlled by the terms of the statute. Mr. Justice Campbell said: "The statute now in force on the subject of quo warranto requires leave before such an information is filed, and makes the granting here, as in England, discretionary." This is also true of *Capital City Water Co. v. State*, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62. In *Lamoreaux v. Ellis*, 89 Mich. 146, 50 N. W. 812, the court exercised the power to require the attorney general to set the machinery of the law in motion, and upon a proper and prima facie showing to file an information in the nature of quo warranto to test the right of an incumbent to the office of sheriff. A similar control over the attorney general's discretion in permitting such proceeding to be instituted was exercised by the court in *State ex rel. Dowdall v. Dahl*, 69 Minn. 108, 71 N. W. 910. But these cases both arose on the attempt of a private citizen to induce the attorney general to act. They were instances of the class over which the courts have exercised discretionary control ever since the statute of Anne was enacted. That the *Lamoreaux* Case falls within this class clearly appears from the quotation there made from *Vrooman v. Michie*, 69 Mich. 42, 36 N. W. 749, where the court said: "Courts can never act, unless upon some reasonable showing; and, as it is contrary to public policy to allow persons to be needlessly annoyed by vexatious claims, the statute which has long existed in England, while it allows the public representative, who is the attorney general or some other high official, to proceed *ex officio*, does not, as construed, permit a relator to proceed without exacting a very precise and positive showing." *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, also grew out of a contest between the attorney general and a private relator. *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 59 Am. St. Rep. 381, 65 N. W. 818, was brought upon the relation of an individual. *People ex rel. Warfield v. Sutter Street R. Co.* 117 Cal. 604, 49 Pac. 736, arose upon an information filed by the attorney general upon the relation of a private person, and it was held that the attorney general could not there-

after himself dismiss the proceedings without an order of court.

The distinction between proceedings by the attorney general and those sought to be commenced by private relators being thus clearly defined at common law, both before and after the statute of Anne, it remains to be seen whether the common-law practice has been changed by the statutes and decisions of this state. A careful examination leads us to the conclusion that the common-law procedure, but slightly modified, prevails in this jurisdiction. Article 6, § 2, of the state Constitution confers original jurisdiction upon the supreme court "in such remedial cases as may be prescribed by law." For the purpose of giving effect to this provision, the legislature enacted a statute (Gen. Stat. 1878, chap. 63, § 1; Gen. Stat. 1894, § 4823) which recites that "the supreme court has power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, . . . subject to such regulations and conditions as the court may prescribe." In *State ex rel. Probstfeld v. Sharp*, 27 Minn. 39, 6 N. W. 408, it was held that proceedings under this statute are governed by the rules of the common law. "This," said Mr. Justice Berry, "is a proceeding by information in the nature of quo warranto under Gen. Stat. 1878, chap. 63, § 1. It is not the action provided for in chapter 79 of said statutes, and the provisions of that chapter are not *per se* applicable to it. In the absence of any legislation or controlling considerations to the contrary, it follows that, as respects procedure, it is governed by common-law rules. . . . High, Extr. Legal Rem. §§ 629, 712, and cases cited: 2 Dill. Mun. Corp. §§ 717, 722; 5 Wait. Pr. 615; *People ex rel. Moses v. Pease*, 30 Barb. 588-591." See also *Territory ex rel. Wade v. Ashenfelter*, 4 N. M. 93, 12 Pac. 879; *State ex rel. Dunlap v. Stewart*, 6 Houst. (Del.) 372. In *State ex rel. Wetzel v. Tracy*, 48 Minn. 497, 51 N. W. 613, Mr. Justice Vanderburgh says: "The term 'quo warranto,' used in that section [referring to the statute], must be deemed to refer to 'an information in the nature of quo warranto' as existing at the common law;" citing *State v. West Wisconsin R. Co.* 34 Wis. 197, 208, 213.

Chapter 79, Gen. Stat. 1878 (§§ 5961-5973, Gen. Stat. 1894), provides for another remedy, which somewhat enlarges the functions of the common-law action and embodies some of the features of quo warranto informations. It is a civil action, and not a special proceeding. It provides that the attorney general may, in the name of the state, bring an action (1) for vacating the charter or annulling the existence of a corporation, other than municipal, whenever

such corporation offends in certain ways, and (2) for the purpose of annulling and vacating certain letters patent granted by the state under certain conditions. It also provides for the bringing of an action in the name of the state by the attorney general, on his own information or on the complaint of a private party, against the party offending in the following cases: (1) When any person usurps, intrudes into, or unlawfully holds or exercises any public office or franchise within this state, or (2) any office in the corporation created by the authority of this state, or (3) when any public officer has done or suffered any act which by the provisions of law cause a forfeiture of his office, or (4) when any association or number of persons act within this state as a corporation without being duly incorporated; and the attorney general may bring the action whenever he has reason to believe that any of these acts can be proved. It is further provided that, when an action is brought by the attorney general, by virtue of this chapter, on the complaint or information of any person having an interest in the question, the name of such person shall be joined with the state as plaintiff. This statute does not expressly provide that the attorney general shall obtain leave of court to bring the action; but it is apparent that the statute embodies some of the provisions of the statute of Anne, and the court has adopted a practice very similar to that in force in the English courts and in various states of the Union under that act.

A proceeding under chapter 63, § 1, Gen. Stat. 1878 (Gen. Stat. 1894, § 4823), is the common-law information in the nature of quo warranto, as it was known and used in England after the enactment of Stat. 9 Anne, chap. 20, and long before the date when English statutes were embodied in the common law which became a part of the law of this country in 1776. This common law clearly distinguished between proceedings by the attorney general *ex officio* and proceedings on the relation of a private person with the consent of the attorney general.

Turning, now, to the decisions of this court, we find the same distinction clearly recognized in all the cases. *Territory ex rel. Parker v. Smith*, 3 Minn. 140, 74 Am. Dec. 749, Gil. 164, was a proceeding under Rev. Stat. 1851, at a time when the writ of quo warranto and information in the nature of quo warranto did not exist in this jurisdiction. *State ex rel. Lindholm v. Parker*, 25 Minn. 215, was an action under chapter 79, instituted by the attorney general, on behalf of the state, on the relation of a private citizen, to oust the respondent from an office. *State ex rel. Probstfeld v. Sharp*, 27 Minn. 38, 6 N. W. 408, was instituted under chap-

ter 63, on the relation of a private individual, with the approval of the attorney general. It was not instituted by the attorney general *ex officio*; but the court recognized his general control over the proceedings. In reference to the suggestion that the relator had acquiesced in the proceedings, and was therefore estopped to proceed, Mr. Justice Berry said: "The answer to this is that it is the attorney general who has instituted and who is conducting the proceeding as the law officer of the state,—the representative, not of the relator, but of the government. It is for him to determine whether the public good requires him to proceed. . . . Notwithstanding any conduct of the party at whose instance he moves, if there is any case in which his determination would be overruled, it must certainly be a very extraordinary one, and not such a case as this." The case belongs to the class, well known at common law and provided for by the statute of Anne, in which the control of the proceedings is intrusted very largely to the court. In *State ex rel. Hahn v. St. Paul & S. C. R. Co.* 35 Minn. 222, 28 N. W. 245, the question of the original jurisdiction of the supreme court in quo warranto proceedings was raised and determined. The court said: "As between the remedy in this court by quo warranto and that by action in the district court, it is for the attorney general, to whom the interests of the state in such cases are intrusted, to determine which he will pursue." *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020, was upon an information in the nature of quo warranto filed by the attorney general *ex officio*. It was contended by the respondent that the attorney general had filed a disclaimer of any interest in the proceedings. Mr. Justice Mitchell said: "An inspection of the statement filed by him will show that it will bear no such construction. As such proceedings are in the nature of a public prosecution, having for their object the recovery to the state of a usurped or fortified franchise, and not to redress private grievances, no one but the attorney general has authority to institute or prosecute them; it being exclusively for him to determine when public interests require them to be instituted. Therefore, had he moved to dismiss, as he had the undoubted right to do, or had he stated that this was not a case which public interests required to be prosecuted, we would undoubtedly have dismissed, notwithstanding objections by private parties. But the attorney general having done neither, and the information being filed by him in his official capacity, this court did the only thing it could do under the circumstances, viz., to entertain the proceedings 1 L.R.A. (N.S.)

and determine them according to law." *State ex rel. Simpson v. Dowlan*, 33 Minn. 530, 24 N. W. 188, was an application by a private relator for leave to file an information in the nature of quo warranto. The application was denied. "We are also agreed," said Chief Justice Gilfillan, "that the granting of leave to file an information (especially upon the application of a private person) is within the discretion of the court, and that leave ought not to be granted where the law furnishes another remedy, unless under special and exceptional circumstances." This general statement must, of course, be read in the light of the facts of the case there under consideration. In *State ex rel. Wetzel v. Tracy*, 48 Minn. 497, 51 N. W. 613, the proceedings were instituted by a private relator in the name of the state with the consent of the attorney general. The object was to test the right of the respondent corporation to exercise the corporate franchise. It was held that the writ would not lie for such a purpose at the instance of a private party, that it must be presented and subscribed by the attorney general on behalf of the state, and that it was not enough that it was prosecuted with his formal approval. *State ex rel. Whitcomb v. Lockerby*, 57 Minn. 411, 59 N. W. 495, and *State ex rel. Whitcomb v. Otis*, 58 Minn. 275, 59 N. W. 1015, were both cases in which private relators sought to use the name of the state to have determined private rights, in which the state was but remotely concerned. In *State ex rel. Dowdall v. Dahl*, 69 Minn. 108, 71 N. W. 910, an appeal by a private person, with no special interest, for leave to file an information in the nature of a quo warranto, was denied because the attorney general had refused to give his consent. See *Pound v. Atty. Gen.* 119 Mich. 528, 78 N. W. 541, for a similar proceeding. *State ex rel. Dowdall v. Dahl, supra*, *State ex rel. Probstfield v. Sharp, supra*, and other such cases, show that, while the court always gives great consideration to the views of the attorney general, it exercises discretionary power over the matter of allowing the information to be filed and the writ to issue when the right to be determined affects individuals only and the attorney general does not appear *ex officio*. In *State ex rel. Bell v. Moriarty*, 82 Minn. 68, 84 N. W. 495, the petition was signed by the attorney general, but was presented to the court by the attorney for the private relator. The court said: "Ordinarily, when the attorney general asks that the writ issue, we assume, unless the contrary appears from an inspection of the information, that public interests require that the

writ issue. This is due to him as the head of the legal department of the state, charged with the duty of representing the interests of the state before this court. But where, as in this case, the application for the writ is made by the attorney of the relator, the attorney general consenting, but not participating, it is our duty upon our own motion to scrutinize the petition and deny the writ, unless it affirmatively appears from allegations of the petition that public interests require that it be issued."

The principle is thus firmly established in this state that the granting or withholding of leave to file an information at the instance of a private relator, or of a private relator with the consent of the attorney general, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. *High*, Extr. Legal Rem. 3d ed. § 605; *Goodnow*, Prin. of Adm. Law, p. 430; 4 *Vin. Abr.* p. 345. See *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385; *Com. ex rel. McLaughlin v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75; *Ohio Turnp. Co. v. Waechter*, 25 Ohio C. C. 605; *State ex rel. Nelson v. Mott*, 111 Wis. 19, 86 N. W. 569, under § 3466, Rev. Stat. Wis.; *People ex rel. Harrison v. Mineral Marsh Drainage District*, 193 Ill. 428, 62 N. E. 225. The information in the nature of quo warranto, as it exists in Minnesota, is thus substantially that known in England after the enactment of Stat. 9 Anne, chap. 20. *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.* 40 Minn. 213, 225, 3 L. R. A. 510, 41 N. W. 1020. Neither this statute nor Stat. 4 & 5 Wm. & Mary, chap. 18, were ever held to apply to informations exhibited by the attorney general *ex officio*. 3 *Stephens*, Nisi Prius, 24, 32; 2 *Tomlins*, Law Dict. 195; *Wescott, J.*, in *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 217.

It follows that the trial court erroneously dismissed these proceedings. The information was exhibited by the attorney general in his official capacity as the principal law officer of the state in a proceeding brought by the state to require a municipal corporation to show cause why its pretended incorporation should not be declared illegal and void. Upon the presentation of the information containing allegations sufficient to make a *prima facie* case, the court should have ordered the writ to issue as of course, and thereafter determined the issues of law and fact upon the merits as in ordinary proceedings.

The order appealed from is therefore reversed.

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MINNESOTA SUPREME COURT.

MICHAEL C. BRADY, Appt.,

v.

ADAM GILMAN, Respt.

(.... Minn.)

1. Redemption from foreclosure—creditor—notice.

The plaintiff filed a notice of his intention to redeem from a mortgage foreclosure sale as a judgment creditor, but his judgment was not docketed until four hours after his notice was filed. He attempted to redeem by virtue of such notice. Held, that he was not entitled to redeem, and his attempt to do so was void.

2. Notice—fractions of day.

The legal fiction that there are no fractions of a day has no application to cases where the statute expressly requires that notice shall be taken of the precise time an official act is done, and that a record thereof be made.

(November 17, 1905.)

APPPEAL by plaintiff from a judgment of the District Court for Hennepin County in favor of defendant in an action brought

Headnotes by **START**, Ch. J.

Case Note.—As is said in *Maine v. Gilman*, 11 Fed. 214, the ancient maxim that the law knows no fractions of a day is now chiefly known by its exceptions. Although the decisions are not uniform as to the extent to which such exceptions are admitted, the courts are in agreement as to the doctrine on which they are based.

In *Combe v. Pitt*, 3 Burr. 1434, Lord Mansfield observed: "But, though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done; for it is not like a mathematical point, which cannot be divided."

And it was said by Justice Story in *Re Richardson*, 2 Story, 577, that the rule that in law there is no fraction of a day is a mere legal fiction, and is never allowed to operate against the right and justice of a case.

When necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day. *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469, 26 L. ed. 775.

Fractions of a day in statutes, or legal proceedings, or in contracts, are not generally considered; but, when the rights of parties depend upon the precedence of time in the same day, or upon a given hour or fraction of a day, it may be alleged or proved, as any other fact. *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220.

In computing time, fractions of a day are

to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Charles E. Bond and M. C. Brady, for appellant:

All that the defendant is in a position to exact from a subsequent redeeming party is a repayment of the money due to him.

Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.

The docketing of the judgment is no part of the judgment. The note of the hour of the docketing of the judgment, standing alone, is not evidence.

Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380.

not as a rule considered, unless made material by the statute controlling the rights in litigation.

In *Seaman v. Eager*, 16 Ohio St. 209, it was held that where, by the terms of the statute, the time of receiving a chattel mortgage for record must be indorsed by the clerk, the time for refileing is to be computed from the hour at which the original filing was done.

The hour when an attachment was made, and the hour when bankruptcy proceedings were instituted, are to be taken into account in determining whether or not the attachment was made within four months of the commencement of proceedings. *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181.

Where a statute provides that "every Saturday after 12 o'clock, noon," shall be a holiday, such half days are to be excluded in computing time for taking an appeal under a statute excluding holidays from the number of days specified. *Ocuppaugh v. Norton*, 24 App. D. C. 296, 68 L. R. A. 272.

In *Lewis's Sutherland* on Statutory Construction, 2d ed. § 179, it is said, in reference to the rule that, where it is necessary to justice, the law takes notice of the parts of the day: "This necessity exists when an act is done on the same day that a legislative act is passed, if that statute, being passed afterwards, should not affect such act, or, being passed before, should do so."

The hour at which an act repealing a bankruptcy law was approved, is to be considered in determining whether a petition in bankruptcy, filed on the same day, is within the saving clause of such repealing act. *Re Richardson*, 2 Story, 571; *Re Ankrim*, 3 McLean, 285, Fed. Cas. No. 395; *Contra*, *Re Welman*, 20 Vt. 655.

Where an election was held on the same day that the law under which it was held was repealed, the court will determine whether the repealing act became effective, by approval, before or after such election. *People ex rel. Campbell v. Clark*, 1 Cal. 406.

The courts will determine whether a vote to issue railroad-aid bonds was taken before the closing of the polls of an election, held on the same day, at which a Constitution was adopted prohibiting such ac-
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The judgment of the trial court should have been in favor of plaintiff.

Clark v. Butts, 73 Minn. 361, 76 N. W. 199.

Mr. A. C. Middelstadt, for respondent:

A creditor who seeks to redeem from a mortgage foreclosure sale must have a lien upon the premises at the time he files his notice of intention to redeem.

Maurin v. Carnes, 71 Minn. 309, 74 N. W. 139; *Todd v. Johnson*, 50 Minn. 310, 52 N. W. 864; *Hughes v. Olson*, 74 Minn. 239, 73 Am. St. Rep. 343, 77 N. W. 42.

Start, Ch. J., delivered the opinion of the court:

Action of ejectment. Trial by the court

tion. *Louisville v. Portsmouth Sav. Bank*, *supra*.

Where a statute governing the right of appeal goes into effect upon its publication, the court will determine the hour of such publication in passing upon an appeal taken that day. *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114.

It is said in *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766: "For most purposes, the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from."

Prima facie, the presumption of law is that the several acts or steps in the course of a legal proceeding take place in the order necessary to give them legal effect. But, whenever an inquiry into the priority of acts, on the same day, becomes necessary in order to protect the rights of parties, the ordinary presumption must give way to the facts of the case. *Knowlton v. Culver*, 2 Pinney (Wis.) 243, 52 Am. Dec. 156.

It was held in *Wallace v. Syracuse*, B. & N. Y. R. Co. 27 App. Div. 457, 50 N. Y. Supp. 329, that a notice of trial, which may be served after the joinder of issue, is premature when served on the same day, but some hours before the answer is served.

Cognizance will be taken of the hour of each act in determining whether a motion to reduce the *ad damnum* of a writ to an amount which would preclude removal of a suit was granted before the filing on the same day of a bond for removal. *Maine v. Gilman*, *supra*.

So, also, the court will determine which of two suits based on one cause of action was first brought, where both were instituted on the same day (*Johnson v. Pennington*, 15 N. J. L. 188. *Contra*, *Middlebrook v. Travis*, 68 Hun. 155, 22 N. Y. Supp. 672): whether a suit in replevin, brought on the same day, was commenced before the cause of action arose (*Knowlton v. Culver*, 2 Pinney [Wis.] 243, 1 Chand. [Wis.] 214, 52 Am. Dec. 156); whether civil process was served upon the defendant before his conviction for felony, which took place on the same day, whereby he became, during the

without a jury. The district court of the county of Hennepin, in which the action was pending, as a conclusion of law based upon its findings of fact, directed judgment on the merits for the defendant. It was so entered, and the plaintiff appealed from the judgment.

The question for our decision is whether the conclusion of law and judgment are supported by the findings of fact. The short facts found by the court are these: On October 7, 1903, the premises in question were duly sold on the foreclosure by advertisement of a mortgage, which was the first lien thereon, to Nathan M. Barnes, mortgagee. On October 1, 1904, another

mortgage on the premises, which was the second lien thereon, was duly made to the defendant herein, and duly recorded on October 5, 1904. On the next day the defendant filed a notice in due form and substance of his intention to redeem as such mortgagee the premises from the sale on the foreclosure of the first mortgage. No redemption was made by the mortgagors, and on October 12, 1904, the defendant, as such junior mortgagee, redeemed the premises from the foreclosure sale. The usual certificate of redemption was issued to him and duly recorded on the same day. On October 6, 1904, the plaintiff secured from one of the mortgagors in the first mortgage a con-

term of his imprisonment, civilly dead (Neale v. Utz, 75 Va. 480).

In apparent conflict with the last-cited case, but in harmony with the rule that fractions of a day will be considered where justice demands it, is the decision in Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867, where it was held that the death of the defendant at a previous hour cannot be shown to defeat a judgment rendered on the same day.

The courts will take notice of fractions of a day, for the purpose of determining priority of appointment, as between receivers. Worth v. Piedmont Bank, 121 N. C. 343, 28 S. E. 488; People v. Central City Bank, 53 Barb. 412.

In Lang v. Phillips, 27 Ala. 311, it was said that the doctrine that the law does not take account of the fractions of a day "does not apply to statutes which, as between different acts, give a preference or priority to the one which is first done."

In discussing the question whether the courts will regard fractions of days in determining the precedence of judgment liens between one another, it is said in Freeman on Judgments, 4th ed. § 370: "It seems to be well settled . . . that, unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid *pro rata* out of the debtor's real estate. Still, this rule does not prevail universally. In many instances courts have inquired, even as between different judgments, the precise time when they were rendered or docketed, and decided that the law will take notice of fractions of days in the contests between creditors seeking to have funds realized from the sale of lands applied in satisfaction of their judgment liens."

The hour will be regarded, in determining the precedence of judgments entered on the same day (Biggam v. Merritt, Walk. [Miss.] 430, 12 Am. Dec. 576); where priority is given by statute to the one first registered (German Security Bank v. Campbell, 99 Ala. 249, 42 Am. St. Rep. 55, 12 So. 436), or where the statute requires the notation of the time

of receipt by the clerk (Bates v. Hinsdale, 65 N. C. 423).

In Clute v. Clute, 4 Denio, 241, it was said, *obiter*, that the court would determine the priority of executions placed in the hands of the sheriff on the same day.

As to whether, between mortgages and judgments entered on the same day, a fraction of a day will be considered, the decisions are in conflict. That it will be considered, has been held in, *inter alia*, Goetzinger v. Rosenfeld, 16 Wash. 392, 38 L. R. A. 257, 47 Pac. 882. *Contra*, Claason's Appeal, 22 Pa. 359.

As between a deed recorded and a lien acquired by rendition of judgment or issuance of execution, the courts will consider fractions of a day. Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232; Clark v. Duke, 59 Miss. 575; Metts v. Bright, 20 N. C. 311 (4 Dev. & B. L. 173) 32 Am. Dec. 683.

The courts will also determine the precedence of attachments levied, or lodged in the sheriff's office, on the same day. Tufts v. Carradine, 3 La. Ann. 430; Brainard v. Bushnell, 11 Conn. 16; Callahan v. Hallowell, 2 Bay, 8.

Fractions of a day have been considered in determining whether an offer to deliver was seasonably made, where, by the terms of the contract, the offer was to be made "by the first half of August" (Grosvenor v. Magill, 37 Ill. 239); whether an auctioneer made the memorandum required by the statute of frauds "at the time of the sale" (Graig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299); whether a garnishment was made before or after an assignment of his contract by the garnishee (Malvin v. Sweitzer, 1 Kulp, 5); whether a set-off was acquired before the execution of an assignment for creditors (Collins v. McKee, 44 Phila. Leg. Int. 167); whether a lease was executed previously to a mortgage (Lockett v. Hill, 1 Woods, 552, Fed. Cas. No. 8,443); whether a check deposited was covered by a guaranty of sums thereafter to be held against the depositor, made the same day (First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766); or which of two sales made the same day was first, where the right to an easement depended upon it (Maynard v. Esher, 17 Pa. 222).

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fession of judgment in his favor in the sum of \$25, and in the afternoon of that day and before 12:20 o'clock delivered it to the clerk of the district court and requested him to enter and docket it forthwith, which the clerk promised to do. There is no showing at what hour of the day last named the judgment was entered in the judgment book in the clerk's office; but the judgment docket does show that the plaintiff's judgment was not docketed until the hour of 5 o'clock of that day. On the same day, and at the hour of 1 o'clock p. m., the plaintiff filed in the office of the register of deeds a notice in proper form stating his intention as a judgment creditor to redeem the premises from the foreclosure sale. On the following October 17th the plaintiff attempted to redeem the premises as such judgment creditor, and did all things necessary to make a valid redemption, save and except that the only notice of his intention to redeem was one filed four hours before his judgment was docketed. Thereupon the usual certificate of redemption was made and delivered to the plaintiff, which was recorded the next day. On March 15th following, on application of the plaintiff and consent of the judgment debtor, the district court of the county of Hennepin ordered the clerk to amend the docket entry so as to show that plaintiff's judgment was docketed at 12:30 o'clock p. m., October 6, 1904, and, further, that the judgment, after such change is made in the record, shall have the same force and effect as if it had been docketed at 12:30 o'clock p. m., provided that the rights of third persons shall not be affected by the order.

Was the plaintiff's attempted redemption of the premises valid? This is the sole question presented by the record, and we answer it in the negative. The attempted amendment of the docketing of the plaintiff's judgment is not relevant here, for the rights of the defendant were not affected by the action of the court to which he was not a party. Every clerk of the district court is required to keep a docket, in which he shall enter alphabetically the name of each judgment debtor, the amount of the judgment, and the precise time of his entry. Gen. Stat. 1894, § 861. The judgment becomes a lien on the unexempted land of the judgment debtor only from the time of so docketing it. Gen. Stat. 1894, § 5425. A creditor having a junior lien, legal or equitable, on mortgaged premises may redeem from a foreclosure sale thereof, provided he files notice of his intention to do so within the year allowed for redemption. 1 L.R.A. (N.S.)

Gen. Stat. 1894, § 6044. It is a condition precedent to the exercise of the right of such creditor to redeem that he file a notice of his intention to do so, and to entitle him to give the notice he must have a lien on the premises at the time he files his notice. Therefore a notice of an intention so to redeem, filed by an intended redemptioner before he is in fact a lien creditor, is void, even though by the docketing of his judgment he afterwards becomes such creditor before the year to redeem expires. *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139.

The plaintiff contends that the trial court found that there was no evidence showing at what hour the judgment was docketed, and does not find that it was not docketed until the hour of 5 o'clock p. m. What the court did find was that there was no evidence showing at what time the judgment was entered in the judgment book, but that the docket book did show that the judgment was not docketed until 5 o'clock p. m. The clerk was required by law to enter the precise time of the docketing, and he is presumed to have done his duty. The necessary inference from the finding is the ultimate fact that the judgment was not docketed until the hour named.

It is also urged on behalf of the plaintiff that the defendant cannot question the validity of the redemption, for the reason that all he was entitled to was the amount paid by him to redeem from the mortgage foreclosure sale and the amount of his own lien, with interest; all of which was paid by the plaintiff to the sheriff when he attempted to redeem. Such is not the law, for the defendant, by his redemption, was subrogated to the rights of the purchaser at the foreclosure sale, and thereby obtained the right to acquire the absolute title to the premises, unless redeemed within the time allowed by law, by one having the legal right so to do. *Hughes v. Olson*, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42.

The last contention of the plaintiff to be considered is that the law does not take notice of fractions or parts of a day; hence the judgment must be deemed to have been docketed at the time the notice of intention to redeem was filed, both acts having been done on the same day. The legal fiction that there are no fractions of a day has no application to cases like this one, where the statute, to avoid confusion, expressly requires that notice shall be taken of the precise time an official act is done and that a record thereof be made.

Judgment affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp't.,
v.

C. D. CRAWFORD, Appt.

(.... Minn.)

1. Appeal—review—evidence elicited by juror.

Where questions improper in form are asked of and answered by a witness in a criminal case, and no objection is made nor exception taken, no error is saved which is subject to review by an appellate court as a matter of right; and if such inquiries are made by a jurymen with the court's permission, failure of the court to interpose objections is not necessarily reversible error.

2. New trial—errors of law.

In criminal cases, the granting or refusing of a new trial for errors of law should not be determined by mere technical conformity with, or infringement of, rules of practice and evidence.

3. Same—when granted.

New trials should be granted only when the substantial rights of the accused have

been so violated as to make it reasonably clear that a fair trial was not had.

4. Homicide—crime established—new trial refused.

The defendant in this case was found guilty of murder in the first degree, and was sentenced to be hanged for the murder of a fellow traveler in a box car, while the accused and another were engaged in holding up the murdered man and other inmates of that car. The principal assignment of error was based upon questions asked by a juror of a witness, with the court's permission, involving a conclusion or opinion as to whether the accused stepped aside to take aim at his victim, to which no objection was made and no exception was taken. Four eyewitnesses to the shooting testified, without attack, impeachment, or inconsistency, to every detail of the homicide. The revolver which fired the bullet and the bullet which was taken from the brain of the dead man were produced, identified, and connected with the accused. He himself took the stand in his own defense and admitted the robbery and shooting, but denied intent to kill. Under such circumstances, a new trial is refused and the judgment affirmed.

Headnotes by JAGGARD, J.

(October 27, 1905.)

Case Note.—Very little is to be found in the decisions or law books of any kind with respect to the right or propriety of inquiries by jurymen of witnesses. While the court in the above case takes a strong position against reversing convictions in criminal cases for technical errors of no vital consequence, it distinctly holds that there was in this case no error, technical or otherwise, in permitting a juror to ask a question of a witness to which no objection was made in the trial court, though it admits that there might be cases in which it would be an abuse of discretion in the court to permit questions by jurors, and in which it would be the more orderly practice for the court to ascertain the point of the juror's inquiry, and then see that it is properly formulated and asked by counsel.

In the few cases in which such questions of witnesses by jurors have been discussed and passed upon they have generally been held proper, or, at least, free from prejudice. Thus, in *North Chicago Street R. Co. v. Burgess*, 94 Ill. App. 337, where misconduct of one of the jurors was alleged in entering into a colloquy with counsel and asking questions of witnesses, the court said: "While the juror assumed a duty which did not belong to him, still there is nothing which shows that he had become incompetent to discharge his duty as juror, though he does appear to have been over-officious and inclined to be disputatious. But we find no objection made by counsel for appellant at the time to the juror's interference. It is too late to raise the objection for the first time on motion for a new trial, having taken, without objection, the chances of a favorable verdict."

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Similar language was used in *Chicago, M. & St. P. R. Co. v. Harper*, 128 Ill. 384, 21 N. E. 561, where the court said: "While the juror, in his attempt to examine a witness, assumed a duty which did not belong to him, and which perhaps ought to have been checked by the court at the outset, still there is nothing in the nature of the questions which disclosed the fact that the juror had become incompetent to discharge his duty as a juror." It was therefore held that there was no error in denying a motion to exclude him from the panel.

In *Chicago, M. & St. P. R. Co. v. Krueger*, 124 Ill. 457, 17 N. E. 52, complaint was made of prejudice on the part of the juror, to which the court said: "This complaint is founded entirely upon manifestations of alleged prejudice exhibited by the juror during the progress of the trial, in his cross-examination of witnesses. However this may be, we do not find therein ground for reversing the judgment."

More unqualified approval of such inquiries by jurors was expressed in *Schaefer v. St. Louis & Suburban R. Co.* 128 Mo. 64, 30 S. W. 331, where questions were asked of witnesses by jurors, as well as by the court, in their endeavor to properly understand the facts in evidence. The court said: "We do not see how this could have possibly been prejudicial to the plaintiff, and do not see why it was not a commendable thing in both the court and the jury endeavoring to ascertain just exactly the situation at the time of the injury, so that they could properly determine the case before them. In fact, the objection is rather a novel one, coming from the plaintiff."

APPEAL by defendant from a judgment of the District Court for Sherburne County, convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. **Ernest S. Cary** and **Charles S. Wheaton**, for appellant:

It was the duty of the court, in its sound discretion, with regard to the rights of the defendant, to determine whether or not the questions were proper and competent questions, before allowing the same to be submitted to the witness, and not allow incompetent questions to be asked witness.

Sowers v. Dukes, 8 Minn. 23, Gil. 6; *Lamoure v. Caryl*, 4 Denio, 370; *Morehouse v. Mathews*, 2 N. Y. 514.

The opinions of witnesses are, in general, irrelevant.

2 Jones, Ev. § 361; 1 Current Law, § 9b, p. 1159; *Hathaway v. Brown*, 22 Minn. 214; *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *People v. Driscoll*, 107 N. Y. 414, 14 N. E. 305; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

The defendant has the right to insist that illegal and improper evidence, which may be harmful, shall be excluded.

People v. Wood, 126 N. Y. 249, 27 N. E. 302; *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404; *People v. Barberi*, 149 N. Y. 256, 52 Am. St. Rep. 717, 43 N. E. 635.

Messrs. **Edward T. Young**, Attorney General, **C. S. Jelley**, and **Frank T. White**, for respondent:

Objections to evidence, raised for the first time on appeal, will not be considered.

8 Enc. Pl. & Pr. p. 211; *Wilson v. Minnesota Farmers' Mut. F. Ins. Asso.* 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; *Aultman v. Kennedy*, 33 Minn. 339, 23 N. W. 528; *Roehl v. Baasen*, 8 Minn. 26, Gil. 9; *Powell v. McCord*, 121 Ill. 330, 12 N. E. 262; *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432; *State v. Ahren*, 54 Minn. 195, 55 N. W. 959; *Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179, 22 N. E. 797.

Jaggard, J., delivered the opinion of the court:

The accused, **C. D. Crawford**, jointly indicted with one **George R. Palmer** for murder in the first degree, was convicted on separate trial, and was sentenced to be hanged. On application of his counsel, a stay of execution was granted. The case comes before this court upon an appeal from the judgment of the trial court. The assignments of error are twenty-three in number. Upon argument in this court, counsel for the accused expressly waived all except the one to which reference will especially be made hereafter. A brief statement of the facts in this case is essential to the proper
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understanding of the questions thus raised. **Crawford** and his codefendant, **Palmer**, knew each other before the night of the murder. **Crawford** had been in the Army and was familiar with the handling of firearms. He and **Palmer**, together with five other young men,—**Lundin**, **Freeman**, **Bjorquist**, **Conradson**, and **Kenner**,—were riding together on a freight train, in a combination mail and baggage car, with the consent of a brakeman. **Crawford**, testifying on his own behalf, confirms the narrative of the other eyewitnesses in almost all essential particulars. In substantially his own language, the tragedy occurred as follows: He had said to **Palmer**, while they were on the car: "Let's hold them up." **Palmer** replied: "All right; I've a flash light." He passed the light over to **Crawford**, who then had both the light and a revolver. **Palmer** found a club in the car. "They each knew what each of them had to do, and what he had to do in order to make this hold-up effective." **Crawford** held the flash light in his left hand on the heads and faces of the men, "on one and then the other," and followed the light with his revolver in his right hand. **Palmer** flourished his club. Both **Crawford** and **Palmer** cried out: "Throw up your hands!" Although no one offered any resistance, **Crawford** fired one shot in the air just to "scare" the prospective victims. At the rear end of the car was a sorting table, about 5 feet long and 4 feet wide. **Lundin** and **Bjorquist** had lain down on it and had gone to sleep, each lying on his right side, each with his face to the front end of the car. **Bjorquist** awoke, got off the table, and held up his hands. **Lundin** remained on the table. After the first shot was fired, **Lundin**, lying with one hand in his overcoat pocket, did not get up; but, when **Palmer** tried to waken him, it seemed to **Crawford** "as if he kind of raised up a little." **Palmer** then stepped away and, according to **Crawford**, said to **Crawford**, "Wake him up;" according to all other eyewitnesses, "Shoot the sun of a bitch." **Crawford**, then only a few feet away from **Lundin**, passed the light backward and forward and followed the light with the revolver. He "shot the revolver immediately after **Palmer** said 'Wake him up.'" He said: "I was standing, more or less standing still at that time, but just then the cars—just as he said 'Wake him up,'—the cars jerked. I had the revolver like this [illustrating], and just as he said 'Wake him up' the train jerked, and I stepped forward. It threw me forward and brought the revolver down like that [illustrating] just as the cars jerked, and just as I went forward the gun went off, and I noticed that the man on the table kind of quivered. I noticed that he did not get up."

The witnesses indicated the way in which Crawford held the flash light in his left hand, so that the light fell on Lundin's face, and the gun in his right hand. He raised or moved up his arm when he was getting ready to shoot Lundin. Conradson testified, without objection, that Crawford "moved it [the flash light] up like this and took aim. He did not take a very long aim, but he brought it up to his eye." Without objection, Kenner testified at one place "that Crawford just took deliberate aim and fired." At another place, in answer to the question, "Did you mark that as the place where he was standing at the time the first shot was fired?" he said, "No, sir; I don't think so, and, if I did, I was mistaken, because he stepped over there at the time he fired the second shot, so that he would have a chance to get a line on his [Lundin's] face." The two defendants then proceeded to rob their four living companions. When they came to the dead man, Palmer seems to have hesitated; but Crawford said: "You need not be afraid of him. He is dead. Dead men tell no tales." Thereupon Palmer robbed the body, taking from it, among other things, a watch. Having taken everything they could find, Palmer said: "We are having damned poor luck this fall," or "damned poor picking this fall." Crawford thereafter ordered Conradson to open the car door, and Palmer said: "We are through with you fellows. Climb out of there." The men in the car proceeded to obey. One of them got out of the car just as the rapidly moving train was about to go over a bridge. He waited until the bridge was passed and then jumped. The others followed. None were seriously hurt. The two defendants stayed on the train some time longer, then left it and went to the shores of a river where they divided the "swag" or "junk" as Crawford describes it. This included the watch which was taken from the body of the dead man and identified by his father, the jeweler who sold it, and otherwise, and which was found in Crawford's possession when he was arrested.

Toward the close of the case of the state there occurred the only matter which is now properly before us upon assignment of error.

The record reads: By one of the jurors:

Q. I would like the witness a question to ask.

The court: You may ask it.

Q. Mr. Conradson, you say that after he the first shot did fire, and before he did the second shot fire, he did to one side step?

A. Yes, sir.

Q. Now, I would like to ask you if your best judgment is if he, after he the first shot did fire, and before he did the second
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shot fire, he did to one side step that he might the better aim take?

A. Yes, sir; so that he could see Lundin's face better and get out of our line and get a better view of Lundin.

Q. And you say that he careful aim did take?

A. Yes, sir.

Q. And then did you hear the report?

A. Yes, sir.

Q. Now, then, after you the report did hear, did you right away know that Lundin was hit?

A. No, sir.

Q. How long after you the report did hear before you knew that the man on the table sleeping was hit?

A. I didn't know that he was hit. I knew that he didn't get up, and I thought he must be shot. That is all I knew about it.

Counsel for the accused insists that it is the duty of the court, in its sound discretion, to allow the juror to ask any proper and competent question, but it was likewise the duty of the court, in its sound discretion, with regard to the rights of the defendant, to determine whether or not the questions were proper and competent questions before allowing the same to be submitted to the witness, and not to allow incompetent questions to be asked, and that failure to object to this question involving the opinion of this witness was error. In support of this he cites typical authorities to the effect that it is a well-established principle that the rejection of competent and material evidence, or the reception of incompetent and improper evidence, which is harmful to the defendant and excepted to, present an error requiring reversal. Such a ruling affects the substantial rights of the defendant, even though the appellate court would, with the rejected evidence before it, or with the improper evidence excluded, still come to the same conclusion reached by the jury. The defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury, and to have illegal and improper evidence, which may be harmful, excluded, and have the opinion of the jury upon proper evidence admitted in the case, and upon such evidence only. *People v. Wood*, 126 N. Y. 249, 27 N. E. 362; *People v. Greenwall*, 108 N. Y. 296, 2 Am. St. Rep. 415, 15 N. E. 404. As was said by Earl, J., in the latter case: "A person on trial for his life is entitled to all the advantages which the laws give him, and among them is the right to have his case submitted to an impartial jury upon competent evidence." *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066.

We are satisfied that, as a matter of strict technical construction, there is no error in this record entitling the accused to a new trial as a matter of right. Essentially the same matters as those here objected to had been previously testified to without objection or exception, as appears from the statement of testimony previously made, and were not assigned as error here. No objection was made to the question asked by the jurymen, nor to the admission of the testimony in answer, nor was any motion made to strike it out, nor was any exception taken in any way thereto. Accordingly, assuming that the questions and testimony have all the legal faults counsel for the accused contends for, and that the decision of this case is to be rested upon technical rules, the appeal must fail. *Saving Questions for Review*, 2 Current Law, 1590. And see *Id.* 1594, *et seq.* That the inquiries were made by a jurymen with the court's permission did not necessarily impose upon the trial judge the duty of conducting the defense by interposing objections based upon their not very improper form, because objections by his counsel might prejudice the defendant. We do not hold that the court's discretion in this regard might not be abused upon a different state of facts. There are cases in which it would be the more orderly practice for the trial court, in its discretion, to ask the jurymen to indicate the point of his inquiry, and then to see that the question is properly formulated, as by directing counsel to put it, so as to afford the usual opportunity for objection and exception. Indeed, there is ordinarily no occasion for a jurymen to interrogate a witness. In the instant case, however, no abuse of discretion on the part of the trial court and no reversible error appears in this matter.

The decision in this case, however, is not based upon compliance or noncompliance with technical rules of practice or evidence. Such rules are primarily different from the constitutional guaranties, without the strict observance of which punishment, even by a properly constituted court, is little better than the punishment by a mob. Matters of mere procedure, however, have no such sanctity. When a court exercises its traditional power to regulate a trial, to pass on the competency, materiality, or sufficiency of evidence, or the propriety of the form of a question, and to revise the action of a jury, it violates no constitutional right; nor does it when it confirms the verdict of a jury. Rules of practice and evidence are primarily designed to secure the orderly administration of the laws of the land. They serve their purpose so far as, and only so far as, they conduce to a fair trial. But, instead

of serving as a means of securing justice, they have been made to usurp dominion, as if their observance were the end to be attained. Decisions of many courts have determined controversies concerning them as if they were the constitutional requirements,—as if the object of the law was their evolution into a perfect system,—and as if the function of even the highest judicial tribunals was to secure their consistent enforcement. Under the guise of protecting the “rights of the accused,” this perversion in the use of these rules has been and must be the source of wrong, alike to the accused and to the public. For, on the one hand, cases involving human lives may arise in which an appellate court would properly feel that there was imposed on it the duty of setting aside a verdict of conviction and of granting a new trial for errors committed by the trial court resulting in an unfair trial of the defendant, although no objection or exception was made or taken to the improper admission or exclusion of evidence, or to the improper conduct or ruling of a trial court, because of the mistake or misconduct, neglect, or incompetency of his counsel. The strict application of practice rules would then make a new and fair trial impossible. On the other hand, the exaggeration of the value of such technicalities has opened the doors for the escape of unnumbered and undoubted criminals. “Some of the instances of its enforcement would seem incredible, even in the justice of a tribe of African fetish-worshippers.” 1 Wigmore, *Ev.* p. 73, § 21.

There is a current impression on the part of the profession of law, and of the community in general, that all courts are hopelessly committed to this apotheosis of an artificial system, as repugnant to common sense as it is subversive of common justice. In point of fact, this is far from being true. The original English rule was that erroneous admission or exclusion of evidence, duly objected to, would not be a basis for a new trial if the rest of the testimony be sufficient to warrant the conclusion to which the jury have come. Later, and about 1835, a different rule came to be generally accepted; *viz.*, “that an error or ruling created *per se* for the defeated party a right to a new trial. It remained the law of England until it was reformed away for civil cases in 1875.” In the United States this rule is the law in the majority of jurisdictions, but it is not sustained by the better opinion or reason (1 Wigmore, *Ev.* p. 71, § 21), and is distinctly not the law in this state. In *State v. Nelson*, 91 Minn. 143, 144, 145, 97 N. W. 652, Brown, J., says: “New trials in criminal prosecutions have for many years been

granted by the courts with too much liberality (3 Columbia Law Rev. 433), and to such an extent have the technical rights of accused persons been magnified and upheld, and that, too, in cases where guilt has been overwhelmingly shown, as to result in much public discontent, and to bring the administration of the criminal laws into disrespect. Errors of no vital consequence, at least not affecting materially the substantial rights of the accused, either in the admission or exclusion of evidence, in the instructions of the trial court to the jury, or alleged misconduct of the prosecuting attorney, have opened prison doors and liberated many criminals. This condition has caused peaceful and law-abiding citizens to become lawless, and to join in the barbarous method of punishing crime by a resort to the court of Judge Lynch. All such outrages of the law have been attributed in the main to the lax administration of the laws in the criminal courts, the gravity and tenacity with which they respect the alleged legal rights of the criminal, and the unnecessarily strict adherence to ancient forms and procedure. Remedies have been suggested, among others, that the right of appeal be taken away in such cases; but it is believed that the only appropriate way to quiet the public mind in this respect and restore confidence in the ability of the courts to administer justice, not only to the criminal, but to society and the state as well, and to overcome the tendency to resort to lynch law, is a prompt and speedy trial, conviction, and certain and unrelenting punishment of the guilty, unaccompanied by the long delays usually incident to the administration of criminal laws, and unaccompanied, too, by too much respect for refined and subtle technicalities. New trials should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had."

The present case, however, presents neither error nor unfair trial. The substantial rights of the accused have not been violated. We have examined with care, notwithstanding the waiver of counsel for the accused, all his assignments of error, and find all without merit. Throughout the entire case, the record shows, the trial court carefully followed each successive development of testimony, correctly ruled on every question raised by counsel, and so ordered that the result was an eminently just and impartial trial. The counsel of the accused who tried the case before the jury, but who did not appear for him upon this appeal, was appointed by the court. He performed his difficult and painful duties with fidelity and ingenuity. So far as the testimony is concerned, the language of Porter, J., in a 1 L.R.A. (N.S.)

similar case (*People v. Gonzalez*, 35 N. Y. 49, 59) is apt: "The circumstances which were established by evidence confessedly competent were so conclusive as to the guilt of the prisoner that no honest jury could refuse to convict him of the crime. . . . We are under no legal or moral obligation to assume that the jury might have rendered a false verdict . . . but for the erroneous admission of . . . evidence." The prosecuting attorney without error proved every step in the perpetration of the double felony, from its beginning to its end, by testimony the most direct, complete, and conclusive, amounting to a substantial demonstration of the guilt, and of the degree of guilt, of the accused. Not only did four full-grown men, who, in the possession of all their faculties, had seen, in the light held by the prisoner himself, in his presence and in the presence of each other, every act of the tragedy, testify without attack, impeachment, or inconsistency, to every brutal detail,—not only were the revolver which shot the bullet and the bullet which was taken from the brain of the dead man produced, identified, and connected with the deceased,—but he himself voluntarily took the stand and admitted the robbery and the shooting. There is accordingly no doubt that the judgment of the trial court should be, and it is hereby, affirmed; and it is hereby directed, in accordance with the statute (*Gen. Stat. 1894, § 7391*), that the sentence pronounced by the trial court be executed.

Judgment affirmed.

NEVADA SUPREME COURT.

WILLIAM BELL et al., Petitioners,
v.

FIRST JUDICIAL DISTRICT COURT FOR
ESMERALDA COUNTY et al.

(.... Nev.)

1. Officer—removal—unconstitutional statute—injunction.

The fact that a statute providing for the removal of an incumbent from a public office is unconstitutional will not prevent the

Case Note.—In determining whether or not a writ of prohibition will lie in a particular case, it must be borne in mind that it is an extraordinary writ, and lies only when an inferior court proposes to exceed its lawful jurisdiction, and the party seeking it is without other adequate means of redress for the wrong about to be inflicted by the act of the inferior tribunal. *Spelling, Injunctions & Extraordinary Remedies*, 2d ed. pp. 1472, 1486. From this it is obvious that, in order to entitle a party to a

issuance of a writ of prohibition to prevent proceedings under it, if relief has been denied petitioner in the lower court, and there is no other plain, speedy, and adequate remedy.

2. Statute—title—elections.

The trial of an officer, after his election, for malfeasance in office, his removal, and the appointment of his successor, are not properly covered by a statutory title "Elections."

3. Conflicting constitutional provisions.

A constitutional provision as to the entitling of statutes is not superseded by a provision that "provision may be made by law for the removal from office of any civil officer for malfeasance or misfeasance in the performance of his duties."

(August 3, 1905.)

APPPLICATION for writ of prohibition to restrain proceedings for the removal of petitioners from office. Allowed.

The facts are stated in the opinion.

Mr. P. M. Bowler, Jr., for petitioners.
Mr. George S. Green for respondents.

Norcross, J., delivered the opinion of the court:

This is an original proceeding to obtain a writ of prohibition restraining and prohibiting respondent, the district court above named, and the Hon. M. A. Murphy,

writ for the purpose of preventing proceedings under an unconstitutional statute, it must appear either that the court acquires its jurisdiction from the statute which is attacked, so that the defect is jurisdictional, or else that the complainant has no other adequate remedy for preventing the enforcement of the statute.

In *BELL V. FIRST JUDICIAL DIST. COURT* the decision sustaining the right to a writ of prohibition was placed upon the ground that, by reason of the summary nature of the proceedings against the complainant, the fact that they might be based upon the accusation of "any complainant," and that, in case of the officer's removal, he was deprived of the office and emoluments pending an appeal, such remedy by appeal was not adequate in case the statute under which the proceedings were had was unconstitutional.

From an examination of the following cases in addition to those cited by the court, it is apparent that, while prohibition will lie to prevent the court from acting where its jurisdiction is derived from an unconstitutional statute, it is not generally allowed although there is a conflict in the cases, where the inferior court has jurisdiction independent of the statute in question; as in such cases the inferior court, having jurisdiction, may itself determine the constitutionality of the statute, and its decision may be subject to review, and consequently 1 L.R.A. (N.S.)

judge thereof, from further proceeding, other than to make an order of dismissal, in a certain action in said court pending, entitled "A. Summerfield, Complainant, v. William Bell, J. E. Davidson, and James Russell, Defendants. Accusation." The issuance of the writ is demanded upon the grounds, first, "that said court has no jurisdiction of the parties, or the subject of said action;" second, "that said court has no jurisdiction of the parties, or of the subject of said action in the manner and form therein assumed to be exercised by said court."

The defendants in said action, petitioners herein, are regularly elected, qualified, and acting officers of the said county of Esmeralda as follows: The said William Bell and James Russell are the justice of the peace, and constable, respectively, of Goldfield township, and the said J. E. Davidson is the district attorney of the county. The action sought to be prohibited by this proceeding was instituted by the complainant, A. Summerfield, a citizen and taxpayer of said county, for the purpose of removing said petitioners from office for alleged malfeasance. The proceeding was brought under the provisions of §§ 59 to 62 of an act entitled "An Act Relating to Elections," approved March 12, 1873 (Laws 1873; chap. 121, p. 209, Comp. Laws, §§

the complainant in such cases ordinarily has an adequate remedy without resort to the writ of prohibition.

In *Pennington v. Woolfolk*, 79 Ky. 21, it was held that prohibition would lie to restrain an inferior court from acting under an unconstitutional statute where its jurisdiction depended upon such statute.

And in *State ex rel. Morley v. Godfrey*, 54 W. Va. 54, 46 S. E. 185, it was held that prohibition will lie to prevent proceedings under a warrant issued for violating a municipal ordinance which the municipality was without power or authority to pass. In this case *Poffenbarger, J.*, discussed at length, in a concurring opinion, the question as to whether prohibition will lie to prevent proceedings under a void ordinance, instead of permitting the inferior court to pass upon the question itself, while *Brannon, J.*, dissented upon the ground that the inferior court, having jurisdiction to hear and determine prosecutions for violation of ordinances, could itself determine the question of the validity of the ordinance, from which judgment an appeal could be taken.

In *Louisiana* it is held that prohibition will not lie to determine the constitutionality of a municipal ordinance for the violation of which a prosecution is pending in a recorder's court, as the jurisdiction of such court to hear and determine such question is not involved. *State ex rel. Morere v.*

1642-1645), which sections read as follows:

"Sec. 59. If any person now holding or who shall hereafter hold, any office in this state, who shall refuse or neglect to perform any official act in the manner and form as now prescribed by law, or who shall be guilty of any malpractice or malfeasance in office, shall be removed therefrom as herein prescribed.

"Sec. 60. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the district court, alleging that any officer within the jurisdiction of said court has been guilty of charging and collecting any illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office as prescribed by law, or has been guilty of any malpractice or malfeasance in office, it shall be the duty of the court to cite the party charged to appear before him on a certain day, not more than ten nor less than five days from the time when said complaint shall be presented, and on that day, or some subsequent day not more than twenty days from that on which said complaint is presented, shall proceed to hear in a summary manner the complaint and evidence offered by the party complained of, and if, on such hearing, it shall appear that the charge or charges of

said complaint are sustained,—the court shall enter a decree that said party complained of shall be deprived of his office, and shall enter a judgment for \$500 in favor of the complainant, and such costs as are allowed in civil cases.

"Sec. 61. It shall be the duty of the clerk of the court in which such proceedings are had to transmit, within three days thereafter, to the governor of the state, or board of county commissioners (as the case may be) of the proper county, a copy of any decree or judgment declaring any officer deprived of any office under this act; and it shall be the duty of the governor or such board of county commissioners (as the case may be) to appoint some person to fill said office until a successor shall be selected or appointed and qualified; and it shall be the duty of the person so appointed to give such bond and security as are prescribed by law and pertaining to such office.

"Sec. 62. In case judgment of the district court, as herein provided, shall be against the officer complained of, and an appeal taken from the judgment so rendered, the officer so appealing shall not hold the office during the pending of such appeal; but such office shall be filled as in case of a vacancy."

It is contended by petitioners that the foregoing sections of the act, under which

Second Recorder's Court Judge, 44 La. Ann. 1100, 11 So. 683. In this case the court said that to authorize such relief would be practically to supplant the remedy by appeal in every case in which the defendant chose to plead the unconstitutionality of the law on which the plaintiff's claim was based. The case was cited with approval in *State ex rel. Crozier v. Rost*, 49 La. Ann. 1451, 22 So. 421, where the court refused to issue a writ to prevent criminal prosecutions based upon an unconstitutional statute.

In *People ex rel. Burbank v. Wood*, 21 App. Div. 245, 47 N. Y. Supp. 676, a New York case later than *Sweet v. Hulbert*, 51 Barb. 312, cited by the court in *BELL v. FIRST JUDICIAL DIST. COURT*, it was held that a writ of prohibition, being an extraordinary remedy, and not issuable when there are other perfectly adequate remedies, will not issue to prevent an examination before a justice of the peace of a party arrested under a warrant pursuant to a statute claimed to be unconstitutional. In so holding the court stated that the justice of the peace had jurisdiction to examine persons arrested on a warrant.

A writ of prohibition will not issue to prevent a justice of the peace from passing upon a statute alleged to be unconstitutional, where he has jurisdiction independent of the statute. *Scott v. Tully*, 106 Ky. 69, 49 S. W. 1063. A similar decision was rendered in *Arnold v. Shields*, 5 Dana, 19, 30 Am. Dec. 1 L.R.A. (N.S.)

669, where the court added that the justice could not take cognizance of the action if his right to do so depended exclusively upon the statute.

That the courts differ as to whether other remedies are adequate is illustrated by the following cases:

In *Re Schumaker*, 90 Wis. 488, 63 N. W. 1050, the court refused to grant a writ of prohibition prohibiting the circuit judge from taking further proceedings in the matter of the application to incorporate a village, based on the ground that the statute authorizing the incorporation was unconstitutional as conferring legislative powers on the court. The application was denied upon the ground that no extreme necessity existed for the issuance of the writ; and there was no reason why the remedies at law were not ample in case an order of incorporation was made by the circuit court.

But in *State ex rel. Luley v. Simons*, 32 Minn. 540, 21 N. W. 750, it was held that prohibition will lie to prevent a judge of the district court from exercising power under an unconstitutional statute authorizing such court to incorporate villages. In discussing the right to a writ, the court said that the exercise of these unlawful powers would result in injury, for which there seems to be no other adequate remedy than that of prohibition.

the said proceedings were instituted, are violative of the state Constitution, and hence void, and that, therefore, the court had no jurisdiction in the premises. Upon the other hand, counsel for respondent takes the position that prohibition is not an appropriate remedy to determine the constitutionality of an act or provisions thereof, and that, therefore this proceeding should be dismissed, without passing upon the merits of the legal questions presented. Unquestionably this proceeding would be improper, if petitioners have a plain, speedy, and adequate remedy in the ordinary course of law; but no authorities are cited by counsel that go so far as to hold that an appellate court will refuse to grant relief by prohibition simply because to do so would necessitate the passing upon a constitutional question. In the case of *Walcott v. Wells*, 21 Nev. 51, 9 L. R. A. 59, 37 Am. St. Rep. 478, 24 Pac. 367, which was a proceeding in prohibition, it is manifest from the majority opinion of the court that a constitutional question would have been passed upon if necessary to a determination of the case, while the dissenting opinion of Belknap, J., was predicated upon his view of the unconstitutionality of the act therein brought in question. The case of *Ex parte Roundtree*, 51 Ala. 42, referred to in the *Walcott v. Wells* Case, 21 Nev. 51, 9 L. R. A. 59, 37 Am. St. Rep. 478, 24 Pac. 367, was a proceeding wherein a writ of prohibition was issued to the judge of the fourth judicial circuit of Alabama to prohibit him from proceeding in a case in the law and equity court of Morgan county; the issuance of the writ being based upon the unconstitutionality of the act creating the court. Among other cases in which the constitutionality of statutes have been passed upon in proceedings in prohibition may be cited the following: *Levy v. Superior Court*, 105 Cal. 600, 29 L. R. A. 811, 38 Pac. 965; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Sweet v. Hulbert*, 51 Barb. 312. In the case of *Walcott v. Wells*, 21 Nev. 50, 9 L. R. A. 61, 37 Am. St. Rep. 478, 24 Pac. 367, this court said: "The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by ap-

peal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. The writ should not be granted, except in cases of usurpation or abuse of power, and not then, unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject-matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition."

It appears from the petition herein that petitioners applied to the lower court for relief, and that the questions herein presented were urged upon that court upon motions to quash and to dismiss the proceedings. If the proceedings in the lower court would be void because of the unconstitutionality of the sections of the act under which it is instituted, I think it is a case for the proper interference of this court by prohibition, unless it appear that there is another plain, speedy, and adequate remedy. If decision is rendered against petitioners in the proceeding in the lower court, a decree is entered removing them from office, and judgment for \$500 in favor of the complainant may be imposed, as well as costs, as in civil cases. If appeal is taken from such judgment, no matter how meritorious the appeal may be, there is no way by which the judgment, at least so far as the decree of removal is concerned, may be stayed pending the appeal; for the statute particularly provides that an appellant "shall not hold the office during the pending of such appeal." Petitioners are charged with gross misconduct,—acts which are cognizable as crimes and punishable as such; in fact, malfeasance in office itself has all the attributes of crime. These accusations, grave as they are, are not, under the sections quoted, required to be made under the solemnity of an investigation of a grand jury and presented by a body of that character, but may rest upon the accusation of "any complainant." After summary hearing and a judgment and decree which may impose a great financial hardship, the accused is deprived of holding office and of receiving its emoluments pending the appeal, and the duties of the office are performed and the salary enjoyed by another person appointed as in the act provided. Not only this, but in a case like that of the district attorney, his appointed

successor may become his legal prosecutor. If the entire proceedings are without authority in law, and void because of the unconstitutionality of the sections of the act providing for this mode of procedure, certainly the remedy to be obtained by the slow process of appeal, which could only follow a vain, fruitless, and perhaps expensive, trial, could not be considered an adequate remedy. But more injurious to the defendant than loss of office and money would be the obloquy fastened upon him by such a decree, which an appeal in such a case could not remedy. It is hard to conceive of a greater legal wrong which might be imposed upon a person charged with a grave and serious offense than to compel him to undergo trial by a court or under a procedure wholly void in law. Even if guilty, his conviction would not be a bar to further trial before a competent court and under a lawful proceeding. If innocent, he would be subject to possible conviction, against which he never could obtain adequate relief; for, if the lower court had no jurisdiction to consider the merits of the case, the appellate court would not, and all that could properly be accomplished by an appeal in such a case would be a dismissal of the cause, with no opportunity for a new trial, or a further chance to overcome the effect of the wrongful conviction. For cases of this character, no other remedy could be adequate, and reason and justice dictate the restraining of such a trial by writ of prohibition. *Brunner v. Superior Court*, 92 Cal. 267, 28 Pac. 341; *People ex rel. Yearian v. Spiers*, 4 Utah, 395, 10 Pac. 609, 11 Pac. 509.

Are the sections of the "Act Relating to Elections" under which the proceeding was instituted unconstitutional? It is urged by counsel for petitioners that they are in several particulars, and the following specifications are made wherein the organic act of the state is declared to be violated: The subject of the sections in question is not mentioned in the title of the act, and has no proper connection with the subject that is mentioned, "elections," but, upon the contrary, is foreign thereto, in violation of article 4, § 17; that the proceeding, in reality being a prosecution criminal in its nature, can only be prosecuted in the name of and by the authority of the state, and the authorization of a prosecution in the name of an individual is violative of article 6, § 13; that the authorizing of such a proceeding otherwise than upon presentment or indictment of a grand jury is violative of article 1, § 8; that the provision requiring a summary proceeding deprives the accused of the right

of trial by jury, in violation of article 1, § 3.

All of the constitutional questions specified have been very ably presented by counsel, but I shall only discuss the first mentioned, for I deem it clearly decisive of the case, making it unnecessary to pass upon the other interesting questions submitted. The purpose of § 17 of article 4 of the state Constitution, which provides that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," etc., has been so frequently considered by this court, and so well settled, that it would accomplish no useful purpose to enter upon a further discussion of a matter so thoroughly covered by former opinions. As was said in the case of *State ex rel. Wilson v. Stone*, 24 Nev. 310, 53 Pac. 497, "that a compliance with this provision of the Constitution is essential to the validity of every law enacted by the legislature, has been so often decided by this court that it is not worth while to cite the cases." The subject of the act in question is Elections. Its purpose and object is the orderly electing of public officials by the qualified voters of the state. The trial of an officer, after he has been so elected, for malfeasance in office, his removal, and the appointment of his successor because of such removal, has no proper connection whatever with the subject of elections. But counsel for respondent says: "Sections 50 and 60 are no more 'incongruous' to the title of the act than §§ 52 to 57, inclusive, and they have been the settled law of this state for many years." Sections 52 to 57, inclusive, relate to contests for members of the legislature. A comparison of §§ 50 to 62, inclusive, with sections 52 to 57, inclusive, of the act in question, only serves to show more clearly the distinction between what matters have a proper connection with the general subject of the act, and what have not. It is manifest that the purpose of an election contest is to determine who has been legally elected in case of controversy. Such contest necessarily relates to the election. Its ultimate object is to determine which of the contesting parties has been duly elected. While it may result in determining that the person holding the office has not been elected thereto and should be ousted therefrom, and that the contestant, or person for whom the contest is instituted, should be invested with the office, such ouster, upon the one hand, and investiture, upon the other, is based primarily upon the true result of the election. The removal of an officer for malfeasance in office has no necessary relationship to the question of his election.

Probably in the great majority of cases the malfeasance in office, like the malfeasance charged against petitioners, has not even the remotest relationship to the election of the officer. If the office is an elective one, the election at which the officer became entitled to hold the office is a thing of the past before the malfeasance is committed. An officer appointed to fill a vacancy existing in an elective office may as readily commit a malfeasance in office as he could had he been elected to the office; and so an officer holding an office that is only appointive may be just as liable to commit such an offense. The object of legislation like that attempted to be accomplished by the sections of the "Act Relating to Elections," herein in question, is to protect the public from corrupt and neglected officials by removing them from office. *Thurston v. Clark*, 107 Cal. 288, 40 Pac. 435; *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680. That this purpose has no proper relationship to that of elections, is too clearly manifest to require any extended discussion.

Counsel for respondent argues, however, that by reason of the provisions of § 4 of article 7 of the state Constitution, the legislature has power to enact legislation for removal of officers guilty of malfeasance or nonfeasance in office in whatever manner it sees fit, and that therefore the sections of the "Act Relating to Elections," herein in question, having been enacted in pursuance of this provision of the Constitution, are valid. The constitutional provision referred to is as follows: "Provision shall be made by law for the removal from office of any civil officer, other than those in this article previously specified, for malfeasance or nonfeasance in the performance of his duties." While the framers of the Constitution recognized the importance of specifying in the organic law of the state a provision requiring the legislature to enact laws for the removal of all officers guilty of malfeasance or nonfeasance in office, other than those whose removal was specified in the Constitution to be accomplished by impeachment, it was never intended that such law or laws could be enacted differently from the method prescribed for the enactment of laws generally. Under the constitutional provision mentioned, the legislature is free to provide whatever proceedings for the removal of guilty public officers it deems most advantageous for the public good, so long as it does not in such enactment violate other constitutional provisions. There is nothing in the Constitution itself indicating any other purpose, and reason does not dictate 1 L.R.A. (N.S.)

why there should be any exception in the case of this character of a law.

While the conclusion reached is that the sections of the act under which the proceedings sought to be prohibited were instituted relate to a subject foreign to that expressed in the title of the act in which they are found, and that, hence, they are void, it is proper to note that the effect of this decision is not to hold invalid all provisions of law enacted for the trial of those charged with, and the punishment of those found guilty of, malfeasance or nonfeasance in office. Some of the acts relating to particular county officers contain provisions for the indictment and removal from office of the official who may be found guilty of a misdemeanor in office. *State v. Borowsky*, 11 Nev. 119. The act relating to officers generally contains many provisions definitive of offenses thereunder and providing punishments therefor. The general criminal practice act of this state provides, in its 1st section, that "a crime or public offense is an act or omission forbidden by law, and to which is annexed on conviction: . . . Fourth. Removal from office." Comp. Laws, § 3986. Section 63 of the act last mentioned provides that "an accusation in writing against any district, county, or township officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for which the officer accused is elected or appointed." The sections immediately following (Comp. Laws, §§ 4038-4051, inclusive) provide for the hearing of objections to the sufficiency of the indictment, for a trial by jury, for judgment upon conviction of removal from office, and the right of appeal to the supreme court. Should these various provisions of law to which attention has been directed be deemed inadequate by the legislature to provide a sufficient remedy for the public against unworthy or corrupt officials, additional legislation upon the subject will doubtless be enacted.

The writ will issue as prayed for.

Fitzgerald, Ch. J., and Talbott, J., concur.

OKLAHOMA SUPREME COURT.

TERRITORY OF OKLAHOMA ex rel.
CHARLES M. THACKER, County Attorney, Plff. in Err.,

v.

FRANK WOODRING et al.

(.... Okla.)

1. Bail bond—authority to take.

Under a statute vesting the power to take

bail solely in persons or courts authorized by law to arrest and imprison persons charged with the commission of criminal offenses, a bail bond taken by the clerk of a district court, or his deputy, is void.

2. Same—enforcement of.

A statutory bail bond which is void for want of authority to exact it cannot be enforced as a common-law obligation.

(September 5, 1905.)

ERROR to the Probate Court for Greer County to review a judgment in favor of defendants in an action brought to enforce a bail bond. Affirmed.

The facts are stated in the opinion.

Mr. Charles M. Thacker, *in propria persona*:

If not good as a statutory bond, it is good as a common-law obligation, upon the broad principle that, having received the benefits of the bond as if taken by proper authority, bail cannot change position with change of interest, and deny the authority of the taker.

Lowe v. Guthrie, 4 Okla. 287, 44 Pac. 198; Territory v. Cooper, 11 Okla. 699, 69 Pac.

Case Note.—The authorities lay down the general rule that the clerk of a court has no inherent power to admit to bail, such an act being a judicial function which a ministerial officer such as the clerk cannot perform. 2 Brandt. Suretyship & Guaranty, 3d ed. § 582; 5 Cyc. Law & Proc. p. 85.

Some cases not cited by the court in *TERRITORY EX REL. THACKER v. WOODRING* also passed on the power of the clerk of the court to take a bail bond and fix the amount of bail. Thus, in *Dugan v. Com.* 6 Bush, 305, it was held that a bail bond taken by the clerk of the city court of Lexington is void for lack of authority to take bail.

Fixing the amount of bail is a judicial function which a ministerial officer such as the clerk of the circuit court cannot perform; and a bond taken by him is void. *Gregory v. State*, 94 Ind. 384, 48 Am. Rep. 162; *State v. Mills*, 13 N. C. (2 Dev. L.) 555.

A bail bond which is taken and acknowledged before the clerk of the district court is not invalid, when this is done pursuant to the direction of the district judge, and at the request of the accused. *Hunt v. United States*, 11 C. C. A. 340, 27 U. S. App. 287, 63 Fed. 568.

In Louisiana it has been held that, after the district judge has admitted to bail, he may, independent of statute, legally delegate to his clerk authority to accept the bond. *State v. Sewall*, 3 La. Ann. 575.

A recognizance taken in term before the clerk of the court, for the appearance of one charged with passing counterfeit money, is valid, as it is presumed that the bond is taken under the direction of the court. *Bodine v. Com.* 24 Pa. 69; *United States v. Evans*, 2 Fed. 147.

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813; *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Davis v. Wakelee*, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555; *McLean v. State*, 8 Heisk. 22; *Dennard v. State*, 2 Ga. 137; *State v. Cannon*, 34 Iowa, 322.

Hainer, J., delivered the opinion of the court:

This is an action commenced in the probate court of Greer county, by the county attorney, in the name of the territory, and against the defendants in error, on a written instrument purporting to be an appearance or bail bond in a criminal action. This instrument reads as follows:

Appearance Bond, District Court.

Territory of Oklahoma, }
County of Greer. } ss:

Be it remembered, that on the 10th day of January, 1902, Frank Woodring, as principal, of Greer county and territory of Oklahoma, and A. S. Woodring and J. B. Woodring, as sureties, residents of Greer county, territory aforesaid, appeared personally before the undersigned, district clerk in and

But in *Lock v. Com.* 11 Ky. L. Rep. 399, it was held that the mayor of Newport had power, under statute, to take bail, but he had no authority to delegate such power to the clerk of the mayor's court; and a bail bond taken by such clerk is void, although the mayor indicated before the execution of the bond that the proposed surety would be acceptable.

As the clerk of the court in which an indictment is found has the power, under statute, to accept a recognizance for the appearance of the prisoner, the clerk of the court to which the change of venue is taken has the same power. *State v. Merrihew*, 47 Iowa, 112, 29 Am. Rep. 464; *State v. Wells*, 36 Iowa, 238.

In *Gregory v. State*, 94 Ind. 384, 48 Am. Rep. 162, it was held that a statute giving the clerk of the circuit court authority to fix the amount of bail in case of persons accused of crime is unconstitutional. The court based its decision on the ground that such a statute delegated judicial power to a ministerial officer.

But in *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3, a statute giving the clerk of the court power to admit to bail one charged with a crime was held to be valid. The court said: "That the clerk of a district court may perform, under the statutes of Wyoming, quasi judicial functions, has never been doubted."

And in *State v. Schweiter*, 27 Kan. 499, a statute gave the clerk of the district court power to issue a warrant and fix the amount of bail when the court failed to do so, and when there was no district judge in the county.

for Greer county, and jointly and severally acknowledged themselves to be indebted to the territory of Oklahoma in the sum of one thousand dollars (\$1,000.00), to be made and levied on their respective goods, chattels, lands, and tenements, to be void, however, if the said Frank Woodring, defendant, who has been committed to the common jail of Greer county, territory of Oklahoma, shall personally be and appear before the district court of said county on the first day of next term, at 9 o'clock A. M., of said day, and from term to term and from day to day of each term, to answer a charge preferred against him for the offense of grand larceny, and to do and receive what shall be enjoined by said court upon him, and shall not depart the said court without leave.

Witness our hands and seals, this 10th day of Jan., A. D. 1902.

Frank Woodring. [Seal.]

A. S. Woodring. [Seal.]

J. B. Woodring. [Seal.]

Taken, subscribed, and acknowledged this 10th day of January, 1902.

B. D. Shear, Clerk,

[Seal.] by O. P. Elliott, Deputy.

The sole question presented here is whether an appearance or bail bond in a criminal action, taken by the clerk or his deputy, is a valid and binding obligation on the principal and his sureties, or either of them. Section 633, of our Code of Criminal Procedure (Wilson's Rev. & Anno. Stat. 1903, § 5769) provides as follows: "Bail, by sufficient sureties, shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons or courts authorized by law to arrest and imprison offenders." It will thus be seen that our statute does not, expressly or by implication, authorize the clerk of the district court or his deputy to take bail in criminal cases. Our statute vests this power solely in the persons or courts authorized by law to arrest and imprison persons charged with the commission of criminal offenses. Before the clerk or his deputy would be authorized to take bail in a criminal case, such power must have been expressly conferred by statute. This has been the uniform holding of the courts that have passed upon this subject. In *United States v. Hudson*, 65 Fed. 68, it was held that, to make a bail bond valid, it must have been taken by competent legal authority, and that an invalid bail bond is not binding on either the principal or his sureties. To the same effect are *United States v. Goldstein*, 1 Dill. 413, Fed. Cas. No. 15,226. In *United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393, Judge 1 L.R.A. (N.S.)

Dillon says: "It is settled that bonds of this character are valid only when taken in pursuance of law and the order of a competent court." It is said by the court in the case of *State v. Buffum*, 22 N. H. 267, when speaking of the liability of sureties on bail bonds: "They are liable in any case only upon the ground that they have entered into a recognizance ordered by a tribunal having authority to act in the premises." It is the essence of authority, understood by the bail or surety of another, that there should have been a valid obligation comprehended. *United States v. Hand*, 6 McLean, 274, Fed. Cas. No. 15,296. "Bail taken by a court without jurisdiction, or by an officer without authority, is void." *State v. Winniger*, 81 Ind. 51; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184; *State v. Jones*, 3 La. Ann. 10; *Gray v. State*, 43 Ala. 41; *Jacquemine v. State*, 48 Miss. 280; *Branham v. Com.* 2 Bush, 3; *Com. v. Roberts*, 1 Duv. 199; *Com. v. Fisher*, 2 Duv. 376; *Dugan v. Com.* 6 Bush, 305; *Harris v. Simpson*, 4 Litt. (Ky.) 165, 14 Am. Dec. 101; *State v. McCoy*, 1 Baxt. 111; *Wallenweber v. Com.* 3 Bush, 68; *Williams v. Shelby*, 2 Or. 144; *Schneider v. Com.* 3 Met. (Ky.) 409; *Blevins v. State*, 31 Ark. 53; *Cooper v. State*, 23 Ark. 278; *State v. Nelson*, 28 Mo. 13; *State v. Hays*, 4 La. Ann. 59; *State v. Vion*, 12 La. Ann. 688; *Holmes v. State*, 44 Tex. 631; *State v. Berry*, 8 Me. 179; *State v. Russell*, 24 Tex. 505; *Com. v. Loveridge*, 11 Mass. 337; *Com. v. Otis*, 16 Mass. 198; *Com. v. Canada*, 13 Pick. 86; *Powell v. State*, 15 Ohio, 579; *State v. Clark*, 15 Ohio, 595; *People v. McKinney*, 9 Mich. 444.

The same rule has been announced in *Morrow v. State*, 5 Kan. 563. Mr. Justice Valentine, in this case, uses the following language: "It may be urged that there was evidence showing that the court deputized the clerk to take these recognizances, but this the court could not do. It may also be urged that they were taken in open court, but that would not make them any better, as they were not taken by the court. It is true that the clerk may do all the work in taking a recognizance, but it must be done in open court, under the court, by order of the court, and in the name of the court; and, when the instrument itself shows that it was not so taken, it is void." In *State v. Caldwell*, 124 Mo. 509, 28 S. W. 4, it was held that a clerk of a court has no authority to take a bail bond, and a bond taken by him is not binding, though the court enter a *nunc pro tunc* order approving the same after the discharge of the prisoner. Mr. Justice Sherwood, speaking for the court in this case, uses the following language: "Now, it is abundantly settled that a bond

or recognizance taken in a criminal cause before an unauthorized person has no savor of validity about it. *State v. Randolph*, 26 Mo. 213; *State v. Nelson*, *supra*; *State v. Ferguson*, 50 Mo. 409; *State v. Watson*, 54 Mo. App. 416. Nor, where the bond or recognizance is taken before the clerk of a court, can it be afterwards validated by the entry by the court of a *nunc pro tunc* order approving the bond. *Morrow v. State*, 5 Kan. 563." In 3 Am. & Eng. Enc. Law, 2d ed., p. 659, the rule is thus stated: "There is no inherent power in the clerk of a court to take bail, and he cannot, in the absence of statute, be delegated so to do by the court."

But it is contended that, if the bond is invalid as a statutory bond, it is good as a common-law bond. This contention is clearly untenable. A statutory bond, which is void for want of authority to execute it, cannot be enforced as a common-law obligation. *Dickenson v. State*, *supra*; 3 Am. & Eng. Enc. Law, 2d ed. p. 688. It follows that the bond taken in this case by the deputy clerk of the district court is void, and therefore the court properly sustained the demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of action.

The judgment of the court below is affirmed, at the cost of plaintiff in error.

All the Justices concur.

OREGON SUPREME COURT.

GEORGE ABBOT, Resp't.,
v.

OREGON RAILROAD & NAVIGATION
COMPANY et al., Appts.

(.... Or.)

1. Carrier—lighting stations.

What period of time will be reasonable for a railroad company which has agreed to stop a night train at a station where night trains are not scheduled to stop, to keep its

Case Note.—As to what constitutes a reasonable time prior to the arrival or departure of trains for keeping a railroad station open and lighted and heated, and as to whether the question should be left to the jury, different courts have taken quite different views.

In *Grimes v. Pennsylvania Co.* 36 Fed. 72, the court left the jury to determine the reasonableness of the time in the case of plaintiff, who reached the depot at 9 o'clock in the evening, about five and a half hours before the train which he was intending to take was due, and who was injured by stepping off the platform, which was un-

station platform lighted for the accommodation of intending passengers prior to the arrival of the train, is for the jury to decide.

2. Same—platform—negligence of passenger.

A passenger is guilty of contributory negligence which will bar his recovery for injuries received by a fall from a station platform, where, having been provided by the carrier with a well-lighted car in which to await the arrival of his train, he leaves it on a very dark night to walk, merely for exercise, on an unlighted platform, knowing that the slope of the land is such that some portions of the platform must be some distance above the ground.

(May 22, 1905.)

APPEAL by defendants from a judgment of the Circuit Court for Sherman County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

Statement by Moore, J.:

This is an action by George Abbot against the Oregon Railroad & Navigation Company and the Columbia Southern Railway Company, to recover damages for a personal injury alleged to have been sustained by plaintiff while a passenger of the defendant companies, and caused by their negligence in failing to maintain a railing at, and in omitting to keep a lamp burning on, a depot platform jointly used by them. The defendants, separately answering, denied the material allegations of the complaint, and for further defenses averred that plaintiff, at the time he was injured, was not a passenger of either company, and that his hurt was caused by his own want of care. The allegations of new matter in the answer having been denied in the replies, the cause was tried, and judgment rendered against the defendants, or either of them, for the sum of \$20,000, and they severally appeal.

Messrs. Snow & McCamant, for appellant Columbia Southern Railway Company:

The relation of carrier and passenger

lighted; saying to them that it was the duty of defendant, within a reasonable time before the arrival and departure of trains, properly to light its waiting room and platform so as to make them comfortable and safe for the use of passengers desiring to take such trains; but that it was not its duty to keep them lighted at unreasonable hours.

Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359, which is cited in *ABBOT v. OREGON R. & NAV. CO.*, states that the duty to furnish a light in the nighttime at a station is limited to the time of departure and arrival of trains, and

ceases when the passenger has been carried to his destination, and been given a sufficient time to leave the carrier's premises.

Smith v. City & Suburban R. Co. 29 Or. 539, 46 Pac. 136, 780; *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344; *Chicago, K. & W. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923; *Davis v. Houston & T. C. R. Co.* 25 Tex. Civ. App. 8, 59 S. W. 844; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; 1 *Fetter*, Carr. Pass. p. 604.

The obligation of a carrier to keep its terminals safe for the reception of passengers is limited to a reasonable time before and after the arrival and departure of trains on which such passengers are to be carried.

Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Hodges v. New Hanover Transit Co.* 107 N. C. 576, 12 S. E. 597; *Illinois C. R. Co. v. Lalogue*, 113 Ky. 896, 62 L. R. A. 405, 69 S. W. 795.

Those who come to a railway station at other times, without business requiring them to come, are mere licensees, to whom

the carrier owes no duty except to refrain from wantonly and wilfully injuring them.

Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 517; *Burbank v. Illinois C. R. Co.* 42 La. Ann. 1156, 11 L. R. A. 720, 8 So. 580; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; *Woodruff v. Bowen*, 136 Ind. 431, 22 L. R. A. 198, 34 N. E. 1113; *Schmidt v. Bauer*, 80 Cal. 565, 5 L. R. A. 580, 22 Pac. 256; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; *Converse v. Walker*, 30 Hun, 596; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699; *Cincinnati. H. & D. R. Co. v. Aller*, 64 Ohio St. 183, 60 N. E. 205; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; *Clark v. Howard*, 31 C. C. A. 454, 60 U. S. App. 32, 88 Fed. 199; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Redigan v. Boston & M. R. Co.* 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 66 Am. St. Rep. 856, 41 S. W. 62.

One who comes to a railway station as a

sufficient time before departure to enable persons desiring to take passage to be in readiness to enter the cars without undue haste, and, after their arrival, to enable those leaving the train to do so in safety; and that the length of time for keeping such light depends on the circumstances in each case.

Texas & P. R. Co. v. Cornelius, 10 Tex. Civ. App. 125, 30 S. W. 720, held that the provision of the Texas act March 6, 1891, imposing a penalty on railroad companies for failure to keep their depots lighted and warmed for not less than one hour before the arrival and after the departure of passenger trains, does not relieve them from liability for failure to keep them warmed for such further reasonable time as they are occupied by passengers waiting for delayed trains; and held defendant railroad company liable for injuries due to waiting in an unwarmed depot for several hours for the arrival of such a train.

Texas & P. R. Co. v. Mayes (Tex. App.) 15 S. W. 43, also holds that it is the duty of a railroad company towards the purchaser of a ticket to keep the station warm for several hours during which the train is delayed.

But Brown v. Georgia, C. & N. R. Co. 119 Ga. 88, 46 S. E. 71, holds that a railroad company is required to keep waiting rooms open only for a reasonable time before and after the departure of trains, and is not liable for failure to keep the waiting room heated for one waiting there over night for the arrival of the next train, after the train which his ticket called for had passed without stopping; although there was no other place for him to go, and although he might

be entitled to recover in such case for the injury received because of the failure to transport him on the train agreed.

Hodges v. New Hanover Transit Co. 107 N. C. 576, 12 S. E. 597, denies the liability of a railroad company for injury to a member of an excursion party while attempting to get on board the train which was standing at the depot from half to three quarters of an hour before the time for starting, caused by the failure to light the platform; holding that fifteen minutes before the time of starting, at which time the first signal was to be given, was a sufficient time for lighting such platform.

Phillips v. Southern R. Co. 124 N. C. 123, 45 L. R. A. 163, 32 S. E. 388, holds that a rule for closing a railroad waiting room after a train leaves, until thirty minutes before the departure of the next train, is a reasonable one as applied to one who came to the station at 8 o'clock in the evening with the intention of waiting for a train which left at 1:30 A. M., and who was driven out in the cold; although it would probably be unreasonable as applied to through passengers and delayed trains.

Louisville & N. R. Co. v. Com. 102 Ky. 300, 53 L. R. A. 149, 43 S. W. 458, holds that the duty to keep ticket offices and waiting rooms open for at least thirty minutes before the departure of a passenger train from a regular passenger depot at which it regularly stops, imposed by Ky. Stat. § 84, does not extend to the opening of such rooms for night trains, for which they have never been kept open for the sale of tickets, where no extra charge is made on such trains to passengers without tickets.

passenger, and remains there longer than is reasonably necessary, or wanders about the platform for a purpose not related to his journey, thereupon becomes a mere licensee, in like manner as if his original entry had been unconnected with any business with the carrier.

Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; Cincinnati, H. & D. R. Co. v. Aller, 64 Ohio St. 183, 60 N. E. 205; Imhoff v. Chicago & M. R. Co. 20 Wis. 344; Chicago, K. & W. R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923.

In the absence of both ownership and control over premises, a party cannot be held liable for defects rendering them unsafe.

Quimby v. Boston & M. R. Co. 69 Me. 340; Lake Erie & W. R. Co. v. Gaughan, 26 Ind. App. 1, 58 N. E. 1072; Skottowe v. Oregon Short Line & U. N. R. Co. 22 Or. 430, 16 L. R. A. 593, 30 Pac. 222; Gwathney v. Little Miami R. Co. 12 Ohio St. 92; Texas & N. O. R. Co. v. Dessommes (Tex.) 15 S. W. 806.

A party who wanders about on an elevated railway platform on a dark night, at a time when he is neither alighting from nor boarding a train, and who falls off the platform, is precluded from recovering by his own contributory negligence.

Massey v. Seller, 45 Or. 267, 77 Pac. 397; Missouri, K. & T. R. Co. v. Turley, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369; Bradley v. Grand Trunk R. Co. 107 Mich. 243, 65 N. W. 102; Emery v. Chicago, M. & St. P. R. Co. 77 Minn. 465, 80 N. W. 627; Graham v. Pennsylvania Co. 139 Pa. 149, 12 L. R. A. 293, 21 Atl. 151; Reed v. AxteLL, 84 Va. 231, 4 S. E. 587; Gulf, C. & S. F. R. Co. v. Hodges (Tex. Civ. App.) 24 S. W. 563; International & G. N. R. Co. v. Folliard, 66 Tex. 603, 59 Am. Rep. 632, 1 S. W. 624; Bennett v. New York, N. H. & H. R. Co. 57 Conn. 422, 18 Atl. 668; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Bedell v. Berkeley, 76 Mich. 438, 15 Am. St. Rep. 370, 43 N. W. 308; Sturgis v. Detroit, G. H. & M. R. Co. 72 Mich. 619, 40 N. W. 914; Forsythe v. Boston & A. R. Co. 103 Mass. 510; Louisville & N. R. Co. v. Ricketts, 96 Ky. 44, 27 S. W. 860; Waterbury v. Chicago, M. & St. P. R. Co. 104 Iowa, 32, 73 N. W. 341; Wood v. Richmond & D. R. Co. 100 Ala. 660, 13 So. 552; St. Louis, I. M. & S. R. Co. v. Cox, 60 Ark. 106, 29 S. W. 38; Gunderman v. Missouri, K. & T. R. Co. 58 Mo. App. 370.

Messrs. W. W. Cotton and H. F. Conner, for appellant Oregon Railroad & Navigation Company:

Plaintiff, at the time of his injury, was at most a licensee.

Heinlein v. Boston & P. R. Co. 147 Mass. 1 L.R.A. (N.S.)

136, 9 Am. St. Rep. 676, 16 N. E. 698; Johnson v. Boston & M. R. Co. 125 Mass. 75; Georgia R. & Bkg. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; O'Donnell v. Chicago & N. W. R. Co. 106 Ill. App. 287; Brunswick & W. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000; Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 39 L. R. A. 148, 61 Am. St. Rep. 68, 48 N. E. 294; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 54 L. R. A. 827, 60 N. E. 818; Bricker v. Philadelphia & R. R. Co. 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983; Haase v. Oregon R. & Nav. Co. 19 Or. 354, 24 Pac. 238; Simmons v. Oregon R. & Nav. Co. 41 Or. 151, 69 Pac. 440, 1022; Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751.

No recovery can be had by a licensee for a mere omission; there must be some positive act of misconduct.

Sterger v. Van Sicklen, 132 N. Y. 499, 16 L. R. A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; Nicholson v. Erie R. Co. 41 N. Y. 525; Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; Blackstone v. Chelmsford Foundry Co. 170 Mass. 321, 49 N. E. 635; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; King v. Central R. Co. 107 Ga. 754, 33 S. E. 839; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L. R. A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Post v. Texas & P. R. Co. (Tex. Civ. App.) 23 S. W. 708; Woolwine v. Chesapeake & O. R. Co. (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L. R. A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Splittorf v. State, 108 N. Y. 205, 15 N. E. 322; Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; Hathaway v. New York, N. H. & H. R. Co. 182 Mass. 286, 65 N. E. 387; Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644.

A railroad company is bound to exercise only reasonable care to keep its premises in a safe condition.

Moreland v. Boston & P. R. Corp. 141 Mass. 31, 6 N. E. 225; Batton v. South & North Ala. R. Co. 77 Ala. 591, 54 Am. Rep. 80; Baltimore & O. R. Co. v. Schwindling, 101 Pa. 258, 47 Am. Rep. 706; Knight v. Portland, S. & P. R. Co. 50 Me. 234, 96 Am. Dec. 449; Gunderman v. Missouri, K. & T. R. Co. 58 Mo. App. 370; 1 Thomp. Neg. p. 314.

A railroad company is under no obligation to keep its station platform lighted,

except during a reasonable time before and after the departure or arrival of its trains.

Brunswick & W. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000; *Grimes v. Pennsylvania Co.* 36 Fed. 72; *Illinois C. R. Co. v. La-loge*, 113 Ky. 896, 62 L. R. A. 405, 69 S. W. 795; *Sargent v. St. Louis & S. F. R. Co.* 114 Mo. 348, 19 L. R. A. 460, 21 S. W. 823, 73 Am. Dec. 337; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; *Harris v. Stevens*, 31 Vt. 79; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

Even though plaintiff was a passenger, he should have exercised due care.

Sargent v. St. Louis & S. F. R. Co. 114 Mo. 348, 19 L. R. A. 460, 21 S. W. 823; *Laffing v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *St. Louis I. M. & S. R. Co. v. Cox*, 60 Ark. 106, 29 S. W. 38; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341; *Graham v. Pennsylvania Co.* 139 Pa. 149, 12 L. R. A. 293, 21 Atl. 151; *Fineth v. Suburban R. Co.* 32 Or. 1, 39 L. R. A. 517, 51 Pac. 84; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506.

Where the negligence of one party is known to the other, and that other acts without regard to such knowledge, the negligence becomes a condition, as distinguished from a proximate cause.

Pollich v. Sellers, 42 La. Ann. 623, 7 So. 786; *Walsh v. Oregon R. & Nav. Co.* 10 Or. 250; *Scott v. Oregon R. & Nav. Co.* 14 Or. 211, 13 Pac. 98; *Ward v. Southern P. Co.* 25 Or. 433, 23 L. R. A. 715, 36 Pac. 166; *Whart. Neg.* 2d ed. §§ 73 et seq. 85, 133, 300; *Tucker v. Northern Terminal Co.* 41 Or. 82, 68 Pac. 426; *Massey v. Seller*, 45 Or. 267, 77 Pac. 397.

Plaintiff's contributory negligence is a complete bar to his recovery.

Massey v. Seller, 45 Or. 267, 77 Pac. 397; *Walsh v. Oregon R. & Nav. Co.* 10 Or. 250; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Sullivan v. Minneapolis, St. P. & S. S. M. R. Co.* 90 Minn. 390, 101 Am. St. Rep. 414, 97 N. W. 114; *Missouri, K. & T. R. Co. v. Turley*, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369; *Gulf, C. & S. F. R. Co. v. Hodges* (Tex. Civ. App.) 24 S. W. 563; *Wood v. Richmond & D. R. Co.* 100 Ala. 660, 13 So. 552; *Louisville & N. R. Co. v. Ricketts*, 96 Ky. 44, 27 S. W. 860; *Splittorf v. State*, 108 N. Y. 205, 15 N. E. 322; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Chewning v. Ensley R. Co.* 100 Ala. 493, 14 So. 204; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73, N. W. 341; *Forsyth v. Boston & A. R. 1 L.R.A.(N.S.)*

Co. 103 Mass. 510; *Bradley v. Grand Trunk R. Co.* 107 Mich. 243, 65 N. W. 102; *Emery v. Chicago, M. & St. P. R. Co.* 77 Minn. 465, 80 N. W. 627; *Graham v. Pennsylvania Co.* 139 Pa. 149, 12 L. R. A. 293, 21 Atl. 151; *International & G. N. R. Co. v. Foliard*, 66 Tex. 603, 59 Am. Rep. 632, 1 S. W. 624; *Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370; *Bennett v. New York, N. H. & H. R. Co.* 57 Conn. 422, 18 Atl. 668; *Toomey v. London, B. & S. C. R. Co.* 3 Q. B. N. S. 146; *Reed v. Artell*, 84 Va. 231, 4 S. E. 587; *Beach, Contrib. Neg.* 2d ed. § 37; *Eaton v. Oregon R. & Nav. Co.* 19 Or. 391, 24 Pac. 415; *Pollich v. Sellers*, 42 La. Ann. 623, 7 So. 786; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L. R. A. 710, 13 Am. St. Rep. 84, 6 So. 277; *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Tanner v. Louisville & N. R. Co.* 60 Ala. 621; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Johnson v. Ramberg*, 49 Minn. 341, 51 N. W. 1043; *Bedell v. Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308.

Mr. A. S. Bennett for respondent.

Moore, J., delivered the opinion of the court:

It is contended by defendants' counsel that the testimony introduced by plaintiff conclusively shows that the injury of which he complains was caused by his contributory negligence, and hence the court erred in overruling their motions for judgments of nonsuit, based on that ground. The legal principle insisted upon necessitates an examination of the bill of exceptions, which shows that the Oregon Railroad & Navigation Company is a corporation owning and operating a railroad from Portland east to Huntington, passing through the station of Biggs, situated on the south bank of the Columbia river. The Columbia Southern Railway Company is also a corporation owning and operating a railroad from Biggs south to Shaniko. The depot and tracks at Biggs are owned by the former company, but the cost of maintaining the station is borne, and the tracks and premises connected therewith are jointly used by both, in receiving and discharging passengers. The station building is placed east and west between parallel tracks, the Oregon Railroad & Navigation Company using the lines of rails on the north side of the depot, and the other company those on the south. This building is surrounded by a plank platform 16 feet wide on the north, 12 on the south, and 14 on the east and west. The land on which the depot stands slopes to the south, so that the north edge of the platform is level with the tracks of the Oregon Railroad & Navigation Company, while the south edge

is about 5 feet above the rails on that side, and the center of the west edge about 6 feet above the surface of the ground, which at that point is somewhat depressed. The Columbia Southern Railway Company, at the time of plaintiff's injury, was operating daily trains only, but the other company was running night passenger trains,—No. 6, going east, passing through Biggs at 12:22 midnight, and No. 3, going west, at 3:30 A. M. These trains were not scheduled to stop at that station, which was closed at night, and no light maintained at the depot, the passengers being accommodated by the day trains of both companies which stopped at that junction.

The plaintiff is fifty-nine years old, has traveled extensively by rail, is engaged in buying wool on commission, and had been at Biggs eleven times prior to his injury, passing in the daylight over a gang plank extending from the depot platform to the cars of the Columbia Southern Railway Company. With other buyers, he was at Shaniko June 27, 1903, attending a sale of wool, which was not concluded until evening. As these dealers could save a day's time if they could reach Biggs and take the night passenger trains of the Oregon Railroad & Navigation Company, they employed the other company to carry them by special train to that junction, the train despatcher of the former company having telegraphed that its night passenger trains would stop at Biggs if the special train reached there in time. The train so chartered left Shaniko at 8:40 P. M., and reached the junction at 12:15 that night, the car in which the wool dealers rode being left on the south side of the depot, and near the west end thereof. A few minutes thereafter train No. 6 stopped at the north side of the depot, and the passengers from Shaniko, who were going east, were escorted by a trainman of the Columbia Southern Railway Company, having a lantern, from its car, over the gang plank and across the west end of the depot platform to the train of the other company. The plaintiff accompanied the departing passengers to their train, and immediately returned with the trainman to the car which he had left, intending to take passage for Portland when train No. 3 arrived. The car in which plaintiff was to wait was well lighted, and provided with a suitable toilet room. He sat down, and tried to slumber, but on the way from Shaniko the passengers had freely indulged in smoking, and he was unable to sleep. Being weary from the effects of his ride and fatigued from the strained position occasioned by sitting for several hours in an ordinary passenger car, he rose, left the coach, and again passed over the gang plank, intending to cross the

tracks of the Oregon Railroad & Navigation Company to seek refreshment in a cool breeze from the Columbia river, and also to urinate. Instead of going directly north, he turned to the west, and slowly walked in the darkness to the edge of the depot platform, which was not protected by a railing, and fell to the ground, sustaining such an injury that one of his legs had to be amputated below the knee. As a witness in his own behalf he testified, on cross-examination, that he had been at Biggs several times prior to June 28, 1903; that he knew the station platform was level with the car tracks on the north, but elevated on the south, requiring a gang plank, over which he had always passed in entering or leaving the coaches of the Columbia Southern Railway Company, but he had never particularly noticed the ground around the station; that he knew the platform did not extend indefinitely to the west; and, referring to the time when he was injured, he said, "It was the darkest night I ever saw."

In support of the judgment rendered, it is asserted by his counsel that, as the defendants jointly maintain the depot at Biggs, each owes a duty to persons arriving on the cars of one company to take passage on those of the other to provide a reasonably safe platform, and to see that it is suitably lighted at night for a reasonable time before the arrival and after the departure of their trains, and for any neglect in these particulars they are jointly and severally liable for any damage resulting therefrom; that the Oregon Railroad & Navigation Company, having agreed to stop its train No. 3 at Biggs, on the night in question, for the accommodation of persons coming on the special train from Shaniko and intending to go west over its line, thereby established the relation of carrier and passenger with such persons from the time of their arrival at the junction, and, neither company having lighted the depot or platform, plaintiff, who then was a passenger of both companies, and entitled to go on the platform for exercise and to secure pure air, had the right to assume from its dark condition that it was reasonably safe for his accommodation, but, having been dangerous by reason of the defendants' failure to maintain a railing or a light, he is entitled to recover from them the damages awarded by the jury, and hence no error was committed as alleged.

It will be remembered that the night passenger trains of the Oregon Railroad & Navigation Company were not scheduled to stop at Biggs, and for that reason no light was maintained there. The plaintiff's right to recover compensation for the injury sustained depends upon the existence of some

duty owed him by the defendants, or either of them, the breach of which was the proximate cause of his hurt. *Emry v. Roanoke Nav. & Water Power Co.* 111 N. C. 94, 17 L. R. A. 699, 16 S. E. 18. The law imposes on a railway company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platforms, approaches thereto, and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers. 3 *Thomp. Neg.* § 2691; 4 *Elliott, Railroads*, § 1641; *Hutchinson, Carr.* 2d ed. § 516; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193, 21 N. E. 968; *Ohio & M. R. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218. What constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company. 3 *Thomp. Neg.* § 2686; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; *Louisville N. A. & C. R. Co. v. Treadway*, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794. A person who has completed his journey on a railroad train, and alighted therefrom at a station provided for the accommodation of the general public, is allowed a reasonable time to leave the premises; and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting room of a depot a reasonable time immediately preceding the arrival of a train which he expects to take, during which such person sustains towards the carrier a relation analogous to that of a passenger, to whom the railway company owes a duty commensurate with the degree of danger to which such person may be exposed. 4 *Elliott, Railroads*, § 1592; 2 *Wood, Railroads*, Minor's ed. § 310. In *Heinlein v. Boston & P. R. Co.* 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698, it was held that a person remaining at a station three or four minutes after he knew that the train which he desired to take had already gone, when there was nothing to detain him except his wish to take a street car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights extinguished, and the passage by which he endeavored to depart insufficiently illuminated. In *Quantz v. Southern R. Co.* 1 L.R.A. (N.S.)

137 N. C. 136, 49 S. E. 79, a person having arrived at night on a train at his destination left the station grounds, but, returning in a few minutes to the depot on business of his own, walking into an open doorway, and, falling, was injured, and it was ruled that he had ceased to be a passenger, and was only a licensee, to whom the railroad company did not owe the duty of keeping the door closed, but only of maintaining a way that was free from danger. In *Missouri P. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, the appellee, a stranger, arrived by rail at Beloit, Kan., about 5 o'clock P. M., and went immediately into the depot, intending to go to Osburn, in that state, by the next train, which she was informed by the agents of the company would leave at 9:20 that night. Having secured a ticket entitling her to be carried on the appellant's cars to her destination, she left the depot, but returned "about dusk" on May 6th, and waited to resume her journey. Her train not having arrived at 11 o'clock P. M., she had occasion to go to the toilet, but, there being none in the building, she went upon the depot platform, which was not lighted, and walking off, sustained an injury, and it was held that the railroad company was liable therefor. In *St. Louis S. W. R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, the appellee, having secured a coupon ticket for the entire distance, left Gainesville, Texas, with her babe, for Mt. Vernon, in that state, going via Greenville, where she was to change cars. At the latter city she was transferred to the appellant's depot, which she reached at 2 o'clock P. M., and, being a stranger without money, and informed that no hotel or boarding house was within a mile of the station, she concluded to remain in the waiting room until 12 o'clock that night, when the next passenger train for Mt. Vernon would arrive. The station agent, knowing her intention, either consented, or at least made no objection, to her occupying the room until she could resume her journey. About 9:30 o'clock P. M. the appellant's night agent in charge of the depot entered the waiting room, turned down the light, placed his arm around the appellee, and, over her protest, tried to kiss her, and also made improper proposals to her. She pleaded with him to desist, and not molest her, whereupon he returned to his office, and she quietly left the depot with her babe, and went to a private residence, and notified the occupant of the attempted outrage. Mrs. Griffith commenced an action against the railroad company to recover damages for the assault, and, having secured a judgment, it was affirmed on appeal; the court holding that as she possessed a ticket, and had gone

to the depot for the purpose of taking passage on the first train that arrived, and, by the assent of the station agent, was permitted to occupy the waiting room, she sustained the relation of a passenger whom the company owed a duty to protect, and it was therefore liable in damages for the assault of its agent. In *Missouri P. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, the question of reasonable time before the arrival of a train when a person at a depot intending to take a train may be regarded in the nature of a passenger was not involved, for, the train having been scheduled to reach the station at 9:30 P. M., and thereafter momentarily expected to arrive, when Mrs. Neiswanger was injured, shows that she was certainly entitled to protection. So, too, in *St. Louis S. W. R. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, the question of reasonable time was not in issue, for Mrs. Griffith's occupancy of the waiting room at the depot was not in pursuance of an absolute right, but resulted from the station agent's knowledge that she intended to remain at the depot ten hours, waiting the arrival of her train, and his assent thereto.

In the case at bar the testimony shows that the agents of the Columbia Southern Railway Company who operated the special train were informed that plaintiff intended to take passage for Portland on train No. 3 of the other company when it reached Biggs, and, knowing this, they assented to his occupying the car in which he had made the journey from Shaniko until the arrival of the other train. The Columbia Southern Railway Company, by reason of this assent of its agents, thereby treated plaintiff in the nature of a passenger, notwithstanding it had safely carried him the entire distance agreed upon. The train dispatcher of the Oregon Railroad & Navigation Company had agreed to stop train No. 3 at Biggs if the special train reached that station in time, and he must have known that some passenger would be at the depot intending to go west. This knowledge, however, in the absence of any stipulation to that effect, did not bind the last-named company to light its depot platform until a reasonable time next prior to the arrival of its west-bound passenger train. The plaintiff, having accompanied the wool buyers going east to their train, returned to the car provided for his accommodation about three hours before train No. 3 was expected to arrive. Whether or not such period of time next prior to the arrival of a train is reasonable during which the Oregon Railroad & Navigation Company should have kept its depot platform lighted at a station where its night passenger trains were not scheduled to stop, 1 L.R.A. (N.S.)

is not now necessary to inquire, for that was a question exclusively for the jury to determine.

In considering the action of the trial court in overruling the motions for judgments of nonsuit interposed on the ground of plaintiff's alleged contributory negligence, we shall for the present treat the question as it relates to the duty of the Columbia Southern Railway Company only, basing our conclusion on its assent to plaintiff's occupying its car until the arrival of the west-bound passenger train on the road of the other company. This car was *pro hac vice* a depot to all intents and purposes, well lighted, and provided with a suitable toilet room, so that it was unnecessary for plaintiff to leave it, as in the cases of *Missouri P. R. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, and *Louisville, N. A. & C. R. Co. v. Treadway*, 142 Ind. 475, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794, to obey an urgent call of nature. The testimony shows that the coach provided for plaintiff's accommodation was scented with tobacco smoke, but it nowhere appears in the bill of exceptions that the fumes of that weed were offensive to him, as in the case of *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114, in which Mr. Chief Justice Dillon said: "If the station room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode, and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care, and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed." At the time plaintiff sustained the injury he did not go upon the station platform for the purpose of entering a car in which he expected to take passage, or to transact any business with either railroad company, nor was he for any reason necessarily compelled to leave the coach which he occupied. His act in leaving the car at the time and under the circumstance indicated, and going to the platform, which he knew was not lighted, is sought to be justified on the ground that he was entitled to walk for exercise, and to secure fresh air, and that he had a right to assume, from the extreme darkness, and his knowledge that the defendant companies were aware that he was waiting the arrival of a train at a depot jointly used by them,

that they had discharged the obligation devolving upon them of making the station platform reasonably safe, and that, relying thereon, he was injured in consequence of their breach of duty, thereby rendering them liable for the damages resulting from the injury which he sustained. He could undoubtedly have secured an abundant supply of fresh air by raising a window of the coach, thereby ventilating it, and hence he was not obliged to leave the car for that purpose.

This brings us to a consideration of the remaining question,—whether or not a person sustaining the quasi relation of a passenger can, for the mere purpose of exercise, leave a well-lighted depot, provided with necessary accommodations, and go in the darkness upon a walk surrounding the station, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing on or its omission to light the platform. A passenger, before reaching his destination, may leave a car or a boat to transact his own private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers; and if, without his fault, he is injured in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained. 1 Fetter, Carr. Pass. § 234. Thus, in *Dice v. Willamette Transp. & Locks Co.* 8 Or. 60, 34 Am. Rep. 576, the plaintiff, a passenger, before reaching his destination, attempted to leave the defendant's steamboat to transact his own business at a landing where passengers and freight were being discharged, and, the night being dark and rainy, and the lights on the boat and on the wharf insufficient to enable him plainly to see his way, he fell, sustaining an injury, and it was held that he had a right of action against the carrier for its negligence in not providing a safe means of egress from the boat to the wharf.

In *Hrebrik v. Carr*, 29 Fed. 298, notice having been given that a steamer would sail early on a certain morning, the plaintiff and her husband went on board the boat the evening before her departure, and soon thereafter he, in attempting to cross to the wharf to secure some tobacco, fell from the gang plank, and was drowned. In an action to recover for the death it was held that a passenger on board a vessel before she left port had the right to go ashore for the purpose stated, and that it was the duty of the carrier to provide a safe means of passage from the steamer to the pier. In that case it does not appear that the night had set in, or, is so, that the

passageway was not lighted. In deciding the case *Benedict, J.*, says: "The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier, is a common incident of travel. It is constantly done, to find lost baggage, to speak to a friend, and may be done to purchase tobacco by anyone addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passenger's use, at all proper times, a safe passageway from the steamer to the pier."

In *Alabama G. S. R. Co. v. Coggins*, 32 C. C. A. 1, 60 U. S. App. 140, 88 Fed. 455; the appellee, a lineman in the employ of the Western Union Telegraph Company, was traveling in the caboose of a freight train to a point where repairs were to be made. The train on which he was riding stopped at Rising Fawn, Georgia, an intermediate station, at the usual place for the alighting of passengers from freight trains, which was about 1,500 feet from the station proper. The appellee got off the car and started to walk to the station by the only practicable way, which was between the main track and the house track, to see if there was any telegram for him from his employer. As he was going to the station he saw a part of the train on which he came backing towards him on the main line, and as it approached he concluded it would be safer to cross over near the house track, and in doing so he was struck and injured by a switching car on a cut-off. In an action to recover damages for the hurt inflicted, the railroad company introduced testimony tending to show that the appellee was loitering along between the tracks, talking with acquaintances whom he met; that he had no reason to anticipate the receipt of a telegraphic order at that point, and that he was standing on or near the track, looking up at the telegraph wires, when struck. The trial court, having instructed the jury in relation to the degree of care due from a railroad company to a passenger on a freight train, said: "Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger, and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if he had any), and return, and no longer. The

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liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty, except that which they owed to any stranger,—not to wantonly or unnecessarily injure him. . . . Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot, and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employees in the yard,—if he stopped in the yard, and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that),—why, then in each of these contingencies, he would cease to be a passenger, but would be there on the switch yard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe to a stranger in the yard without any business." A judgment, having been rendered against the railroad company, was affirmed on appeal; Taft, J., in referring to the instructions, saying: "The foregoing states the law correctly, and leaves to the jury the issue in such a way as to enable them, without difficulty, justly to determine whether Coggins was entitled to the high degree of care from the railroad company due a passenger when he was struck." Further in the opinion it is said: "The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations and go to the station house while the train is waiting. But we think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the

like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." In that case nothing is said as to what time the appellee was injured but, as it is intimated that he was looking up at the telegraph wires when he was struck, it is to be inferred that it was daylight. This being so, what is said in the opinion about the right of a passenger to walk up and down the depot platform for exercise can have no application to explorations made at such a place in utter darkness.

In *St. Louis & S. F. R. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, W. F. Coulson was a passenger on appellant's train, which stopped at an intermediate station for dinner. He left the car in which he was riding, and went to an eating house, where he secured his lunch, and, having returned he passed through a car to the depot platform where, having been informed by the conductor that the train would start in three or four minutes, he walked to the platform on the opposite side, and stood 5 or 6 feet from the end of a coach. He then started towards the car, whereupon he caught his foot in a warped plank, and, falling, put out his hand for protection, and as he did so the train simultaneously started, whereby he was injured. A judgment having been rendered against the railroad company for the damages sustained, it was contended by the appellant that its obligation under the contract ceased when Coulson got his lunch and returned to the car. The court, discussing this question, says: "We cannot consent to this doctrine. The train had stopped for dinner. The passengers were invited to this platform. It was maintained for their safety and convenience, and they were expected to get on and off. This was involved in and connected with the regular passenger service of the road. The act of Coulson in leaving the train at this particular point, after he had returned from his luncheon, is not sufficient to justify this court in declaring, as a matter of law, that he was negligent, or that the obligation of the company to provide safe passage for him had been fulfilled, or that the relationship as a passenger to the company had for the time ceased." In that case the injury occurred at the noon hour, when the passenger was undoubtedly afforded sufficient natural light plainly to see the passageway that had been provided by the railway company for the accommodation of the traveling public.

In *Chicago & A. R. Co. v. Woolridge*, 32 Ill. App. 237, the appellee, having a railroad ticket, was walking on a depot platform about 9 o'clock P. M. waiting the departure of his train, which stood on a side

track, and was expected to pull out after a "rally" meeting adjourned. Another train coming in rapidly hit a baggage truck which was being pulled on the platform, causing it to strike and injure him. In an action to recover the damages resulting from the hurt the court refused to instruct the jury that unless the appellee was at the place where he was injured on business with the railroad company, or was there to take a train about to depart from the station, or to meet someone expected to arrive on the train which struck the baggage truck, or to see someone about to leave, then, if there was a suitable waiting room, though he was expecting to depart on some other train for which he might have been waiting, he had no right to be on the depot platform at the time he was injured. A judgment having been rendered against the company, was affirmed on appeal; the court, in referring to the charge requested, saying: "We do not think this states the law correctly. To hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense." In that case the baggage master testified that he lighted the gas at the baggage room door before the arrival of the train causing the injury. The depot platform must also have been lighted, for Woolridge testified that he saw the baggage truck when it was struck by the incoming train.

In *Lemery v. Great Northern R. Co.* 83 Minn. 47, 85 N. W. 908, the plaintiff, having purchased a railroad ticket, entered a day coach at Duluth, Minnesota, for a continuous passage to Park River, North Dakota, on defendant's through train that did not stop at intermediate stations to receive or discharge passengers. After the train started, plaintiff left the car originally taken, passed to the rear into a sleeping car, going through a coach occupied by a military company that maintained guards at each entrance of the car, but passengers were not prevented from passing through it when necessary. As the conductor entered the sleeper, plaintiff discovered that he had lost his ticket, and, being compelled to pay his fare, he demanded a receipt therefor, but none was given him, the conductor claiming that his blank acknowledgments of payment were at the other end of the train. The plaintiff remained in the sleeper until the train arrived at Grand Rapids, Minnesota, where it was stopped at night, when it was very dark, for the pur-
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pose, only, of taking water. When the train came to a halt, plaintiff left the sleeper, as he insisted, to find the conductor and again to demand a receipt, and also to pass around the car occupied by the militia and enter the day coach, claiming that he was not permitted longer to remain in the sleeper, and that the military guards would not allow him to pass through the car which was under their care and protection. In alighting at the station plaintiff fell between the steps of the sleeper and the depot platform, which was not lighted, sustaining an injury. An action having been begun to recover the damages resulting from the hurt sustained, a judgment of nonsuit was rendered, which was affirmed on appeal, the court finding that the reasons assigned by plaintiff for going to the station platform were subterfuges, and holding that a through passenger on a train which did not stop at intermediate stations, who leaves such train without the knowledge, consent, or invitation of the company, at any intermediate station at which the train may stop for some purpose necessary to its operation and management only, abandons for the time being his relation as a passenger, and assumes all the risks incident to his movements. In rendering that decision, Mr. Justice Brown, speaking for the court, says: "In the case of a local train the company is bound to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the approaches to the train in a safe condition for their egress and ingress." Further in the opinion it is said: "This was not a local train, but a through train, and the plaintiff was a through passenger. The train did not stop at Grand Rapids to receive or discharge passengers. There was no invitation held out to plaintiff to leave the train at that station. There was no occasion for him to do so, and he must be taken to have assumed all risks incident thereto. There was not only no invitation, express or implied, to passengers to leave the train at this station, but the fact that the station platform was unlighted was in the nature of a warning to them to remain on board."

The cases to which attention has been called, illustrating the right of a passenger, without forfeiting his relation as such, to leave a car or a boat at an intermediate station or landing to transact business of his own, or for his own pleasure, where a stop is made to receive or discharge passengers, are relied upon by plaintiff's counsel to justify their client in assuming, from the unlighted platform, that it was safe for him to walk thereon.

An examination of these cases will show that *Dice v. Willamette Transp. & Locks Co.* 8 Or. 60, 34 Am. Rep. 575 is the only one cited in which judgment is given for injuries received in the darkness by a passenger at an intermediate station or landing by leaving a car or a boat to transact business not connected with the carrier; and in that case it will be remembered that the steamboat and the wharf were lighted, but not sufficiently to enable the plaintiff to discover and avoid the danger to which he was exposed. In that case, the boat having made a landing at night where passengers and freight were being discharged, *Dice* might reasonably have inferred from the light on the wharf and on the steamer, which he must have seen, that the passage-way was sufficiently illuminated to enable him safely to go ashore. In the case at bar, if the plaintiff had necessarily been compelled to leave the car because the Columbia Southern Railway Company neglected to furnish suitable accommodations, or if the train of the other company, upon which he expected to take passage, was approaching Biggs Station, so that to board it he was obliged to cross the depot platform in the darkness, a very different rule of law would be applicable. The right of a passenger, before reaching his destination, to leave a car and to walk on a depot platform for exercise, when the train is stopped in daylight, to receive or discharge passengers, or at night, even, when the walk is sufficiently illuminated, is admitted. The vibration of a car in rapid motion prevents a passenger from materially changing his position in a seat, the occupation of which for several hours necessarily produces extreme tension of the muscles of the lower limbs, to relax which relief is found in walking, and, as this cannot readily be secured in a car, it must be obtained, if at all, outside the coach and when it is at rest. When a train is stopped in daylight for any reasonable length of time to receive or discharge passengers, an invitation is thereby tacitly extended by the railroad company to the passengers in the coaches to alight for a few minutes' rest and invigoration by a change of position and a respiration of pure air. This same invitation, it would seem, must also be offered at night where a train is stopped for a reasonable time to receive or discharge passengers at a station, the platform of which is well lighted. A passenger on a train, before reaching his destination, cannot, in reason, be invited to leave the car every time a stop is made at night to receive or discharge passengers. If a contrary rule were to obtain, it would necessarily follow that a railroad company would not venture

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to stop a train when flagged at night at an insignificant station, the platform of which was not illuminated, however urgent might be the call to board the train. When the platform of a depot at which a train stops at night is not illuminated, the darkness is a notice to passengers in the cars who are not obliged to depart at that station to remain in the coaches. *Lemery v. Great Northern R. Co.* 83 Minn. 47, 85 N. W. 908. So, too, where a person, intending to take a train, goes at night to a well-lighted waiting room of a depot and, leaving it, walks to an unlighted freight platform and there sustains an injury, his contributory negligence precludes a recovery. *Gunderman v. Missouri, K. & T. R. Co.* 58 Mo. App. 370. In that case the plaintiff, knowing the construction of the depot, went to a platform not intended to be used by passengers. It is cited, however, to show that an unlighted way imparts notice to all persons except such as are necessarily compelled to pass over it. In deciding that case the court, referring to the plaintiff, says: "He wantonly left the comfortable waiting rooms and well-lighted passenger platform of defendant, and sauntered forth into the darkness, and upon the defendant's freight platform, and, without there giving heed to the existing conditions, patent to his senses, and which were sufficient to have warned an ordinarily prudent man of the probable danger of proceeding further, he persisted in going forward until he fell into the pit. He was guilty of such contributory negligence as must preclude his recovery." To the same effect, see *Grimes v. Pennsylvania Co.* 36 Fed. 72.

In the case at bar plaintiff had crossed the depot platform several times in daylight before he was injured, and, though he testified that his attention was never called to the condition of the ground at the west end of the platform, he knew the south side of the walk surrounding the building was elevated while the north side was level with the track of the Oregon Railroad & Navigation Company. Knowing these facts, reason must have taught him that the surface of the ground at the west end of the platform descended to the south, unless it had been graded up to that line.

If it was incumbent upon either of the defendants to light the depot platform three hours before a train was expected to arrive, the failure in this respect was known to the plaintiff, who, when he was injured, was not necessarily compelled to leave the well-lighted car that had been provided for his accommodation; but, having done so, on one of the darkest nights he ever saw, his injury results from his own contributory negligence, thereby pre-

cluding a recovery of damages for the hurt sustained. *Massey v. Seller*, 45 Or. 267, 77 Pac. 397; *Missouri, K. & T. R. Co. v. Turley*, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369; *Emery v. Chicago, M. & St. P. R. Co.* 77 Minn. 465, 80 N. W. 627.

There being no conflict in the testimony, an error was committed in refusing to give a judgment of nonsuit in favor of each defendant. The judgment is therefore reversed, and the cause remanded, with directions to sustain the motions interposed.

Petition for rehearing denied.

OREGON SUPREME COURT.

STATE OF OREGON, Resp.,
v.

J. C. RYAN, Appt.

(.... Or.)

1. Conspiracy—proof of.

A conspiracy may be proved by showing the declarations, acts, and conduct of the conspirators.

2. Same—admission of evidence.

Upon trial of one accused of getting money from another by means of a conspiracy to steal, evidence is admissible of declarations by one of the conspirators which induced the victim to go to the desired spot, where the others carried out the scheme, although no conspiracy was shown to have existed at the time they were made.

3. Larceny—securing money by trick.

One who induces another to part with

money as a wager on a pretended event which is not to take place, with the intention of appropriating it to his own use, is guilty of larceny in making such appropriation, notwithstanding the owner consents to part with the possession.

(October 23, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Marion County convicting him of larceny. Affirmed.

The facts are stated in the opinion.

Messrs. James McCain, W. H. Holmes, and Webster Holmes, for appellant:

Evidence of Huston's sayings in Portland was inadmissible.

Underhill, Crim. Ev. §§ 492, 493; Cox v. State, 8 Tex. App. 258, 34 Am. Rep. 746; *State v. McGee*, 81 Iowa, 17, 46 N. W. 764; *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Brown v. United States*, 150 U. S. 97, 37 L. ed. 1012, 14 Sup. Ct. Rep. 37.

Larceny is not necessarily committed wherever property is feloniously obtained from the owner by means of schemes or fraudulent acts.

2 Bishop, *Crim. Law*, 8th ed. § 758; 3 Greenl. *Ev. § 150*; 18 Am. & Eng. *Enc. Law*, 2d ed. p. 459; Russell, *Crimes*, 4th ed. 200; *Bassett v. Spofford*, 45 N. Y. 392, 6 Am. Rep. 101; *Welsh v. People*, 17 Ill. 339; *Com. v. Lovell*, 2 Phila. 385; *Thorne v. Turck*, 94 N. Y. 90, 46 Am. Rep. 126; *People v. McDonald*, 43 N. Y. 61; *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Com. v. Eichel-*

Case Note.—In *STATE v. RYAN* the prosecutor did not become a party to the wager. The race and pretended bet between the confederates were merely a trick by which possession of the money produced by him as security for his position as stakeholder was obtained, and the case falls within the general principle of larceny by trick, so well stated in *State v. Edwards*, 51 W. Va. 220, 59 L. R. A. 465, 41 S. E. 429: "Where a person, by means of some fraud or trick, and with intent to steal, procures the delivery of money or goods to him by the owner, it amounts to a taking, within the definition of larceny, unless the delivery of the possession is made for the purpose of passing the property or title in the goods as well as the possession. And, if possession be acquired by such means, and with such intent, and the goods or money are afterwards converted by the taker to his own use, the offense is larceny; and whether such intent existed at the time of the taking and practice of the fraud is a question for the jury. But this distinction must be borne in mind: If the property is delivered with the intention on the part of its owner of parting with it altogether, passing both title and possession, the offense is not larceny, but obtaining property by false L.R.A. (N.S.)

pretenses; but, if the owner is induced to deliver the possession only, the taker having a preconceived design to convert it to his own use when obtained, it is implied that the taking is against the will of the owner, and the offense is larceny. While the act of taking, in order to constitute larceny, must be a trespass against the owner's possession, actual violence is not necessary, for in these cases the fraud by which possession is acquired takes the place of force."

The case is nevertheless closely related to that of a wager to which the prosecutor becomes a party, staking his money upon a pretended chance at cards, dice, or other game, upon the outcome of which, however, there is, through prearranged design of the other parties thereto, no intention or possibility of his winning. That the confederates in such a game are guilty of larceny is generally recognized. "It is larceny where the defendants so fraudulently conduct a gambling game or lottery as to give the prosecutor no chance of winning, and he parts with his money through fraud or fear." *Rapalje, Larceny*, § 14.

Larceny by trick is well illustrated by *State v. Edwards*, above quoted from. The prosecutor was induced by a friend to enter a three-card-monte game with a stranger.

berger, 119 Pa. 254, 4 Am. St. Rep. 642, 13 Atl. 422; Connor v. People, 18 Colo. 373, 25 L. R. A. 346, 36 Am. St. Rep. 295, 33 Pac. 159; People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2; People v. Campbell, 127 Cal. 278, 59 Pac. 593; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; State v. Edwards, 51 W. Va. 220, 59 L. R. A. 465, 41 S. E. 429; State v. Will, 49 Ia. Ann. 1337, 22 So. 378; Haley v. State, 49 Ark. 147, 4 S. W. 746.

Messrs. A. M. Crawford, Attorney General, John H. McNary, and P. H. D'Arcy, for respondent:

It is immaterial whether the conspiracy was established before or after the introduction of acts and declarations forming part of it.

State v. Moore, 32 Or. 65, 48 Pac. 468; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898.

It is immaterial at what time one charged as a member of a conspiracy to commit crime is shown to have entered the conspiracy.

Smith v. State, 21 Tex. App. 96, 17 S. W. 560; Holtz v. State, 76 Wis. 99, 44 N. W. 1107; Underhill, Crim. Ev. §§ 492, 493; Greenl. Ev. 15th ed. § 3; 3 Greenl. Ev. 15th ed. § 93; Wharton, Crim. Ev. § 698.

If the owner of property delivers it to another, who receives it with felonious intent at the time, he is guilty of larceny, even though it is by the owner's permission.

State v. Meldrum, 41 Or. 380, 70 Pac. 526; State v. Howard, 41 Or. 49, 69 Pac. 50; State v. Hall, 76 Iowa, 85, 14 Am. St. Rep.

204, 40 N. W. 107; Com. v. Eichelberger, 119 Pa. 254, 4 Am. St. Rep. 642, 13 Atl. 422.

Wolverton, Ch. J., delivered the opinion of the court:

The defendant was convicted of the crime of larceny, and appeals from the judgment rendered in pursuance thereof.

The subject of the larceny was \$2,000, consisting of 100 gold \$20 pieces, current money of the United States, alleged to have been the property of one John F. Roth, the prosecuting witness. Roth testified, in substance, that he was acquainted with the defendant; that he met him in Salem, Oregon, at the Willamette hotel on the 23d day of September, 1904; that defendant came to a room in the hotel occupied by witness and a party by the name of Huston, and was introduced to him by Huston; that witness met Huston in Portland, about two days prior to this date, in Doctor Pohl's office, and had a conversation with him therein; and that he explained what he was up for. Witness continues (quoting from the bill of exceptions): "Huston told me that two men here at Salem were trying to get up a foot race, and he said that they wanted some bona fide business man to come up here and hold the money for them; and he says, if he could get me to come up here, he would assure me that he would pay me well for my trouble. He said I did not need to bet anything. He said them two fellows had lots of money. All they wanted was for me to come up here and hold the money, and divide it fairly after the race

After winning a small amount, larger stakes were put up, and he and his "friend" won heavily. He was prevailed upon to return a little to the stranger, who had been fleeced, and the prosecutor's money, a pile of \$300, was given over, leaving him with a tin box full of bogus paper. The "friend" was held guilty of larceny.

Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123, which is there cited, is of a similar nature. The prosecutor, having been decoyed into a saloon by one of two confederates, was induced by one to loan him a sum to stake upon the throw of dice. It was lost to the other confederate pursuant to the scheme of the two. It was held to be larceny.

That cannot be called a game of chance, says the court in United States v. Murphy, MacArth. & M. 375, 48 Am. Rep. 754, where the result is certain, and by no possibility could the victim have won. A conviction for larceny was sustained, the game of faro, in which the prosecutor's money was lost, being proved to be a mere farce, in which the sharpers were sure of winning.

Similarly, in Miller v. Com. 78 Ky. 15, 39 Am. Rep. 194, the prosecutor was taken in by conspirators in a faro game so operated that only they could win. Money was ob-

tained from him by his "friend" to stake on the game, and was lost to the second of the two confederates. The latter are said by the court to be in the same position as if, instead of going through the form of the game, they had, immediately upon obtaining possession of the money, divided it between them.

Exactly this state of affairs appears in Queen v. Buckmaster, L. R. 20 Q. B. Div. 182, where the prisoner, having obtained the prosecutor's money at the race track under pretense of making a bet upon a forthcoming race, made off with the same, and, after the race, denied the existence of the bet or having received any money from the prosecutor.

Similar cases in which a conviction for larceny is sustained are found in Hall v. State, 6 Baxt. 522; State v. Skilbrick, 25 Wash. 558, 87 Am. St. Rep. 784, 66 Pac. 53; People v. Dean, 35 N. Y. S. R. 931, 12 N. Y. Supp. 749; Rex v. Robson, Russ. & R. C. C. 413. See, however, Hindman v. State, 72 Ark. 516, 81 S. W. 836.

Fraudulently obtaining property by a game, device, or slight of hand is covered by statute in Massachusetts. Com. v. Jenks, 138 Mass. 484.

was over, and I agreed to come up on those conditions; and I came up here, and on Friday evening we went to the hotel, and Ryan came up to our room, and Huston introduced me to him, and he [Ryan] explained the thing differently. He said he wanted to bet some money on a foot race against Raymond. He said Raymond was a friend of his, and he wanted me to bet against Raymond for him, and he said he would pay me for my trouble. Next day he met us again and wanted to know if I had any money in the bank to show I was a business man in Portland. The next day Ryan came to the hotel again, and wanted to know if I had any money to show, in case of an argument, that everything was all right, that I was responsible, and I told him that I had a bank book, the money that was put in the bank from our business, and a small check, and he said in case of an argument he wanted to show about \$2,000 in the bank; that that would be enough to satisfy Raymond probably, if he lost that much money and wanted to protest the race. He wanted me to go back and make arrangements so I could get \$2,000, and I went back and explained the case to my brother-in-law, and he let me have that amount of money. Ryan said we might not have to draw it and I agreed to it, and we came back here Tuesday, Huston and I, and Ryan met us and went to the hotel with us, and we had dinner, and after dinner he [Ryan] went out. About 1 o'clock Ryan met us again, and he took us down to his room,—it was over a saloon on the corner,—and he introduced me to this man Raymond, and Raymond said that he wanted to bet some money on a foot race. Ryan gave me a bunch of greenbacks marked \$2,500, and he said, when Raymond came, 'You bet this money with him,' so Raymond said he wanted to bet, and he put down \$2,500 in greenbacks. Raymond said he would go back to the bank, and Ryan gave me a bunch, \$3,000, all in greenbacks, and I bet Raymond all this other bunch. It was put in a little grip, and Raymond went downstairs with this man, Morris. While he was down there, Ryan gave me another bunch of \$5,000 in greenbacks, but he says, 'Go down and draw your money,' and he said, 'I want the money.' I did not think anything about it being a scheme, and I went down to draw my money. It was \$2,000. I got it all in 20-dollar gold pieces. When I got back, Raymond says, 'I have got \$5,000 more,' and I bet him the \$5,000 which Ryan gave me. Ryan says, 'Did you draw your money from the bank?—and I had it in a little bag, and Ryan took it and he put it in a grip and he says, 'We will run the race,' and he says, 'Leave the money in the bank,' and he stepped out about five or ten minutes and came back and showed me a little receipt, 1 L.R.A. (N.S.)

which read: 'One grip and contents deposited here.' He folded it up and put it in his pocket, and said, 'After the foot race we will get it,' and we went out to the ball ground, and, when we got there, there were a few boys in there, about sixteen or eighteen years old, playing ball. Then it was decided to go back of the ball ground, and they went back there, and Ryan stepped off 60 feet and told me to go to one end while he measured off 60 feet, and I stayed up there, and the men started to run and one fell down, and Ryan said to Raymond: 'We will run this thing over inside of ten days,' and he said: 'All right. We will go to the race track or some other place,' and we agreed all around that we would run it off in ten days, and Ryan said: 'We will leave the money in the bank until after the race comes off,' and I went back to Portland that same night, and Huston went along." The witness further testified, in substance, that he came to Salem on the 23d of September in company with Huston; that Ryan, Raymond, Morris, Huston, and another man accompanied him to the race; that Morris was one of the runners and Huston the other; that Ryan was supposed to be betting on Huston, and Raymond on Morris. The defendant offered evidence tending to show that he met Roth, the prosecuting witness, for the first time on the 23d of September, 1904; that he was not introduced to him, but that Roth came to him on the street and said to him, in substance: "We understand that you know something about athletics, and [referring to the foot race in question] we would like for you to be stakeholder," which the defendant consented to do. He said, amongst other things, to the defendant, that he wanted it understood that this race was to be run as private as possible, and, as his partner was interested with him, he did not want him to know this race was coming off; and, further, the defendant testified and offered evidence tending to show that, after the race was run and was unsatisfactory to Roth, it was agreed between Roth and Raymond, who was backing the other runner, Morris, that the race should be again run on the following Saturday. That the defendant retained the money until late in the evening Saturday, and after the time had expired within which the race was to be rerun, Raymond and Morris, his runner, were present, ready to rerun the race, but that Roth did not come with his runner to contest. That after his time had expired [the defendant] as stakeholder turned the money in his hands over to Raymond." The foregoing testimony illustrates fairly the respective positions of the parties litigant. There was an objection interposed to the prosecuting witness detailing what was said and done by Huston in

Portland, that being two days prior to the time they met the defendant in Salem, on the ground that such evidence was incompetent by which to establish the defendant's guilt. The court, however, permitted it to go to the jury upon the assurance on the part of the state's attorney that he would connect up Huston with the defendant in the transaction later on in the trial. Error is now predicated upon the admission of such testimony, not because of the order in which it was allowed to go to the jury, but solely upon its incompetency.

The theory of the state is that both Huston and the defendant were, with others, engaged in a conspiracy to wrongfully obtain the money in question from Roth, and that what was said and done by Huston in Portland was in furtherance of such conspiracy, and therefore tantamount to the utterances and acts of the defendant himself. It is a matter, perhaps, of substantive law, rather than a rule of evidence, that what one conspirator says and does during the existence and in furtherance of the conspiracy are the utterances and doings of all, on like principle that the acts of an agent within the legitimate scope of his employment bind his principal as if done by the latter. The conspirators are all principals, and the acts of each are the acts of his fellow conspirators, and are binding upon that basis. Unless, therefore, the relationship is such as to make them all principals, none are affected, except the party whose acts or admissions are in question. When the appropriate relationship is shown, then may the acts and utterances of each be shown as the acts and utterances of all. 3 Wigmore, Ev. § 1797; 15 Am. Law Rev. 80. The common expression of the books seems to be that "those declarations only are admissible which are made by a conspirator during the existence of the conspiracy, and in furtherance of it." Underhill, Crim. Ev. § 493. Greenleaf says that the acts and declarations must "be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects." 1 Greenl. Ev. 16th ed. § 184a.

Now, it is argued that what Huston said and did in Portland was prior to the formation of any conspiracy between the parties concerned in the theft. But is the premise well founded? It is not material at what particular time anyone entered into the conspiracy. It is enough to know that he was a common conspirator. The acts or declarations of one or more of the conspirators are sometimes admitted before sufficient proof is given of the conspiracy. This rests, however, largely within the discretion of the trial court, but the proper connection must be subsequently made, so as to show

prima facie a conspiracy between all, before such acts or declarations will ultimately be permitted to go to the jury. Such is the course pursued in the present case. A conspiracy may be proved by showing the declarations, acts, and conduct of the conspirators. It is seldom possible to establish a specific understanding by direct agreement between the parties to effect or accomplish an unlawful purpose. Usually, therefore, the evidence must be necessarily circumstantial in character, and will be sufficient, if it leads to the conviction that such a combination in fact existed. Thus, if it be shown that the conspirators were apparently working to the same purpose,—that is, one performing one part and another another,—each tending to the attainment of the same object, so that in the end there was apparent concert of action, whether they were acting in the immediate presence of each other or not, it would afford proof of a conspiracy to effectuate that object. *Mussel Slough Case*, 6 Sawy. 612, 5 Fed. 680; *United States v. Sacia*, 2 Fed. 754. Such proofs would evidence prima facie a conspiracy. So it is, as was pertinently said by Pennefather, Ch. J., in *R. v. O'Connell*, cited and quoted in 2 *Wigmore on Evidence*, § 1079: "If the conspiracy be proved to have existed, or rather, if evidence be given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all; and, whatever one does in furtherance of the common design, he does as the agent of the co-conspirators." Now, a conspiracy between Huston and the defendant was not shown prima facie sufficient to carry the case to the jury, until their acts and conduct two days later in Salem were detailed by the witness. But Huston's declarations and representations to Roth in Portland, and the fact that the former accompanied the latter to Salem, leading to a meeting with the defendant and the other parties concerned in the scheme, coupled with the further fact that the scheme was then carried to a successful issue, all participating, show a common design of all. That design could not have been successful without Roth's presence in Salem, and Huston played the part of bringing him here. This affords evidence in itself of a conspiracy existing prior to the time that Huston talked with Roth in Portland; and, further, that the acts and declarations of Huston in the presence of Roth were but a part of the common design to effectuate the purpose of the conspiracy. What Huston did, therefore, in Portland was in furtherance of the common design and prima facie, at least, during the existence of the conspiracy. The scheme included a foot race and a betting thereon, or a simulation to that effect. Huston talked about such a scheme in Portland, and, when

he induced Roth to come to Salem, the defendant took the matter up where Huston had left it, and Huston subsequently participated in the race. Could there be any more pertinent evidence of a conspiracy between Huston and the defendant to accomplish an unlawful purpose, and that it had its origin prior to Huston's meeting Roth in Portland? Clearly not. The ruling of the trial court in admitting the evidence was therefore unexceptional. *State v. Moore*, 32 Or. 65, 48 Pac. 468, is by analogy authority for this view, and *State v. McGee*, 81 Iowa, 17, 46 N. W. 764, so much relied on by appellant, is not adverse.

The next assignment of error relates to the following instructions of the court, to wit: "If, however, the property was received or taken by the defendant with a felonious intent at the time, he is guilty of larceny, even though it were by the owner's consent. Any preconcerted plan to obtain money, and an intent to steal coupled with that plan, is felonious. If money is obtained by trick, artifice, or device, as fraudulently obtaining it under color of a bet, inducing a person to bet merely for the purpose of getting possession of the stakes deposited, and with the intent to appropriate them, regardless of the event on which the bet was made, is larceny. So you are to consider whether or not this whole transaction was a mere scheme or device to steal Roth's money. If it appears to you beyond a reasonable doubt that the defendant entered into such scheme, either by himself or with others, intending all the time to steal this money from Roth, and you should believe that beyond a reasonable doubt, and further find that he did get the money by such scheme, you should find him guilty as charged in the indictment." The meaning intended to be conveyed by the language quoted is elucidated by a preceding clause and others that followed, whereby it was explained that, if the property was received in good faith, a subsequent wrongful conversion would not support an allegation of larceny in the original taking; and, further, that if the bet was made, and Ryan was a stakeholder in good faith, he could pay the money over to the winner at any time after the race, and before a return was demanded by Roth, and the transaction would not constitute larceny. The legal significance of the term "bet" or "wager" is well understood. The contention of appellant is that, if Roth bet his money on the foot race in question, it is not of the slightest legal consequence how he came to do so, whether he was so induced by fraud or not, or whether the foot race was fair or not; that in either or any event he parted with his money voluntarily, and, there not being present the element of trespass, there could be no larceny. The 1 L.R.A. (N.S.)

proposition goes beyond the authorities. It is not larceny, say the learned authors of the American and English Encyclopedia of Law (vol. 18, 2d ed. p. 482), to obtain money "by inducing a person to bet on some game or trick, and then, by fraudulently making it appear that the party betting has lost, taking the stakes deposited by him." The text seems to be based upon an old English case, where the party parted with his property on a wagering trick, supposing that he had lost fairly. *King v. Nicholson*, 2 Leach, C. L. 610. By a footnote the authors further say: "A distinction is to be noted between apparently winning a bet by fraudulent means and inducing a party to deposit money or goods on a bet merely as a means of getting possession of them." The principle applicable for determining whether money obtained fraudulently amounts to larceny or not is well illustrated in *People v. Tomlinson*, 102 Cal. 19, 23, 36 Pac. 506, 507. The court says: "Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by false pretenses. But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny." The distinction was applied in a later case. *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2. Mr. Justice Caton states the principle a little more comprehensively in *Welsh v. People*, 17 Ill. 339. He says: "The rule is plainly this: If the owner of goods alleged to have been stolen parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny." This doctrine is expressly reaffirmed by two later cases from the same state. *Stinson v. People*, 43 Ill. 397; *Doss v. People*, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093. The latter comes very near on the facts to the case at bar.

Now, if the defendant and his co-conspira-

tors made use of the bet as a scheme or device to secure possession of Roth's money, and at the same time the bet was merely simulated, it not being intended that there should be a bona fide foot race between the supposed contestants, and the money was received to be disposed of on the result of such race, and the race was not run bona fide, and was not so intended from the beginning, then it was larceny in the defendant to appropriate it. The money was received by the defendant to be disposed of in a particular way; that is, to be held as stakes to abide the event of a bona fide foot race. If Roth won, the money was to be returned to him with his winning, but, if he lost, then to be turned over to Raymond. Such was the effect of the wager, if real. If, however, there was not to be a bona fide race, and the defendant intended to retain the money to his own use, and not to dispose of it on account of Roth, or in a particular way, to which Roth had assented, then there was a larcenous taking, for Roth would never have assented to staking his money if he had known that it was to be retained in any event. Though he may have voluntarily given the money into the hands of the defendant, he did not part with the title, because he was tricked to believe there was to be a fair and bona fide foot race; and, while he might have intended to bet, the defendant did not intend that he should have any chance of winning, and therefore did not intend to account for the money or dispose of it in the particular way agreed upon. Thus he obtained Roth's money feloniously, and was guilty of larceny from the inception. If this is not larceny, then the distinction is too refined for practical and safe application. As was said by Mr. Justice Campbell, in *People v. Shaw*, 57 Mich. 403, 406, 58 Am. Rep. 372, 24 N. W. 121, 122, whose language is peculiarly apt in the present exigency: "We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious."

The circuit court properly distinguished between a real bet and one that was merely colorable or simulated for the purpose of getting wrongful possession of Roth's money, and the instructions are not vulnerable to the objections interposed.

The court further instructed that evidence of an escape is always admissible as against the defendant, but at the same time left it to the judgment of the jury whether or not the real purpose of the defendant was to escape justice or to go about his affairs innocently. 1 L.R.A. (N.S.)

This is assigned as error. The matter is disposed of, however, favorable to the instruction in *State v. Lee*, 17 Or. 488, 21 Pac. 455. No further comment is necessary.

The judgment of the Circuit Court will be affirmed, and it is so ordered.

Petition for rehearing denied.

RHODE ISLAND SUPREME COURT.

SUSAN F. EARLE

v.

RUDOLPH BERRY.

(.... R. I.)

1. New trial—finding on evidence.

A new trial will not be granted because the appellate court believes that the jury erroneously decided a question of fact on conflicting evidence.

2. Duress—refusal to pay money as.

Refusal to pay money admitted to be due, except upon receiving a certain kind of receipt, does not constitute such duress as to render the receipt void.

3. Compromise—receipt of less than is claimed.

An acknowledgment in writing that an amount received is all that is due, after a dispute as to what is due, is binding as a compromise.

(May 29, 1905.)

PETITION by defendant for new trial after verdict in plaintiff's favor in an action brought to recover money alleged to be due and unpaid. Granted.

The facts are stated in the opinion.

Case Note.—The holding of *EARLE v. BERRY*, that the refusal to pay money admitted to be due, unless a receipt demanded is given, does not constitute duress, is in accord with other authorities, where the parties stand on equal terms, except for the fact that the person giving the receipt needs the money.

Thus, the giving of a full release of equities claimed in certain property with the full knowledge of all the facts, to one who had distinctly refused to recognize them, in order to induce the latter to surrender property which he had detained under a claim of ownership and in denial of the former's right, does not constitute duress. *S. C. Hall Lumber Co. v. Gustin*, 54 Mich. 624, 20 N. W. 616.

Nor does the fact that the one giving a receipt in full is an employee, and is told, on the determination of his employment, that he will get nothing unless he signs such receipt, change the rule. *Golden v. Bartlett Illuminating Co.* 114 Mich. 625, 72 N. W. 622.

Nor that the government was the debtor,

Messrs. Cooke & Angell for defendant.

Mr. James C. Collins, Jr., for plaintiff:

The exactment of the money in dispute was compulsory and against the will of the plaintiff.

Earle v. Norfolk & N. B. Hosiery Co. 36 N. J. Eq. 188; Spaid v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lafayette & I. R. Co. v. Pattison, 41 Ind. 312.

The right to recover money paid under duress of property is very broad.

Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Spaid v. Barrett, *supra*; Shaw v. Woodcock, 7 Barn. & C. 73; Scholey v. Mumford, 60 N. Y. 498; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Bates v. New York Ins. Co. 3 Johns. Cas. 238.

Mr. Earle's statement at the time of the signing of the receipt, that the defendant would hear further from this matter, prevents the receipt from being conclusive.

Oates v. Hudson, 5 Eng. L. & Eq. 469, 6 Exch. 346; Stevenson v. Mortimer, 2 Cowp. 805; Ripley v. Gelston, 9 Johns. 201, 6 Am. Dec. 271; Clinton v. Strong, 9 Johns. 370; Astley v. Reynolds, 2 Strange, 913; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; Cobb v. Charter, 32 Conn. 358, 87 Am. Dec. 178; Adams v. Schiffer, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; Fuller v. Roberts, 35 Fla. 110, 17 So. 359; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Wilkerson v. Hood, 65 Mo. App. 491; Moses v. Macfarlen, 2 Burr. 1005; Cooley, Torts, 593.

A receipt may be "explained, qualified, or contradicted by parol evidence, and the circumstances under and the purposes for which it was executed may be shown."

Beach, Modern Law of Contracts, § 463; Scott v. Scott, 105 Ind. 584, 5 N. E. 397; Vyne v. Glenn, *supra*.

and that the claim was a very large one. United States v. Child, 12 Wall. 232, 20 L. ed. 360.

But stopping the payment of money due from third persons, with the knowledge that the creditor is in such circumstances that the failure to obtain the money will result in his financial ruin, will constitute duress avoiding a receipt in full, given on payment of part of the money claimed to be due. Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997.

And the withholding of a seaman's wages unless he will sign a receipt in full, including claims for assaults and batteries and imprisonment as well as for wages, is held to constitute duress because of the peculiarly helpless and dependent position of seamen. Thomas v. M'Daniel, 14 Johns. 185; The David Pratt, 1 Ware, 495, Fed. Cas. No. 3,597.

Such a receipt has also been held void 1 L.R.A. (N.S.)

Douglas, Ch. J., delivered the opinion of the court:

At the time to which this action relates—about September 2, 1902—the plaintiff and her family were the owners of 90 shares of the capital stock of the Phoenix Iron Foundry, a corporation doing business in the city of Providence, but all but 5 of these shares were hypothecated for debts,—63 shares to the Mechanics' Savings Bank to secure a loan of \$12,600, and 22 shares to Alfred Metcalf to secure a debt of \$8,000. The plaintiff's husband was a salaried officer of the company, and her two sons were employed there. One hundred and seventeen shares of the stock were owned by Edwin A. Smith, who was treasurer of the Mechanics' Savings Bank. The balance of the stock—30 shares—was in the treasury of the company. On September 2d, as he testifies, but probably a day later, the complainant's husband, who represented her in these transactions, received the following letter:

Providence, R. I., September 3, 1902.

Mr. Charles R. Earle,
Treasurer.

Dear Sir:—

I have to inform you that I have disposed of my holdings in the Phoenix Iron Foundry, having sold all my stock to Mr. Perry H. Brundage, of 49 Wall Street, New York, for \$300 per share, the same to be paid for at the Rhode Island Hospital Trust Company on October 1st, 1902, and he will take all the other stock at the same price provided he is notified of the same on or before September 15th. Yours truly,

Edwin A. Smith.

The purchaser referred to in the letter was acting in the interest of the Textile Finishing Machinery Company, which had acquired a controlling interest in several other manufacturing corporations, and Mr.

for duress where it was executed after the seaman had applied for a discharge from service, and before the request had been granted. Mitchell v. Pratt, Taney, 448, Fed. Cas. No. 9,668.

And the refusal to pay a discharged employee in a foreign land any part of the amount due, or to bring him home in the vessel of the employer, as required by the contract of employment, unless a receipt in full is given, has also been held to amount to duress by imprisonment. Rourke v. Story, 4 E. D. Smith, 54.

So, also, the refusal, by a military commission, to return unquestioned vouchers to claimants unless they would sign receipts in full for an amount allowed after making an arbitrary deduction from another voucher has been held to constitute duress avoiding the receipt. Livingston v. United States, 3 Ct. Cl. 131.

Earle, on receipt of this letter, was alarmed lest this new controlling power should wind up the business of the Phoenix Iron Foundry, terminate his employment, and force the plaintiff to sell her stock at the price offered. He consulted counsel, who advised him that the treasury stock could lawfully be sold by the directors, and thereupon he conceived the plan of purchasing it for his wife, and thus giving her the control and thereby enabling her to continue the business, or to demand a larger price for her original shares. At first he endeavored to persuade Messrs. Berry & Boyden, a firm of which the defendant was a partner, to advance the money needed to pay for the treasury stock and to redeem the stock which had been pledged. He also approached other capitalists with similar propositions. Finally, he procured \$9,000 from Alfred Metcalf, and placed it in the hands of the defendant, who paid it into the treasury of the company, and received therefor a certificate in his own name of the 30 shares of treasury stock. At the same time Mr. Metcalf intrusted the plaintiff's husband with the stock which he had held as security, and certificates for this stock were also placed in the defendant's hands. Mr. Earle continued negotiations with the agent of the textile company, and finally received and accepted on behalf of his wife an offer of \$500 per share for the 90 shares originally controlled by her and \$300 per share for the 30 shares purchased of the corporation. The defendant, on September 30th, with his own money, paid the note at the savings bank, with interest from July 1st to October 1st, amounting to \$12,757.50 and obtained possession of the certificate which the bank had held. On October 1, 1902, the plaintiff's stock having been sold and the defendant having received \$54,000 therefor, the parties met for a settlement. The defendant retained \$2,500 for his own services, paid the counsel who had been employed \$1,200, and, deducting the amount he had advanced to the Mechanics' Savings Bank, paid the plaintiff the balance, \$20,542.50, and the amount due Mr. Metcalf, \$17,000 (who had given an order to pay this sum to Mrs. Earle), and took the following receipt:

Providence, R. I., Oct. 1, 1902.

Received from Rudolph Berry \$37,542.50, of which \$17,000 is [to be] paid in cash to Alfred Metcalf, and the whole is the entire amount due from him on account of \$54,000, collected by him on sale of stock in the Phoenix Iron Foundry by myself and others to Courtland C. Earle, as well as ourselves.

Susan F. Earle,
Charles R. Earle,
and Courtland C. Earle,
by Charles R. Earle.

This suit was brought March 19, 1903, to recover the sum of \$3,850, which it was alleged the defendant had wrongfully retained out of the sum of \$54,000 collected on her account. The defendant pleaded the general issue and a plea in set-off, claiming that the plaintiff owed him \$5,000 for services in advancing \$12,757.50 to the Mechanics' Savings Bank, and for consultations in regard to the disposal of the stock, and for payments to the attorneys, and for his services in the premises. November 14, 1904, the jury found a verdict for the plaintiff in the sum of \$2,667.50, being \$2,425 damages, and interest to the date of the trial, \$242.50, thus allowing the defendant the amount he had paid the attorneys and \$75 for his own services, and the defendant now brings his petition for a new trial on the grounds that the verdict is against the law and evidence, that there had been an accord and satisfaction of the claim in suit before the suit was commenced, that the court erred in charging the jury as requested by the plaintiff's counsel's requests 3 and 4, and that the amount of the verdict is excessive.

The plaintiff's case rested on the establishment of two propositions of fact: (1) That the defendant retained more money for his services than he was legally entitled to. (2) That the plaintiff's signature to the acknowledgment of full payment, which she signed, was procured by duress. We think she fails to sustain either proposition by satisfactory evidence. Mr. Earle's statement of Mr. Berry's relation to the transactions between them makes him only a voluntary lender of \$12,757.50 for one day, upon ample and undoubted security. If this were his only service, a commission of from \$50 to \$100, as estimated by the stockbrokers who were called as witnesses, would seem to be sufficient compensation. Mr. Berry says that his agreement with Mr. Earle was to assist him with advances necessary to obtain control of the 120 shares, and, if the Textile Finishing Machinery Company should buy them, he should have \$5,000 of the profits. If, on the contrary, the Textile Finishing Machinery Company should not purchase the stock, then he should furnish sufficient money to acquire all the stock and to carry on the business, and in the latter case should retain a controlling interest in the business. If this was the agreement, the amount of \$2,500 was not excessive compensation for the risk he assumed. We think Mr. Berry's story accords better than Mr. Earle's with the undisputed circumstances in which the parties were placed. The Textile Finishing Machinery Company, in purchasing Mr. Smith's stock, supposed they were securing control of the corporation. Mr. Smith had stipulated for the plaintiff that she should

receive the same price that he had obtained for himself. He had acted in good faith towards the Earles. But he was also the treasurer of the bank, and when he found that, by the device of using the treasury stock, the Earles had outwitted him and his customer, it was to be feared that he might retaliate by causing the bank to sell the pledged stock. Mr. Earle told Mr. Berry that the note was not due for six months; but the note itself, which is in evidence, shows that it was a demand note, and that the last interest had been paid only to July 1, 1902. Mr. Earle attempts to explain his statement to Mr. Berry by saying that he had a verbal agreement with Mr. Smith not to enforce payment of the note for six months; but such an agreement would have no binding force. Mr. Smith then had it in his power to make good to the Textile Finishing Machinery Company his agreement to deliver a majority of the stock, or, if they declined to go farther with the bargain, to demand from the Earles that they should redeem their pledged stock and purchase his holdings. The requirement in the charter that the stock should first be offered to the corporation could not have hindered such a sale, for the foundry had just emerged from the hands of a receiver, and had no money to pay out in acceptance of such a proposition. Something more was needed than a mere honest custodian of the stock and proceeds, to wit, a capitalist, able and willing, in case of necessity, to provide funds to satisfy present creditors and to continue the business; and this is the position which Mr. Berry says he agreed to fill. This question, however, of the value of the defendant's services depends upon conflicting evidence; and, though we believe the jury erred in their decision of it, we should not feel warranted, for this reason alone, in granting a new trial.

Upon the next question of fact there is nothing in the plaintiff's favor worthy of the name of evidence. The claim of duress rests upon the testimony of Mr. Earle alone, and he had been discredited by his statements to Mr. Berry, repeated at the trial, that the savings bank note could not be enforced until December, which a production of the note itself conclusively contradicts. Mr. Earle's testimony does not show any act of coercion on the part of the defendant. It is, in substance, that he presented an order from Mr. Metcalf directing the payment of his \$17,000 to Mrs. Earle, and Mr. Berry refused to pay that until a receipt was prepared for Mrs. Earle to sign, showing the disposition of the whole of the money; and that, after the paper was prepared, Mr. Berry still refusing to pay what he admitted to be due unless she would sign the paper,

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he and the plaintiff concluded to sign it in order to get what Mr. Berry admitted to be due.

His testimony is reported as follows:

Q. What took place in regard to the settlement?

A. Then I asked him to give the money to Mrs. Earle.

Q. Did you state what money?

A. Yes, sir.

Q. What money did you state?

A. All of it.

Q. How much was it?

A. \$54,000.

Q. What reply did Mr. Berry make to that?

A. He said he was not going to give it all to her.

Q. What did you then ask him?

A. I said—then—I took the order from Mr. Metcalf and presented the order, and I said, "Give me that."

Q. How much did that order call for?

A. I think that order called for \$9,000. There were 22 shares that he bought of me. It was not necessary, but I handed it to him.

Q. Now, what reply did Mr. Berry make to your demand for the \$17,000, called for by the order of Alfred Metcalf?

A. Well, now, Mr. Angell was very busy getting out some writing or paper, and he brought it in—when he finished it he brought it in—to Mrs. Earle, and I read it. It was a receipt for so much money, what she received,—some \$35,000 that he wanted to pay her,—but she did not want to take it. I said, "Now, I will ask him for the \$17,000." I took that paper in there and demanded that.

Q. Of whom?

A. Of Mr. Berry.

Q. What reply did he make to you?

A. He said he would not pay one without the whole of it.

Q. Did you make any demand for any portion of this sum?

A. I made a demand for that.

Q. Did you make any further demand upon him for the \$9,000?

A. No, I made demand for that.

Q. Did you make any further demand besides the whole of the money and this part here?

A. Why, yes, sir; I did say—I think I told him that after he declined to give me that, I said, "Give me the \$9,000."

Q. What reply did he make to that?

A. He said he would not give me any until Mrs. Earle signed that paper.

Q. And then what was done?

A. Well, after some little time, and waiting and thinking it over, I says, "All there

is about it, I will sign that paper, and see him afterwards."

Q. Did you tell him so?

A. I said it so he could hear it, in his presence.

Q. Did Mrs. Earle have any talk with him or his attorney in regard to signing that paper?

A. She asked Mr. Parkhurst, I think, what she should do about it.

Q. Did she speak to Mr. Berry about it, whether or not she would sign the paper—did she speak to him about it?

A. She said she did not want to sign that paper; yes, sir.

Q. And the result was, as you said, that the paper was finally signed?

A. Yes, sir.

Q. Who signed it?

A. Mrs. Earle signed it and I did. It was a receipt; that is all it was; simply a receipt.

Mrs. Earle says she had no conversation with Mr. Berry at all. She only knows what her husband told her of the discussion between him and Mr. Berry. She signed the paper reluctantly, after her counsel had advised her to do so. Mr. Earle is contradicted by Mr. Parkhurst, Mr. Berry, and Mr. Angell as to any refusal by Mr. Berry to pay over the amount he admitted to be due unless the plaintiff would agree that it was the whole sum due. After the money had been drawn, Mrs. Earle acknowledged her obligation to Mr. Berry, and thanked him for what he had done. And no demand for any further sum was made upon Mr. Berry until the following March. As a matter of fact, the controversy between Mr. Earle and Mr. Berry seems to have been in respect to the attorney's bills, not in regard to Mr. Berry's compensation. Mr. Earle, all through the interview, denied his obligation to the attorneys, and persisted at the trial that they were not employed by him; but the evidence that their services were engaged and employed for the plaintiff's benefit is most convincing. The jury did not sustain Mr. Earle in this assertion, for the verdict allows the defendant the sums he paid the attorneys. The evidence so strongly preponderates against the claim of duress or coercion that we feel certain the jury did not rightly appreciate the question before them, and we are confirmed in this view by an examination of the exceptions taken by the defendant to the charge of the court.

Plaintiff's counsel requested the court to charge: "(3) That, if the jury find that the plaintiff signed the receipt offered in evidence in order that she might obtain the amount which it was undisputed belonged to her, after refusal on the part of the defend-

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ant to give it to her unless she did so, then the receipt is not binding upon the plaintiff, and she may recover, notwithstanding the statements contained in it." And: "(4) That the receipt signed by the plaintiff is not conclusive, but is, only evidence of a settlement; and the whole transaction and circumstances under which it was given may be gone into to explain it or avoid it." These requests were granted, and the defendant duly excepted. To the last statement the presiding justice added the following observations: "That is true. It would be a different thing if it was under seal. It is not. It was simply a receipt made and signed," etc. The first instruction goes farther than any reported case. It would have been correct if the defendant had been in possession of the plaintiff's goods, and had refused, without right, to deliver them unless upon payment of money not due. Duress of goods is recognized by the law as a cause for setting aside a contract or for allowing recovery of money paid. But a threat to withhold payment of a debt or to refuse performance of a contract is not duress. 9 Cyc. Law & Proc. p. 448 d. The discrimination between duress and such inequitable conduct as is charged by the plaintiff in this case is clearly made by Cooley, J., in *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511, where it is held that "refusal, on demand, to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress if the debtor has done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion." The opinion cites and analyzes the following cases: *Astley v. Reynolds*, 2 Strange, 915; *Smith v. Bromley*, 2 Dougl. K. B. 696; *Ashmole v. Wainwright*, L. R. 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Scholey v. Mumford*, 60 N. Y. 498; *Chase v. Dwinal*, 7 Me. 134, 20 Am. Dec. 352; *Shaw v. Woodcock*, 7 Barn. & C. 73; *Nelson v. Suddarth*, 1 Hen. & M. 350; *White v. Heylman*, 34 Pa. 142; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643; *Crawford v. Cato*, 22 Ga. 594; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Bates v. New York Ins. Co.* 3 Johns. Cas. 238; *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. Weissenberg School District*, 57 Pa. 433, 98 Am. Dec. 237; *First Nat. Bank v. Watkins*, 21 Mich. 483; *Skeate v. Beale*, 11 Ad. & El. 983; *Preston v. Boston*, 12 Pick. 14; *Wilcox v. Howland*, 23 Pick. 167; and continues: "Many other cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed,

and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so,"—citing *Atlee v. Backhouse*, 3 Mees. & W. 633; *Hall v. Shultz*, 4 Johns. 240, 4 Am. Dec. 270; *Silliman v. United States*, 101 U. S. 465, 25 L. ed. 987,—and sums up the case as follows: "In what did the alleged duress consist in the present case? Merely in this: That the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money, and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley and McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment, except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal, doctrine; and, if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need." In *Silliman v. United States*, *supra*, the owners of certain barges which were employed by the quartermaster's department claimed that they were forced by duress of their property to sign new charter parties at a reduced rate; but the court held that neither the forcible retention of the barges nor the refusal to pay the compensation agreed upon constituted duress. *Harlan, J.*, says: "They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business, or to meet their pecuniary obligations to others. . . . We are aware of no authority in the text-books or in the adjudged cases to justify us in holding that the last charter parties were executed under duress. There is present no element of duress in the legal acceptance of that word. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law." *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21, was a bill in equity to set aside settlements and conveyances alleged to have

been induced by fraud and oppression. The court found that the defendant's conduct amounted to duress of goods, but they say (p. 40 of 11 Colo., p. 216 of 7 Am. St. Rep., and p. 34 of 17 Pac.): "It was therefore not a mere withholding of a debt due from himself, but an unlawful interference between the plaintiff and other debtors, by means of which he stopped the payment to plaintiff of sums due him, and presents a case analogous to that of *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; reviewed by Mr. Justice Cooley in the case of *Hackley v. Headley*, 45 Mich. 577, 8 N. W. 511. We are of the opinion that the settlement of the 1st of August was clearly made under duress of property, and must be held null and void." In the light of these cases, which are the only ones brought to our attention where the retention of money has been claimed to constitute duress, it is clear that the charge given was erroneous.

The second instruction gave the jury to understand that the paper which was signed by the plaintiff was a mere receipt, and was of inferior force to a release under seal. The statute (Gen. Laws 1896, chap. 202, § 12) has done away with the necessity of affixing a seal to a general or special release, and this reference to the law which had been abrogated was calculated to mislead the jury into giving the document less weight than it was entitled to. While not in form a release, it was more than a mere receipt. It was, in addition, an acknowledgment that the sum received was all that was due. The amount due having been in dispute, as all parties agree that it was, the offer and acceptance of the amount specified was binding upon both parties as a compromise. *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182. The receipt says, in effect, that it was so agreed upon, and cannot be contradicted except on a proof of mistake, fraud, duress, or undue influence. *Small v. Sumner*, 6 Gray, 239; *Tanner v. Merrill*, 108 Mich. 58, 31 L. R. A. 171, 62 Am. St. Rep. 687, 65 N. W. 664; *Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Ennis v. Pullman Palace Car Co.* 165 Ill. 161, 46 N. E. 439; *Lawrence v. Schuylkill Nav. Co.* 4 Wash. C. C. 562, Fed. Cas. No. 8,143; *Truax v. Miller*, 48 Minn. 62, 50 N. W. 935. In *United States v. Child*, 12 Wall. 232, 20 L. ed. 360, Mr. Justice Miller makes this comprehensive statement, which is conclusive of the question before us. He says: "We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner, and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a

party who, without force or intimidation, and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him, for the compromise will be void, as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void."

The defendant's exceptions to these instructions of the court are sustained, and the petition for a new trial is granted, and the case will be remitted to the Common Pleas Division for further proceedings.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

THE PINE FOREST.

CHARLES W. MORSE et al., Appts.,
v.
READING COMPANY.

(64 C. C. A. 228, 129 Fed. 700.)

1. Salvage—by owners of vessel in fault.

The owners of a tug whose fault causes the wreck of its tow are not entitled to salvage for services rendered in raising and bringing the wreck into a port of refuge, although such services are rendered by another vessel belonging to them.

2. Same—effect of statute limiting liability.

The owners of a vessel whose fault causes a wreck cannot, by taking advantage of the statute for the limitation of liability after they have rendered services in raising and taking the sunken vessel into a port of refuge, entitle themselves to salvage, although the entire value of the ship in fault is consumed in satisfaction of the claim of the injured vessel, and the denial of the

salvage claim will in effect give the injured party the value of the salvage services in addition to the amount allowed by the statute.

3. Same—agreement for compensation.

A formal agreement will not entitle a vessel in fault to salvage for services rendered to one injured.

4. Towage contract—salvage.

A towage contract cannot be converted, under the admiralty law, into a salvage service under conditions brought about by the fault of the tug.

(March 29, 1904.)

A PPEAL by libellants from a decree of the District Court of the United States for the District of Rhode Island dismissing a libel filed to compel payment of salvage. Affirmed.

The facts are stated in the opinion.

Argued before Colt and Putnam, Circuit Judges, and Aldrich, District Judge.

Mr. Edward E. Blodgett, with Mr. Eugene P. Carver, for appellants:

The right of limitation existed at the time of the accident, and the proceedings that are incident to making the limitation refer back to that time.

The City of Norwich, 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150.

Messrs. Robert M. Morse and W. M. Richardson, for appellee:

Voluntary services of restitution give no claim to pecuniary compensation.

The Clarita and The Clara (The Clara Clarita v. Cox) 23 Wall. 1, 23 L. ed. 146; The Capella, L. R. 1 Adm. & Eccl. 356.

The duty or obligation of the tug to make restitution or to pay damages extends to her owners.

Fleming v. Lay, 48 C. C. A. 748, 109 Fed. 952.

Libellants should not be permitted to credit on their limited liability the cost to them of the services of restitution incurred prior to the stipulation; that is, to credit on their limited liability that which was not at the time a liability.

The Benefactor (New York & W. S. S. Co. v. Mount) 103 U. S. 239, 26 L. ed. 351.

Case Note.—The general doctrine that a vessel which has caused the wreck of another, or put the other in peril, cannot claim any salvage for rescuing the other vessel from its peril, has been applied in a good number of cases. The Sampson, 4 Blatchf. 28, Fed. Cas. No. 12,279; The Mary Patten, 2 Low. Dec. 196, Fed. Cas. No. 9,223; The Samuel H. Crawford, 6 Fed. 906; The Chas. E. Soper, 19 Fed. 844; The Minnie C. Taylor, 52 Fed. 323; The Washington v. The Saluda, Fed. Cas. No. 17,232; The Clarita and The Clara (The Clara Clarita v. Cox), 1 L.R.A. (N.S.)

23 Wall. 1, 19, 23 L. ed. 146, 152. This rule is also cited in The Relief, 51 Fed. 255, and applied to a case somewhat analogous, holding that, if a pilot, through his unskillfulness, puts a vessel in distress, it would be grossly inequitable that the attending pilot boat of the association of which he is a member, and through which he gets his license, should profit by his want of skill.

In the case of THE PINE FOREST the only distinction from these cases was that the vessel claiming the salvage was not the one that caused the wreck, though they both

Putnam, Circuit Judge, delivered the opinion of the court:

This appeal relates to a libel for salvage, following a wreck which occurred under circumstances shown in the record in *The Triton*, in which case we passed down an opinion and entered judgment on February 4, 1904. 64 C. C. A. 226, 129 Fed. 698. The libel in this case was dismissed by the district court, and the libellants appealed to us. The *Triton* was a steam tug which had the barge *Pine Forest* in tow. The record stipulates into this case the proofs and proceedings in *The Triton*, where we found that *The Pine Forest* was wrecked, and that the tug, under her contract of towage, was liable for the damage arising therefrom. The amount now claimed is for raising *The Pine Forest* and bringing her into a port of refuge. It is agreed that we are to accept \$8,750 as a fair value of the services, if they are to be recovered for in this proceeding. It was stipulated in *The Triton* that, aside from the \$8,750 now in controversy, the damage to *The Pine Forest* and her cargo, for which *The Triton* was primarily responsible, amounted to \$24,784.91. The items making up this total were stated in detail, and included repairs and refurnishings at the port of refuge, damage to the cargo, loss of freight, demurrage, loss of personal effects of the crew of the barge, and small incidental items. Therefore, if the amount now claimed is included with the stipulated damage to the barge and cargo, the total would be \$33,534.91. It also appears in *The Triton* that her owners availed themselves of the provisions for limited liability contained in § 4283 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2943), and sequence; and, for that purpose, the value of their interest in accordance therewith was stipulated at \$20,000. Consequently, damages were awarded at that amount, interest, and costs.

The barge was raised and brought into port, not by *The Triton*, but by the libellants, now the appellants, who were the owners of *The Triton*, or the representatives of those owners, and also the owners, or representatives of the owners, of the tugs and barges employed in the salving enter-

prise. Indeed, it is agreed that the libellant in *The Triton* is to be taken as the claimant in the case now before us, and that the libellants in the case now before us are to be taken as the claimants in the other suit and owners of the tug. The present libellants, however, undertake to make a distinction based on a claim that the employment of *The Triton* in the towage service for which she was held responsible was under a charter; but this is dismissed from our consideration by the fact that it appears, on cross-examination of the witness who testified that she was under charter, that it was not of the hull of the tug, and that during the towage service she remained under control of her owners. It cannot be claimed on the proofs before us that her owners *pro hac vice* were other than the registered owners. Thus, the legal identity of the parties in interest in the two litigations is established.

In *The Glengaber*, L. R. 3 Adm. & Eccl. 534, 535, decided by Sir Robert Phillimore in June, 1872, a vessel was brought into a position of jeopardy by a steam tug, as in the case at bar. Another steam tug, *The Warrior*, of which only a part of the owners were owners of the tug at fault, rescued the tow. It was held that the case was one of salvage. Sir Robert Phillimore concluded as follows: "I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief."

It will be noticed that this expression ignored the fact, which was carefully stated in the report of the case, that only some of the owners of *The Warrior* were owners of the other tug; and the decision has been cited with apparent approval, either without reference to this distinction, or without following it out, by text writers usually authoritative. Kennedy, *Civil Salvage*, 74, 75; Carver, *Carriage by Sea*, 3d ed. 1900, 386, note e. This makes, apparently, a weighty body of authority, all resting on the proposition that we are to look at the conduct of the salving ship only, and that this identifies with her all who are con-

belonged to the same owners. But in *The Washington v. The Saluda*, *supra*, the situation was similar. The salvage was claimed by a pilot boat, and was denied because the pilot whose fault had caused the danger of the vessel in distress was a part owner of the pilot boat that claimed the salvage.

The principle of this decision is, in the language of Mr. Justice Clifford in *The Clarita and The Clara*, *supra*: "Whenever, therefore, a fault is committed whereby a collision ensues, that fault is imputed to the owners." This language was used in respect 1 L.R.A. (N.S.)

to liability for collision. But, if the fault is imputable to the owners, to allow them to recover salvage for rescuing a vessel from a danger which they had themselves caused would be to violate the maxim against allowing one to profit by his own fault. In the case of *THE PINE FOREST* there seems to have been an identity of ownership in respect to the vessel causing the damage and the one that claimed the salvage. Whether the doctrine of the case should apply where the ownership was the same only in part is another question.

nected with her, whether as officers, seamen, or owners. Nevertheless, this is certainly not now the law in England when the ownership is identical, as in the case at bar.

Authoritative English decisions later than *The Glengaber*, and also authoritative English text writers, hold the rule which defeats salvage in the case before us. In *The Glenfruin*, L. R. 10 Prob. Div. 103, decided in 1885, the salving vessel was expressly excluded on the ground of identical ownership with the vessel in fault; and *The Laertes*, L. R. 12 Prob. Div. 187, 190, decided in 1887, laid down the same rule in positive terms. So in *Carver, Carriage by Sea*, 3d ed. 386, at the same page where the note refers to *The Glengaber*, the learned author, who is accepted as high authority, adopts the rule of *The Glenfruin*; and the work entitled *Abbott's Merchants' Shipping and Seamen*, 14th ed. 1901, at page 975, says: "The owners of a salving ship who are also the owners of the salvaged ship may obtain salvage remuneration from the owners of the salvaged cargo, provided the circumstances which caused the necessity for the salvage services do not amount to a breach of the contract of carriage between the ship's owners and the owners of the cargo which is on board the salvaged ship."

This is also accepted as the law in so accurate a work as *Williams & Bruce, Admiralty, Jurisdiction & Practice*, 3d ed. 1902, 141. *The Glenfruin* has never been questioned in England by any text writer, or, so far as the official reports disclose, by the supreme court of judicature in any of its departments, by the privy council, or by the House of Lords. These authorities declare the right of the crew of the salving ship to salvage; but this, of course, avoids the difficulties of the case before us. To the same effect, *The Clarita and The Clara* (*The Clara Clarita v. Cox*) 23 Wall. 1, 19, 23 L. ed. 146, 152, referring to circumstances under which the peril to which a vessel may be exposed is caused by libellants who claim salvage reward, says that "to the rule that such libellants are not entitled to recover there are no exceptions." Therefore, in view of the fact that the parties are identical, as we have explained, the present libellants are positively barred by the authorities everywhere, unless relieved by the statutes of limited liability.

As already stated, the owners of *The Triton* availed themselves of those statutes, and damages were assessed against her to the full amount at which her liability was limited. Therefore her entire value was exhausted in the proceeding against her. In this connection dates become important, and they are as follows: The wreck occurred January 16th; the work of raising *The Pine Forest*

commenced on January 18th, and was completed on February 27th; on March 5th. *The Triton* was libeled; and on March 10th, the application was made for a limitation of liability. In the succeeding April the present libel was filed. So it appears that all the services for which compensation is now claimed were performed prior to the application for limitation of liability. Thus the present condition is a complication of artificial results arising from a mere incidental order of succession of dates. If the owners of *The Triton* had appreciated that she would ultimately be found at fault by the court, they might have surrendered her before commencing the services for which compensation is now claimed, and thus, perhaps, they could have purged themselves, and entitled themselves to a salvage reward. Also, if the services now claimed for had been rendered by someone else than the owners of *The Triton*, the burden of them would have rested on the claimant of *The Pine Forest*, without any right of recoupment from the owners of the tug. As it stands, the owner of the barge is receiving \$20,000, in addition to services of the value of \$8,750, a total of \$28,750, thus in excess of the amount at which *The Triton* was appraised. This is contrary to the underlying purpose of the statute of limited liability. Nevertheless, by force of the rules and authorities to which we will refer, this anomalous result cannot be avoided.

It is to be borne in mind that the claim asserted in this libel is for salvage. But according to the underlying rules of the admiralty law, and aside from the statutes of limited liability, it is clear that the services rendered by the libellants, inasmuch as they were the owners of *The Triton*, were not salvage services. The authorities are overwhelming that under those rules there can be no salvage reward to a vessel or individual with reference to a condition arising from the fault of that vessel or individual. This is not merely technical, but it is recognized everywhere as fundamental.

In stating this proposition, we must regard as ineffectual the suggestions on the one side and the other with reference to the nature of the alleged stipulations between the owner of the barge and the owners of *The Triton*, and of the conferences which occurred between them, as to the services which were rendered by the present libellants. Salvage does not ordinarily arise out of a contract, and the most formal agreements for salvage or rescue services do not bar the admiralty from reaching the merits, or from applying its fundamental rules when circumstances justify it. Presumably, at the time of these conferences, the libellants had no belief that *The Triton* was in

fault, or that there was anything in the way of their recovering for the services which the conversations concerned, and to which the present litigation relates. Very likely, also, the owner of The Pine Forest had at that time no decided understanding otherwise. Nevertheless, as well observed by the learned judge of the district court, this suit "must be determined from the proof as to the things which were done;" that is, from the event. What we intend by this, a hypothetical illustration from a class of cases which are common will make clear. Two vessels are in collision; No. 1 is seriously damaged and No. 2 only slightly injured, or not injured at all. No. 1 appeals to No. 2 for assistance; and immediately from the decks of the two vessels, the masters agree as to a round sum to be paid for the assistance, if successful. All this is effectual if it is afterwards determined that No. 2 is not in fault, but it goes for nothing if it is finally settled that she was the guilty vessel. Therefore, as we have said, the conferences referred to are not of importance on the appeal before us.

We come to the precise proposition that, at the critical time, the relations of The Triton and The Pine Forest were such that, under the maritime law, no claim could arise on which the libel now before us, which asks salvage, can be based. The Triton was under a contract of towage. She was not released from that contract by the mere fact that the barge required assistance which, under ordinary circumstances, would entitle those rendering it to salvage compensation. The *Carbonero*, 45 C. C. A. 314, 106 Fed. 329, 333. Also, under all the authorities and on principle, a towage contract cannot be converted under the admiralty law into a salvage service under conditions brought about by the fault of the tug, as in the case before us. This is declared in nearly all the authorities we have cited, and emphatically in *The Clarita* and *The Clara* (*The Clara Clarita v. Cox*) 23 Wall. 1, 18, 19, 23 L. ed. 146, 152. A very late reaffirmance of the rule is found in *The Duc D'Aumale* [1904] p. 60.

These propositions are not *dicta*, nor limited to special circumstances. They are the logical results of proportions of maritime law, so plain that they need not be detailed, and all the text writers of authority agree to them. We have no occasion now to discuss the conditions under which officers and crews can become salvors, because there are here no such conditions. The officers and crews of the rescuing tugs and barges were paid their ordinary wages, included in the \$8,750. These rules of maritime law would so plainly bar the libellants from maintaining a libel for salvage as salvage 1 L.R.A. (N.S.)

that we would not have deemed it necessary to elaborate them, or cite authorities in reference thereto, except that they do not appear to have received special attention in their particular application to the case at bar. They dispose of this case, because, as we have said, it is strictly a libel for salvage.

Nevertheless, it is interesting and worth our while, in order to avoid any impression that we are disposing of this appeal on merely technical grounds, to pursue the relations of the parties to the controversy somewhat further. Section 4283 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2943) provides that the "liability of the owner" "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." If we had only that general declaration of the fundamental rule of adjustment, and the case was not merely a libel for salvage, but one which would enable us to make a complete disposition of all counterclaims and all equities pro and con, we might, perhaps, in the absence of authorities otherwise, administer the statute by holding that the owners of The Triton, in rendering services, in raising The Pine Forest, to the value of \$8,750, should be equitably discharged from liability to that extent, and that, in determining all the sums to be awarded against her and her owners, this \$8,750 should be deducted; so that ultimately the statutory provision that the liability of owners should in no case exceed the amount or value of their interest could be literally, and also substantially, complied with. But, aside from the fact that the form of proceedings now before us could not, for the reasons we have stated, permit so broad an adjustment, the various statutes of limited liability have not been administered practically in that enlarged manner, and do not contain machinery adjusted thereto.

As sustaining this proposition, the claimant relies on *The Benefactor* (New York & W. S. S. Co. v. Mount), 103 U. S. 239, 245, 26 L. ed. 351, 354, where it is said that, in case of payment of a demand against a vessel before proceedings for limited liability are commenced, the court will refuse its aid in compelling return of the money received. This, however, is to be considered in connection with the later case of *The City of Norwich*, 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150. What is to be met in the case at bar is not a simple proposition like that in *The Benefactor*, but the possibly logical result of the application of the statutes of limited liability in harmony with *The City of Norwich*, at page 493, 118 U. S., at page 143, 30 L. ed., and at page 1156, 6

Sup. Ct. Rep. Speaking of the options given the vessel owner, namely, one of surrendering the vessel and the other of an appraisal, this opinion says that the measure of liability is the same whichever course is adopted. It adds that this "enables the owner to lay out money in recovering and repairing the ship, without increasing the burden to which he is subjected." This has reference to repairs which might be made on the ship in fault before proceedings for limited liability are commenced; and, on broad principles, the owner of the offending vessel ought to be allowed, in the same way, to recover and repair the injured ship without increasing his burden. In other words, in order that the liability of the owner of an offending vessel may not exceed his interest, the rule has been settled by the Supreme Court that the value thereof shall be taken as of immediately after the damage was done; and the point is to meet the proposition that, to give full effect to the logical sequence of that rule, everything else should have relation to that point of time. In other words, the proposition to be met is that, when the application for a limitation of liability had been made by the owners of *The Triton*, she and they were purged as of the time immediately after *The Pine Forest* was wrecked.

There is another difficulty which meets the claimant in this case. Under all circumstances, according to the rules of maritime law, no one should be discouraged from rendering assistance to a vessel in distress. Sometimes, as we may well presume to have been the fact in the case at bar, the owners of the offending vessel, by their equipment and adjacency to the place of wreck, are the most competent of all to effect a prompt rescue; but, on the rule asserted by the claimant, and which, by the force of authority, we are compelled to accept, such persons, when situated like the libellants, may well say: "We refuse to expend our moneys in behalf of your property until we have applied for the benefit of the statutes of limited liability, so as to enable us to recover what we may disburse." Such a proposition would not be admissible where life was involved; but, when it is a mere question of property, there is no unreasonableness in the interests of one party being balanced against those of another.

Notwithstanding these difficulties, we seem, as we have said, to be bound by authority to affirm the decision of the district court dismissing the libel. Under the English statutes, the point seems to have been directly determined against the owners of *The Triton*. The *Ettrick*, L. R. 6 Prob. Div. 127, was first decided by Sir Robert Phillimore, and he was affirmed on appeal, 1 L.R.A. (N.S.)

at page 132, all in 1881. The case is accepted by so careful an authority as Mr. Marsden in his *Collisions at Sea*, 4th ed. 193, which gives the pith of this decision. That under the English statutes, the liability extends to £8 per ton of the offending vessel is not essential, as is plain of itself, and as is also emphasized by the fact of the citation of *The Ettrick* by the Supreme Court, to which we will hereafter refer. The substance of this decision is stated by Marsden as follows: "The owner of a ship sunk by collision, who, admitting that the collision was caused by the fault of his own ship, obtains judgment for limitation of his liability, and pays into court the statutory amount of his liability, does not thereby escape from the legal consequences of his wrongful act in causing the collision, except so far as the act expressly relieves him. The owner of a ship sunk in the Thames paid into court the statutory amount of his liability. His ship was raised by the Thames conservators (who have statutory powers to raise wrecks and reimburse themselves for the expense of raising them by sale of ship and cargo), he undertaking to pay the cost of raising. It was held that the shipowner was bound to hand over cargo on board to its owner, and that the cargo owner was not liable to pay him anything by way of salvage or general average contribution."

In the case as reported, Jessel, the Master of the Rolls, at page 132, states the position of the owner of the offending vessel in such a way as to present the precise difficulty we have suggested. He observes: "He [that is, the shipowner] says that the payment of £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed."

That is to say, the master of the rolls puts the position of the shipowner as though he had claimed that a compliance with the statutes of limited liability purged his vessel and himself as of the time when the damage was done. Of course, *The Ettrick* necessarily overrules this proposition, and thus meets all suggestions in the way of the owner of *The Pine Forest*. There were other propositions considered in the various opinions delivered in the case, but none of them contravene the use we make of the decision. *The Ettrick* has never been questioned by any judicial tribunal in England. It is accepted by Mr. Justice Kennedy in his work on Civil Salvage, to which we have already referred, at page 183. It is also accepted by the Supreme Court in *The Irrawaddy* (Flint v. Christall) 171 U. S. 187, 195, 43 L. ed. 130, 133, 18 Sup. Ct. Rep. 831.

The Irrawaddy supports the conclusion we are compelled to announce. That case arose under the "Harter act," so called; but that, for all the purposes to which we apply The Irrawaddy, there is no distinction between that statute and the statutes on which The Triton relies, is true, and is emphasized by the fact that the Supreme Court used The Ettrick as we have already said. It is true that the issue in The Irrawaddy was not one of salvage, but of general average, the shipowner claiming to share therein, although the sacrifice which underlay it was made in order to relieve against the fault of his own vessel. General average and salvage, for all the purposes we are considering, are to be spoken of in the same breath; and, indeed, they run together in a great many respects. The pith of what applies to this case is stated at pages 193, 194, 171 U. S., at page 132, 43 L. ed., and at page 833, 18 Sup. Ct. Rep., as follows: "The act in question [meaning the Harter act] does undoubtedly modify the public policy as previously declared by the courts; but if Congress had intended to grant the further privilege now contended for, it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

This, in connection with the citation of The Ettrick, is a declaration that the rules of interpretation as applied in The Ettrick and The Irrawaddy run on parallel lines, and reach in the same way the statutes of limited liability on which The Triton relies as they do the Harter act. The result is that, on the fundamental principles of the maritime law, neither The Triton nor her owners can recover for salvage services to The Pine Forest, and, on the authorities, there is nothing in the statutes which gives them relief in this respect beyond what otherwise existed.

There is much force in the proposition that the statutes of limited liability on which The Triton relies effectuate a privilege, so that, if availed of by a vessel owner, it must be taken with all the burdens of the condition as it exists at the time to which the acceptance has been delayed; in other words, that, unless the shipowner acts at once and promptly, he must stand the consequences thereof. Under some circumstances it would be impossible to escape this proposition in some respects. The opinions of the master of the rolls and the lords justices in The Ettrick contain sev-

eral expressions in that direction; especially the former at the foot of page 132, and Lord Justice Brett at page 134, where he speaks of "a new series of events," meaning the raising of The Ettrick and her cargo, "with which, to my mind, the act of Parliament," meaning the statute limiting liability, "has nothing whatever to do." Nevertheless, in view of the various considerations which we have stated, it is not safe to apply this proposition too rigidly or universally. Possibly the circumstances would admit of its application here; but we deem it safer to dispose of this appeal in view of the authorities which we have cited, and which, taken together, result in the proposition that, whatever may be the theory of the statutes, they contain no suitable provision or machinery for working out any salvage compensation for the libellants, now the appellants.

With reference to any services which might be rendered after an application for limited liability has been made by the owners of an offending vessel, the position would probably be different; but, as this case stands, we are led to the conclusion that the libellants can obtain no relief.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

Petition for writ of certiorari denied by Supreme Court of the United States January 23, 1905.

DISTRICT OF COLUMBIA COURT OF APPEALS.

FRANK W. PALMER, Public Printer, Appt.,
v.

DISTRICT OF COLUMBIA.

(.... App. D. C.)

1. Smoke law—obedience by public official.

A public official intrusted with the custody of a government building must obey the provisions of a statute forbidding

Case Note.—There is little authority very closely in point on the question as to the construction of the general terms of an act in the exercise of police power, so as to make them apply to a public official. Cases as to the exemption of Federal officials from the operation of state laws of this character involve the power of the state, rather than the intention of the legislature. In *PALMER v. DISTRICT OF COLUMBIA* there can be no question of legislative power to reach the defendant, but only a question of the intent to include him in the general language. The power of Congress to compel the public printer to avoid making a smoke nuisance

the emission of dense smoke from chimneys into the atmosphere.

2. Same—purchase of soft coal—effect of approval.

That Congress has approved the estimate of a custodian of a public building for a supply of soft coal for a season does not absolve him from liability for violation of an act of Congress forbidding the emission of dense smoke from chimneys into the atmosphere.

3. Same—no provision of apparatus.

A public official charged with a violation of an act of Congress forbidding the emission of dense smoke from chimneys into the atmosphere cannot escape liability on the ground that Congress has not supplied him with the necessary apparatus to prevent such emission, if he has made no effort to procure it.

(June 13, 1905.)

ERROR to the Police Court of the District of Columbia to review a judgment convicting defendant of violation of the smoke law. Affirmed.

The facts are stated in the opinion.

Messrs. Morgan H. Beach and A. R. Mul-lowney for appellant.

Messrs. A. B. Duvall and E. H. Thomas, for appellee:

The use of soft or bituminous coal is not allowable under the statute if thereby the prohibited smoke is emitted.

Moses v. United States, 16 App. D. C. 438, 50 L. R. A. 532; Bradley v. District of Columbia, 20 App. D. C. 172.

The statute applies to the defendant, who is required by law, as alleged in the in-

formation, "to take charge of and manage the government printing office."

Sinclair v. District of Columbia, 20 App. D. C. 336.

The defendant, even though he is a public officer, is liable for violation of the smoke law.

Teall v. Felton, 1 N. Y. 543, 49 Am. Dec. 352; Jones v. Seward, 40 Barb. 563; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Tweed's Case (Flanders v. Tweed) 16 Wall. 504, 21 L. ed. 389; The Monte Allegre, 9 Wheat. 616, 6 L. ed. 174.

The government does not guarantee the integrity of its officers, but leaves to all who are wronged by such officers their rights of action against them.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; United States v. Hart, Pet. C. C. 390, 3 Wheeler, Crim. Cas. 304, Fed. Cas. No. 15,316; Re Obstruction of Mail Carriers, 5 Ops. Atty. Gen. 554; Penny v. Walker, 64 Me. 430, 18 Am. Rep. 269.

Morris, J., delivered the opinion of the court:

The appellant was arraigned in the police court of the District, and there was judgment rendered against him there for the violation of what is known as the "smoke law" of the District, that is, the act of

is, of course, not open to question. But the dissenting chief justice strongly argues that the act cannot be reasonably construed to indicate an intent to make it apply to his case. It is obvious that the same or similar language in different statutes may be differently construed with respect to different subjects and conditions. For instance, it is not necessarily inconsistent to hold that by a general prohibition of the sale of liquor in the District of Columbia without a license by any person, as held in *Page v. District of Columbia*, 20 App. D. C. 469, Congress did not intend to prohibit the continuance of such sales in the Capitol restaurants under arrangements made with its own committees, and at the same time to hold, as in the present case of the smoke nuisance, that similar general language prohibiting the emission of dense, black, or gray smoke from any smokestack other than the chimneys of private residences was intended to apply to buildings used for public purposes as much as those used for private house buildings, hotels, etc.

In addition to the cases considered in the above opinions of the court as to the construction of the general terms of a statute 1 L.R.A. (N.S.)

so as to make them applicable to public officials, reference may be made to *Laurens v. Crawford*, 55 S. C. 594, 33 S. E. 728, where it is held that constables and other peace officers are within the general terms of a statute against carrying concealed weapons; but it should be said that the decision was based principally on the fact that an exemption of such officers, contained in a prior statute on the subject, was omitted from the latest revision of the law.

In *Neall v. United States*, 56 C. C. A. 31, 118 Fed. 699, the general terms of the Federal statutes against forgery, referring to "every person who, with intent to defraud, falsely makes, forges," etc., are held to apply to and include an officer of the Army of the United States so as to subject him to prosecution in the district court of the United States,—at least, where the prosecution is begun after his discharge from the Army, without any action having been taken against him by the military authorities. But in this case the question turned on the relation of the civil to the military jurisdiction over crimes by persons in the Army, and not on the sufficiency of general terms to include the public official.

Congress of February 2, 1899 (30 Stat. at L. 812, chap. 79), entitled "An Act for the Prevention of Smoke in the District of Columbia and for Other Purposes." The act has been repeatedly before this court for construction, and its validity has been uniformly upheld. This, however, is the first occasion in which a public official, charged with the custody and control of one of the great public buildings of the city, has been held for a violation of the act. The appellant is the public printer, and the question now to be determined is whether, as the custodian for the time being of the government printing office, he is amenable to the courts for a violation of the law in permitting the issue of dense black or gray smoke from the chimneys of that office. Under the numerous adjudications cited on his behalf, there is undoubtedly great plausibility in the appellant's contention that the executive offices of the government in this city are not subject to the municipal regulations which all other citizens are required to obey. But we cannot give our assent to the proposition that there is any class of officials above the law, or that there is one law for the official and another for the private citizen with reference to the same duty equally incumbent upon all, and which requires the equal obedience of all, if the statute which commands it is to be at all effectual for the purpose for which it was enacted. We cannot think that it was the intention of Congress to suppress the nuisance of smoke emanating from a private hotel, and at the same time to authorize it tenfold, perhaps a hundredfold, greater in volume in the great public building across the street. Such discrimination, if it be assumed to exist, would be manifestly unjust, and by its palpable injustice would tend to bring the statute into odium and contempt, and would contribute more than aught else to prevent its effective observance.

If there is any one principle of our American institutions which is dear above all others to the hearts of our people, and of which the disregard is above all other things repugnant to our sense of justice, it is that of equality before the law. And this principle of equality is more applicable than anywhere else to the matter of municipal regulations. Municipal regulations intended for the safety of life and limb, and for insuring the public health, if they would be effectual, cannot be permitted to be violated with impunity by anyone, no matter what may be his station or his official position, and even though the offender should seek to shield himself behind the protection of international privilege. The individual citizen, desirous to obey the law and to conform to all its reasonable requirements, will feel

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himself sorely tempted in a contrary direction, and will not be solicitous to suppress the nuisance of smoke on his own premises or to remove the dangerous accumulation of snow and ice from the sidewalks in front of his residence if on the opposite side of the street from him the agents of the municipality, or the agents of government, are under no obligation on their part to contribute anything to the public safety in that regard.

The act of Congress, for the violation of which the appellant has been charged, is an exercise of the police power of the state, and is intended to suppress a public nuisance injurious to human comfort and human life. The nuisance is equally deleterious and equally a nuisance whether committed by a private person in the management of a factory, store, hotel, or apartment house, or by an officer of the government in the management of a large building, such as the government printing office, temporarily intrusted to his care; and neither in the letter nor in the spirit of the law is there any apparent purpose to be found to discriminate against the private citizen and in favor of the public official. The terms of the statute are general and comprehensive. In the broadest and most emphatic language it declares the emission of dense black or gray smoke from any smokestack or chimney in the District, other than the chimneys of exclusively private residences, to be a public nuisance, and punishable as such. It did not content itself with forbidding and punishing the act, but it characterized the act as a public nuisance, in order that there should be no doubt about the scope and purpose of the enactment, and in order to eliminate the nuisance of smoke from the District of Columbia. For apparently good reasons, which are obvious to everyone, the movable engines used for the propulsion of railroad trains and steamboats were excluded from the operation of the act. And for still more obvious reasons, of which this court may take judicial cognizance, namely, because in them hard or anthracite coal was almost universally used, which emits little or no smoke, the chimneys of private residences were specially excepted. But, with these exceptions, the prohibition is general, and the buildings used for the business of the government are as much within the spirit and the letter and the purpose of the enactment as are department stores, office buildings, and hotels. Indeed, were there discrimination in this regard, a grave question of constitutional right might arise, based upon the ground of palpable inequality, which such legislation would then suggest.

The same general purpose is evidenced in

the sweeping enumeration of the persons liable to the penalty of the act, which comprise "the owner, agent, lessee, or occupant of any building of any description." Here, of course, if the scope and purpose of the enactment were such as to exclude the agents of the government from its operation, we would not hesitate to hold, in accordance with the adjudications and with well-established principles of law, that these were not intended to be embraced within the statute, notwithstanding its very general and comprehensive language. But when we find the purpose to be general, and to be best subserved by the inclusion of the agents of the government, and when the language of the statute is amply sufficient in its generality to include such agents, we fail to see why they should not be regarded as embraced within its terms.

This conclusion is further strengthened by the 5th section of the act, which prescribes "that no discrimination shall be made against any method or device which may be used for the prevention of smoke, and which accomplishes the purpose of this act." This would seem to be rather a direction by Congress to the agents of government than an intimation to private citizens that they are entitled to use any proper device for the prevention of smoke. As an acknowledgment of private right in individual citizens, it would be meaningless; as a direction to officers of government, it was eminently right and proper to insert it in the act; and the fact of the insertion of such a provision tends to show that the Congress intended that the officers of the government in charge of public buildings should be included within the purview of the act.

On behalf of the appellant, reliance is placed upon the well-established rule of law that, where the state is not named in an enactment, it is not bound by its provisions. Thus, the state ordinarily is not bound by the statute of limitations to which individual citizens are held, and there are numerous other illustrations to be found in the books; but this rule, it seems to us, is not here applicable. The appellant is not the state, nor does he represent the state, in this case. On the contrary, the state, or its representative, the municipality, is the party in interest against him. The state is interested, even as against its own officials, in having its laws enforced, especially those laws which are made for the preservation of the public health. It is not left to the public officials to determine for themselves whether they will obey the laws or not. It is not left to them to create a public nuisance at their pleasure and then shield themselves behind the pretense that they are the state and cannot be held for that which the

legislature expressly prohibited from being done. In France, in the days of Louis XIV., when he said that he was the state, this plea might hold. It might have availed a defendant even in the days of personal government in England, when the infamous maxim was in force that the King could do no wrong and his officers were shielded by his privilege. But we cannot see how, in our country, and in this age and generation, a public official, charged with the commission of a public nuisance, which the legislative power of the state has endeavored most rigidly to prohibit, can protect himself by the claim that in the performance of the act he represents the state.

We have held in the case of *Roth v. District of Columbia*, 16 App. D. C. 323, that the municipality, even in the course of its performance of its governmental functions, is not entitled to perpetrate a nuisance. And the same rule will apply still more strongly to the executive officers of the government, whose duty it is to execute and obey the laws, not to violate them. All laws are presumed to be consistent with each other until the contrary is shown; and, therefore, it is no excuse to a public official to secure him immunity for the violation of one law that he is obeying another. He must obey both. He must take all laws as qualifying each other, and, if he is the public printer, he must do the public printing under such rules and regulations as Congress has prescribed; and especially he must not do it under such conditions as Congress has prohibited.

Apart from the general principles which we have considered, and which we hold do not excuse him, the plea of the appellant is that he made estimates for the use of soft coal in the building under his charge; that he submitted those estimates to the proper committees of Congress, and that Congress approved them, and made its appropriation of money for the conduct of his office in accordance with them. But we fail to see how, in law or in reason, this affords any justification for a violation of the law against public nuisances. If this were the case of an agent for a private building, submitting to an absent or intangible owner, an estimate for the soft coal to be used in such building, and having the approval of such owner for his estimate, could it reasonably be contended for one moment that such estimate and approval would relieve the agent from liability for the creation of a public nuisance? Repeatedly in this court have we heard in this connection the pleas of parties that they have taken all the precautions in their power, and yet have been unable to prevent the prohibited emission of smoke from their chimneys; but, in the

face of the express prohibitions of the act, and in the face of the fact taught by practical science that the nuisance is preventable, even with the use of soft coal, by the use of proper appliances and proper management, we have never held such pleas to be valid.

Congress has never prohibited the use of soft coal in this District. Such prohibition may be the inevitable result, if obedience is not otherwise rendered to the statute. But thus far it has evidently been the view of Congress that the use of soft coal is not inconsistent with the prevention of the public nuisance created by the emission of dense smoke from chimneys. This being the case, it is not apparent why the appellant should regard his use of soft coal under the authority of Congress as a justification of a public nuisance, which Congress has been careful to prohibit. In other words, it is not the use of soft coal that causes the public nuisance, but the use of it in an improper way or without the proper appliances; and the appellant has not said that he has used this coal in the proper way, or that he is without the proper appliances for the prevention of smoke from it. His true defense is, not that he has used soft coal under the authority of Congress, but that Congress has not furnished to him the proper appliances wherewith to devert such use of its resultant nuisance of smoke. And this defense he has not made. But let us assume that he has made it, and that this is what he means. Is it a good defense? We think not.

The smoke law has now been in force for upwards of six years. So far as the record before us discloses, it does not appear that during that whole period the appellant has at any time made any effort to conform to the requirements of the statute. It will not do for him to say that Congress has not provided him with the proper appliances when he has made no effort to procure such appliances. It cannot be assumed that, in the multitude and magnitude of its public duties, Congress can take the initiative in the determination of the details needed for the conduct of any public office or department of government.

The appellant was appointed to his office with the duty imposed upon him to conduct that office according to law,—according to all the laws affecting it,—the smoke law, as well as others; and he is not at liberty to conduct the business of that office in violation of law. The duty was incumbent upon him, as upon all executive officers, to report to Congress the requirements necessary for its management in accordance with the law. It does not appear that he has done so. If it appeared that he had made application

for the proper appliances, and that the application had been refused or ignored, perhaps a different question might be presented here. But that question is not presented now, and we cannot assume that Congress will deliberately refuse to executive officers of the government the necessary appliances for giving effect to its own act and its own specific and reiterated requirement.

We are of opinion that the judgment of the police court in this matter was right and just, and that it should be affirmed.

But, inasmuch as the operations of the government printing office might be seriously interfered with by rigid enforcement of the act at the present time when Congress is not in session and application cannot immediately be made to it by the appellant to remedy the result of past negligence, the municipal authorities, we think, would do well to exercise discretion in the matter of further prosecution at this time.

Affirmed.

Shepard, J., dissenting:

Regretting that I cannot concur in the judgment of my brethren, I think it proper to state the reasons for my dissent.

To the information presented against him the defendant entered a special plea alleging, in substance, that the said building was solely owned, used, and occupied by the United States; that in the discharge of his duties as public printer in the execution of the work carried on in said building, it was his duty to report, annually, to the "Joint Committee on Printing" of the two Houses of Congress, submitting estimates of the materials and so forth, including fuel, for the use and consumption of said printing office, together with all contracts and payments therefor; that Congress has regularly appropriated the money for the purchase of bituminous coal to be used as fuel in the furnaces of said building, all of which purchases have been duly reported as aforesaid; that in the discharge of his duties he has used due care and prudence in the use of said bituminous coal in carrying on the work required by the United States in said building; and that the emission of smoke was occasioned by the use of said fuel notwithstanding his exercise of due care and prudence in the performance of his said duties.

The Attorney General filed a motion on behalf of the United States to set aside and dismiss the information for want of jurisdiction of the court, on the ground, as he informed the court, that the building is the property of the United States, possessed, held, and occupied by them for public purposes, and that the defendant is a public officer of the United States and not the

owner, agent, lessee, or occupant of the same.

The court denied this motion, and sustained a demurrer to the said plea. The defendant electing to stand upon his plea, the court adjudged him guilty, and sentenced him to pay a fine of \$50, and in case of default in payment thereof to be imprisoned for sixty days.

There is no occasion to consider whether the public printer would be liable for the commission of a nuisance through his own wrongful act or neglect of duty, because the allegation of the exercise of due care and prudence in the use of the appliances furnished by the United States has been admitted by the demurrer to the plea. Nor is the effect of this allegation avoided by the further allegation that it was the duty of the public printer, among others devolved upon him by Congress, to make estimates of the supplies and fuel needed in the operation of the printing office, for the consideration of the "Joint Committee on Public Printing." For neglect of duty or misconduct, if any, in that respect he can be held responsible by the United States, but not by the District of Columbia in this proceeding.

Whatever effect his recommendations or want of recommendation may have had upon said committee, the fact remains that Congress provided by law for the operation of the engines of the government printing office through the use of bituminous coal, without providing, at the same time, for the necessary appliances to consume the smoke therefrom.

The single question for determination, then, is, whether the act of Congress approved February 2, 1899, applies to the buildings in the District of Columbia belonging to and operated by the United States?

The act reads as follows:

"Sec. 1. That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared to be, a public nuisance: Provided, that nothing in this act shall be construed as applied to chimneys of buildings used exclusively for private residences.

"Sec. 2. That the owner, agent, lessee, or occupant of any building of any description from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance, 1 L.R.A. (N.S.)

and of violating the provisions of this act.

"Sec. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the police court of the District of Columbia, be punished by a fine of not less than \$10 nor more than \$100 for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense." [30 Stat. at L. 812, chap. 79.]

The general object of the exercise of legislative power is the enactment of laws for the regulation of the acts and rights of citizens, and not of the sovereign. And the universal rule of construction is that the sovereign state is not bound or its rights affected by a statute of apparent general application unless expressly named therein, or unless the words used are so clear and unmistakable as to leave no doubt that such was the legislative intention. This rule has been uniformly applied in the construction of general statutes of limitations and bankruptcy, and others relating to revenue licenses and impositions, to interest upon debts and demands, to judgment and mechanics' liens, to practice and the like. *United States v. Knight*, 14 Pet. 301, 315, 10 L. ed. 465, 472; *United States v. Insley*, 130 U. S. 263, 266, 32 L. ed. 968, 969, 9 Sup. Ct. Rep. 485; *United States v. Herron*, 20 Wall. 251, 255, 22 L. ed. 275, 276; *Lewis v. United States*, 92 U. S. 618, 622, 23 L. ed. 513, 514; *Stanley v. Schwalby*, 147 U. S. 508, 515, 37 L. ed. 259, 262, 13 Sup. Ct. Rep. 418; *Page v. District of Columbia*, 20 App. D. C. 469, 474, 475; *State v. Milburn*, 9 Gill, 105, 117; *Carr v. State*, 127 Ind. 204, 220, 11 L. R. A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; *Seton v. Hoyt*, 34 Or. 266, 273, 43 L. R. A. 634, 75 Am. St. Rep. 641, 55 Pac. 967; *Josselyn v. Stone*, 28 Miss. 753, 763; *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; *Fuller v. Roosevelt*, 4 Cow. 144; *State v. Garland*, 29 N. C. (7 Ired. L.) 48; *Cole v. White County*, 32 Ark. 45, 51; *Stoughton v. State*, 5 Wis. 291, 297; *Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751; *Brunswick v. King*, 91 Ga. 522, 524, 17 S. E. 940; *People v. Gilbert*, 18 Johns. 227.

Authorities need not be multiplied in support of a general principle that has met with no judicial denial so far as my research has extended. In the main those have been selected which would seem to bear most directly upon the application of the general principle to the conditions presented by the case at bar; and some of these will be briefly reviewed.

In *Page v. District of Columbia*, *supra*, it was held that an act providing in broad terms that no person shall sell liquor in

the District of Columbia without a license, etc., did not apply to persons conducting restaurants in the Capitol under arrangements made with committees of the House and Senate respectively.

In *State v. Milburn, supra*, it was held that a general statute declaring that no bond shall be received in evidence that had not been stamped, as provided by a revenue law relating to bonds of every nature whatsoever, did not apply to an unstamped bond sued on by the state of Maryland.

In *Josselyn v. Stone, supra*, a general statute required the registration of all judgments in order to give liens, and another was subsequently passed providing that all such liens shall be enforced within a certain period or else lost. Held, that the latter statute, which did not name the state, though sweeping in its terms, did not apply to the lien of a judgment in favor of the state.

In *Mayrhofer v. Board of Education, supra*, it was held that a general statute providing for a mechanic's lien upon "any property," and "any building," did not extend to a school building in a district acting by authority of the state.

In *Fuller v. Roosevelt, supra*, it was held that a general statute abolishing imprisonment for debt did not bind the state because it was not named.

In *Seton v. Hoyt, supra*, a general statute providing for the running of interest on all debts and demands was held not to apply to the debt of a county, because it was a subdivision of the state; and the latter was not named in the act.

In *Cole v. White County, supra*, a general fee bill authorizing certain costs for the service of all writs by officers was held inapplicable to writs served in proceedings on behalf of the state. To the same effect, *People v. Gilbert, supra*.

In *State v. Garland, supra*, it was declared that the state was not bound by a general statute regulating jurisdiction in cases of appeal.

In *Butler v. Merritt, supra*, the following facts appear: The state, by authority of law, maintained a dispensary in a town for the sale of liquor. Subsequently, the town, by a popular vote taken in accordance with the provisions of a general local-option law, put the latter in force. This was a sweeping act prohibiting the sale of liquor by all persons. The court held that sales by the state were not within the prohibition, and that the word "persons" did not include the agents of the state. In *Stoughton v. State, supra*, the defendant was indicted for a nuisance directly resulting from a dam main-

tained under grant of power by the state. The conviction was reversed on the ground that the state could not punish as a crime an act which it had expressly authorized. No question of injury done to private individuals by reason of the nuisance was involved. To the same effect, *People v. New York Gaslight Co. 64 Barb. 69*.

Tested by the principle stated, in the light of its application in the analogous cases before cited, I am of the opinion that the act of Congress does not apply to the public buildings of the United States in the District of Columbia. Had the regulation been enacted by the municipal authorities under broad general police powers conferred upon them by Congress from time to time, it would not be contended that they, without express authorization, could bring the buildings of the United States under their jurisdiction. From the beginning, a distinction has been carefully made, in respect of management, control, and police, between the public property occupied and used by the United States for governmental purposes, as well as much that is not so used; and that of ordinary public use which falls naturally within the scope of municipal control and supervision.

As regards the regulation of the uses of public property of the latter kind, as well as that of private owners, Congress, which is invested with plenary powers of legislation within the limits of the District of Columbia, has rarely, if ever, conferred upon the municipal authorities other than the minor powers of regulation that are common to municipal corporations in this country generally. Congress reserves to itself the granting of franchises in the public streets, their extension and improvement, as well as the regulation of some of their ordinary uses by the public. By direct legislation it has established some market places and provided for their general regulation; created hack and cab stands in certain public places, and has undertaken to provide for the removal of snow and ice from the sidewalks. See *Coughlin v. District of Columbia, 33 Wash. L. Rep. 376*. Other instances might be cited. The act under consideration is a municipal regulation of the same nature. Clearly its primary object was to direct the uses of property ordinarily subject to municipal police regulation. The United States are not named in the act, and I do not find in the use of general words, common in all such local legislation, an unmistakable or certain intent to include their public buildings within its operation. The words "agent" and "occupant" in addition to "owner" and "lessee" are aptly used to

meet the case of corporate ownership, and of private ownership where the owner retains no constant personal direction and management. The word "persons" used in the 3d section necessarily refers, and is limited in its meaning, to the "owner, agent, lessee, or occupant" named in the 2d section.

Neither "agent" nor "occupant" aptly describes the relation of the public printer to the owners of the building in this case. The occupation as well as the ownership of the building is unquestionably that of the United States; and the public printer, who superintends the business which they carry on, with the means and appliances furnished by the legislative department, is not their agent within the ordinary meaning of that word. He holds a public office created for the purposes of the government, and to that end certain powers have been delegated to him. And a public officer is quite different from an ordinary agent. *United States v. Maurice*, 2 Brock. 96, 102, Fed. Cas. No. 15,747; *Atty. Gen. v. Drohan*, 169 Mass. 534, 535, 81 Am. St. Rep. 301, 48 N. E. 279; *Atty. Gen. ex rel. Rich v. Jochim*, 99 Mich. 358, 367, 23 L. R. A. 699, 41 Am. St. Rep. 606, 58 N. W. 611.

In the absence of some express declaration to the contrary. I regard it as most unreasonable to presume that Congress contemplated his prosecution and punishment, equally with the agents of private owners, when, in the exercise of ordinary care, he was engaged in the performance of public duties imposed upon him by law with the only means and appliances provided for the purpose. It requires more than inference to convict the Congress of the gross injustice and oppression of enacting a law embracing in its term the administration of a department of the government, and then subjecting the officer charged with that administration to punishment for the careful discharge of duties imposed upon him by express provisions of the law.

The apparent injustice of making a distinction between public and private ownership of buildings in respect of the emission of noisome smoke and cinders is a matter with which the courts have nothing to do. This injustice, however, consists not so much in the exemption of the buildings of the United States from the operation of a municipal regulation, as in the failure to provide the necessary fuel or appliances through which the emission of objectionable smoke might reasonably be prevented. In my opinion the judgment of the police court ought to be reversed with direction to sustain the plea and motion.
1 L.R.A. (N.S.)

WISCONSIN SUPREME COURT.

HENRY F. JORDAN, Admr. of Joseph De-
Ange, Deceased, Resp't.,
v.

CHICAGO & NORTHWESTERN RAIL-
ROAD COMPANY, Appt.

(.... Wis.)

1. Appointment of administrator—collateral attack.

The appointment, by a court of competent jurisdiction, of an administrator, is not open to collateral attack in a suit by the administrator to collect assets, on the ground that it was void because of lack of assets in the state.

2. Same—action for killing as asset.

A right of action for negligent killing of a person is an asset of his estate, sufficient to warrant the appointment of an administrator.

(October 3, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Kenosha County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by Cassoday, Ch. J.:

It is conceded that the plaintiff's intestate was killed in the county of Kenosha, January 23, 1904, while in the employ of the de-

Case Note.—The decision in the above case, that a right of action for the negligent killing of a person is an asset of his estate, sufficient to warrant the appointment of an administrator, is sustained by the clear preponderance of the authorities.

In *Re Mayo*, 60 S. C. 401, 54 L. R. A. 660, 38 S. E. 634, it was held, on a review of the authorities from different states, that, where a statute creates a right of action which cannot be enforced except by an administrator, and provides for a special distribution by him of the proceeds, the probate court, where an intestate was killed, can grant administration to enforce such right of action. This was the case of a nonresident intestate. Other cases in which administration has been granted to enforce the right of action for the killing of a nonresident are *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213 (where the administration granted was ancillary); *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639 (where there was also an administrator in another state); *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 733; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283.

In some cases where the deceased was a resident of the state it has also been held that the right of action for wrongful death is an asset sufficient to sustain adminis-

defendant as a section laborer. January 26, 1904, the plaintiff filed his verified petition in the county court of that county, wherein he represented, in effect, that he was the public administrator of that county; that the deceased died in the town of Pleasant Prairie, in that county, January 23, 1904, intestate; that he died possessed of certain personal property not exceeding \$5,000, consisting of a claim for damages against the defendant for negligently causing his death and for wages due him from the defendant for work and labor performed by him for the defendant, and debts due and unpaid to an amount unknown to the petitioner; that the deceased had left him surviving a widow and three children, whose Christian names and ages were unknown to the petitioner, and who were then in Italy or on their way to the United States; that, except as above stated, no person under twenty-one years of age, or otherwise incapable of prosecuting

or defending such action, had any interest in the subject-matter therein, or any rights in respect thereto which might be affected by the order entered thereon; that at the time of his death the deceased was an inhabitant of Kenosha county; and the petition prayed that letters of administration be issued to the plaintiff or some other suitable person. Upon such petition, the Kenosha county court, on February 2, 1904, issued letters of administration to the plaintiff, reciting therein, in effect, that the deceased, late of Lake county, Illinois, died intestate while living in Kenosha county, and having at the time of his death goods, chattels, credits, and estate in Kenosha county, by means whereof such letters were granted of all and singular the goods, chattels, credits, and estate, and also the auditing, allowing, and final discharging of the account of the deceased, and therefore the county court granted to the plaintiff, in ef-

tration. This was declared in *Missouri P. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67, 40 N. W. 401, and *Morris v. Chicago*, R. I. & P. R. Co. 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143, in both of which cases the death took place in another state.

On the other hand, in *Illinois C. R. Co. v. Cragin*, 71 Ill. 177, administration granted in Iowa, on a cause of action for death in Illinois, was held invalid; and, upon the ground that there had been no real adjudication in Iowa, it was held that the administration could not be granted.

In *Indiana* the court held, in *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477, that a right of action for causing the death of a non-resident was not assets which would sustain administration. Likewise, in *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420, the same decision was rendered.

In *Marvin v. Maysville Street R. & Transfer Co.* 49 Fed. 436, the United States circuit court in Kentucky said that the right to recover for the death of the decedent under the Kentucky statutes was not assets upon which an administration of a nonresident decedent could be obtained in that state; but this is not only in conflict with the later decision of the Kentucky supreme court in *Brown v. Louisville & N. R. Co.* *supra*, but was not strictly a part of the decision, as the action was brought by a foreign administrator, and it was on this ground that the case was disposed of by the circuit court of appeals. 8 C. C. A. 21, 16 U. S. App. 236, 59 Fed. 91.

A distinction between the statute passed on in the Kansas and Indiana cases and that of Michigan is made in *Findlay v. Chicago & G. T. R. Co.* *supra*, because the Michigan statute provides for distribution of the recovery as intestate property generally, while in Indiana and Kansas it goes exclusively, in the first instance, to the widow and children, or next of kin. But, in Nebraska, which upholds the administra-

tion based on such right of action, the recovery is, by the statute referred to in the *Bradley Case*, *supra*, "for the exclusive benefit of the widow and next of kin." The same is true of the Iowa statute passed upon in the *Morris Case*, *supra*; and, under the Minnesota statute referred to in the *Hutchins Case*, *supra*, it is said that the proceeds of the action for death of an intestate "formed no part of his general estate, but belonged to his next of kin." And the South Carolina statute set out in the *Mayo Case*, *supra*, makes the recovery "for the benefit of the wife, husband, parent, and children," if there are any. Therefore, it must be conceded that the Indiana and Kansas cases referred to are not to be reconciled with those of the other states.

The reasoning in the majority of the courts seems to be convincing in favor of the right of administration; as, in the *Hutchins Case*, *supra*, the court says: "The fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it." In the *Findlay Case*, *supra*, the Michigan court says: "It could not have been contemplated by the legislature that the right to bring this action could be made to depend upon the question of whether the deceased left other property." In the *Brown Case*, *supra*, the Kentucky court said that the statute giving such right of action to an administrator "necessarily implies the right to have an administrator appointed by the local courts for this purpose alone, if there be no other necessity or right or authority for such appointment."

The right to make a collateral attack on the appointment of an administrator on the ground that there were no assets to sustain the action is denied in most of the decisions, as shown by the note in 18 L. R. A. 243, which fully agrees with the conclusions of the court in the above case.

fect, full power to administer and faithfully dispose of all and singular the goods, chattels, and estate of the deceased; to ask, demand, recover, and receive the debts which were due unto the deceased while living and at the time of his death properly belonging to him; to pay the debts of the deceased so far as there was property to do so; to make, or cause to be made, a full, true, and perfect inventory of all and singular the goods, chattels, credits, and estate of the deceased which had or should come to his possession or knowledge on or before May 2, 1904; and also to render a just and true account of such administration at or before the expiration of one year from February 2, 1904, and to obey all orders and decrees of the court, and also render a just and true account of such administration when thereunto lawfully required. February 20, 1904, the plaintiff, as such administrator, commenced this action and alleged in the complaint, in effect, that such killing was solely by reason of the wrongful act, default, negligence, and carelessness of the defendant; that the defendant was liable in damages therefor to the plaintiff as such representative; that the amount recovered be paid over to the widow and children of the deceased; that the deceased was a resident of Lake county, Illinois, but was injured and died in Kenosha county, leaving a widow and three infant children and property and an estate to be administered therein, but leaving no widow or next of kin residing therein; that immediately upon such death the plaintiff, as such public administrator, became the only personal representative of the deceased; that January 26, 1904, he filed his petition for his appointment as such administrator and was appointed as stated; that, soon after, the defendant's claim agent offered the plaintiff \$3,000 in compromise and settlement of said claim and cause of action, and the plaintiff accepted the same and thereby the cause of action was settled and compromised; that the plaintiff then presented to the defendant proper releases and discharge of the defendant from all further liability, but that the defendant did not pay the same, as its attorney expressed doubt of his authority to make such settlement,—and prayed judgment for \$3,000 and interest from February 2, 1904. March 2, 1904, the defendant answered in abatement of the action, by way of admissions, denials, and counter allegations to the effect that the deceased at the time of his death was a nonresident of Wisconsin, and not a citizen of the United States; that the widow and children were residents and citizens of Italy and nonresident aliens; that the deceased left no estate to be administered in Wisconsin, and no property or estate in Ke-

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nosha county; that no sufficient petition or application for administration had been made to the Kenosha county court; that no notice of the time or place of hearing, as required by § 3808 of the Revised Statutes of 1898, had been given; that the Kenosha county court had no jurisdiction to make such appointment, or any appointment, over the estate of the deceased, or to grant such letters of administration; and that all the proceedings of that court were null and void. The defendant further answered in bar of the action, by way of admissions, denials, and counter allegations to the effect that the deceased was instantly killed while in the employ of the defendant as a section laborer; that he left him surviving his widow and children, who were residents and citizens of Italy and nonresident aliens.

The cause having come on for trial May 2, 1904, it was stipulated by and between the parties in open court, in effect, that a trial by jury be waived, and the cause heard by the court; that, if the court should adjudge that the plaintiff was lawfully appointed administrator of the estate of the deceased and had the legal right to bring the action, judgment might thereupon be entered in favor of the plaintiff and against the defendant for \$3,000, the defendant reserving the right to appeal from the judgment of the court, so far as the same related to the legality of the appointment of the plaintiff as such administrator; that the record of such appointment might be considered in evidence; and that the deceased was killed in Kenosha county, January 23, 1904, while in the defendant's employ as a section laborer, by being struck by a locomotive operated by the defendant. At the close of the trial the court made findings of fact to the effect that all the material allegations of the complaint were true; that the plaintiff was and is the administrator of the estate of the deceased and the personal representative thereof, and as such had the legal capacity to commence this action; that the appointment of the plaintiff as such administrator and the granting to him of letters of administration were and are valid, regular, and proper; that, the court having so found and decided, judgment should, pursuant to the stipulation, be given and entered in favor of the plaintiff for \$3,000, together with costs of the action; that the deceased left property and an estate within Kenosha county to be administered therein; that the allegation of the answer that the deceased died instantly was not proved, and, as conclusions of law, the court found, in effect, that the plaintiff was entitled to a judgment against the defendant for \$3,000, together with the costs of the action, and ordered judgment to be en-

tered accordingly. From the judgment so entered the defendant brings this appeal.

Mr. Edward M. Hyzer, for appellant:

Defendant had a right to inquire into the validity of the appointment of a plaintiff administrator.

Hubbard v. Chicago & N. W. R. Co. 104 Wis. 746; 76 Am. St. Rep. 855, 80 N. W. 454. The appointment was void.

Odell v. Rogers, 44 Wis. 136.

The existence of conditions which authorize the interference of a county court with property by way of administration is open to collateral inquiry.

Melia v. Simmons, 45 Wis. 334, 30 Am. Rep. 746; Wisconsin Trust Co. v. Wisconsin Marine & F. Ins. Co. Bank, 105 Wis. 464, 81 N. W. 642.

Mr. Norman L. Baker, with Messrs. B. J. Wellman and R. V. Baker, for respondent:

A special administrator may be appointed for the sole purpose of bringing such an action where there is no other property.

Grece v. Helm, 91 Mich. 450, 51 N. W. 1106; Swan v. Norvell, 107 Wis. 625, 83 N. W. 934.

The appointment of the administrator is in every way regular.

Welsh v. Manwaring, 120 Wis. 377, 98 N. W. 214.

The granting of administration to the public administrator cannot be attacked collaterally.

Tallman v. McCarty, 11 Wis. 402; Van-Fleet, Collateral Attack, § 62, p. 83; Frank-furth v. Anderson, 61 Wis. 107, 20 N. W. 662; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139; Vermillion v. Le-Clare, 89 Mo. App. 55; Larson v. Union P. R. Co. (Neb.) 97 N. W. 313; Wilkinson v. Conaty, 65 Mich. 614, 32 N. W. 841; Johnson v. Johnson, 66 Mich. 525, 33 N. W. 413; Barney v. Babcock, 115 Wis. 409, 91 N. W. 982; Portz v. Schantz, 70 Wis. 497, 36 N. W. 249; Baker v. Baker, 51 Wis. 538, 8 N. W. 289; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 804, 77 N. W. 147; Roberts v. Weadock, 98 Wis. 400, 74 N. W. 93; Slinger's Will, 72 Wis. 22, 37 N. W. 236; O'Connor v. Decker, 95 Wis. 202, 70 N. W. 286; Ormsbee v. Piper, 123 Mich. 265, 82 N. W. 36; McGehee v. McCarley, 33 C. C. A. 629, 63 U. S. App. 422, 91 Fed. 462; Bradley v. Missouri P. R. Co. 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; Missouri P. R. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283; McCooey v. New York, N. H. & H. R. Co. 182 Mass. 205, 65 N. E. 62; Tanas v. Municipal Gas Co. 88 App. Div. 251, 84 N. Y. Supp. 1053; Lowman v. Elmira, C. & N. R. Co. 85 Hun, 188, 32 N. Y. Supp. 579, 154 N. Y. 765, 49 N. E. 1099; 1 L.R.A. (N.S.)

Pick v. Strong, 26 Minn. 303, 3 N. W. 697; 11 Am. & Eng. Enc. Law, p. 785.

A debt constitutes assets of the estate at the debtor's domicile.

Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; Re Picquet, 5 Pick. 65; Pinney v. McGregory, 102 Mass. 186; 11 Am. & Eng. Enc. Law, 2d ed. p. 764.

A claim for negligent killing is property within the meaning of a statute authorizing the appointment of an administrator.

Re Mayo, 60 S. C. 401, 54 L. R. A. 660, 38 S. E. 634; Missouri P. R. Co. v. Bradley, *supra*; Phillips v. Chicago, M. & St. P. R. Co. 64 Wis. 475, 25 N. W. 544; Brown v. Louisville & N. R. Co. 97 Ky. 228, 30 S. W. 639; Findlay v. Chicago & G. T. R. Co. 106 Mich. 700, 64 N. W. 732; Hutchins v. St. Paul, M. & M. R. Co. 44 Minn. 5, 46 N. W. 79; Richards v. Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437; Morris v. Chicago, R. I. & P. R. Co. 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121; Hartford & N. H. R. Co. v. Andrews, 36 Conn. 213.

Cassoday, Ch. J., delivered the opinion of the court:

Under the stipulation entered into on the trial, the only question here for consideration is whether the plaintiff was lawfully appointed administrator of the estate of the deceased and had the legal right to bring this action. There is no claim that the plaintiff should have been appointed such administrator by reason of being one of the persons referred to in § 3807 of the Revised Statutes of 1898, or that the notice prescribed in § 3808 of the Revised Statutes of 1898 was ever given. The plaintiff claims, and the trial court in effect found, that the appointment was properly and regularly made by the county court upon a sufficient petition under § 3819 of the Revised Statutes of 1898. Omitting words not applicable here, that section declares that, "when any person shall die intestate, leaving property in this state, but leaving no widow, surviving husband, or next of kin, known to the county court, living therein, . . . the county court having jurisdiction of such estate . . . shall, upon its own motion, or upon the application of the public administrator, if such court shall deem necessary, grant administration of such estate . . . to the public administrator, and it shall thereupon be lawful for the public administrator to take possession of the property and effects of the intestate. . . . and protect and preserve the same and to proceed with the administration of such estates and with the care and management of the estate, . . . until admin-

istration . . . thereon shall, upon proper application of some person entitled to apply therefor, be granted to some other person. If such intestate . . . be a nonresident, administration . . . of his estate shall be granted to the public administrator of the county where the property may be found." And then, after providing for the revocation of the appointment of such public administrator, the section provides that "such estates shall be administered by the public administrator in the same manner as other estates, except as otherwise provided herein." Rev. Stat. 1898, § 3819. As held by this court, this section "obviously provides merely for a temporary situation, and authorizes appointment of the public administrator only until those having lawful right under § 3807 shall make proper application." *Welsh v. Manwaring*, 120 Wis. 377, 379, 380, 98 N. W. 214. As indicated, "the county court, having jurisdiction of such estate," may, "upon its own motion, or upon the application of the public administrator, . . . grant administration of such estate . . . to the public administrator." Of course, such appointment may properly be made without notice.

The contention is that the county court had no jurisdiction to make such appointment, because the intestate did not die "leaving property in this state." In other words, it is claimed that it appears from the evidence taken that the intestate left no estate in Wisconsin, and that, in the absence of an estate therein, the county court had no jurisdiction to make the appointment. The records of such appointment by the county court are in evidence; but there is no indication that such appointment was ever set aside by the county court, or any appeal taken therefrom to the circuit court. But counsel for the defendant contends that the authority of the county court to make such appointment is open to collateral attack for want of jurisdiction, by reason of the absence of any estate in Wisconsin left by the intestate. In support of such contention counsel cite the decisions of this court holding that "the only jurisdiction the county court has in respect to the administration of estates is over the estates of dead persons." *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *Wisconsin Trust Co. v. Wisconsin Marine & F. Ins. Co. Bank*, 105 Wis. 464, 81 N. W. 642. See also *D'Arumant v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721. The distinction between such a case and the one at bar is pointed out by Marshall, Ch. 1 L.R.A. (N.S.)

J., in an early case, and expressly sanctioned by some of the cases above cited. *Griffith v. Frazier*, 8 Cranch, 9, 23, 3 L. ed. 471, 475. It is there said that "in the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary [having the power of our county court], and, though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But, suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. . . . The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And, although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." This court, following the highest courts of England, has held, on direct appeal from the county court, that an order or judgment of a Louisiana court appointing an administrator of the estate of a deceased person, though based on a petition alleging that the deceased died while a resident of that state leaving property therein, was not conclusive as to the domicile of the deceased, and did not preclude a court of this state from taking jurisdiction of proceedings to probate the will of the deceased and administer so much of his estate as was actually located in Wisconsin. *Frame v. Thormann*, 102 Wis. 653, 667-671, 79 N. W. 39, Affirmed in 176 U. S. 350, 356, 44 L. ed. 500, 503, 20 Sup. Ct. Rep. 446; *De Mora v. Concha*, L. R. 29 Ch. Div. 268, Affirmed in L. R. 11 App. Cas. 541. See also *Overby v. Gordon*, 177 U. S. 214, 223, 224, 44 L. ed. 741, 745, 746, 20 Sup. Ct. Rep. 603. Of course, it frequently occurs that an intestate person leaves property located in different states. Where that is the case, there can be no doubt that the appropriate court of each state where such property is located may, upon proper proceeding being had, grant letters of administration of so much of the estate as is therein located.

The question here presented is whether the appointment of the plaintiff as administrator by the county court is open to collateral attack. The county court, upon petition filed, certainly had jurisdiction to determine whether the deceased left any property in the state of Wisconsin. Having such jurisdiction of the subject-matter in such proceeding *in rem*, its determination could not properly be treated as a nullity, nor be open to collateral attack. *Van Fleet*, Collateral Attack, §§ 527, 573, and cases there cited. In the last of these sections, it is

said that "the statutes concerning the appointment of administrators authorize it to be made in certain cases in any county where the decedent left assets. On the presentation of a petition asking for an appointment in such a case, it becomes a question of fact, to be determined from the evidence, whether or not the decedent did leave assets in that county, and an erroneous decision is conclusive in a collateral proceeding." See 11 Am. & Eng. Enc. Law, 2d ed. p. 785; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697; *McCooley v. New York*, N. H. & H. R. Co. 182 Mass. 205, 65 N. E. 62; *O'Connor v. Huggins*, 113 N. Y. 511, 21 N. E. 184; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426; *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139. In this last case it was expressly held that "the right of a public administrator to take charge of an estate cannot be collaterally questioned." To the same effect: *Hoes v. New York*, N. H. & H. R. Co. 73 App. Div. 363, 77 N. Y. Supp. 117. In so far as this court has spoken on similar subjects of jurisdiction, the same is in harmony with the authorities cited. *Tallman v. McCarty*, 11 Wis. 401; *Portz v. Schantz*, 70 Wis. 497, 36 N. W. 249; *Swan v. Norvell*, 107 Wis. 625, 83 N. W. 934. We must hold that the appointment of the plaintiff as such administrator was conclusive on the defendant in this action. Besides, the evidence is sufficient to support the finding that the deceased left property and an estate within Kenosha county to be administered therein.

The judgment of the Circuit Court is affirmed.

Dodge, J., concurring:

Upon the ground that the evidence shows that decedent had property in Kenosha county I concur in the affirmance of the judgment, but I cannot yield assent to the doctrine that the exercise of jurisdiction to appoint an administrator by the county court concludes all collateral inquiry as to whether it had jurisdiction to do so. To so hold is to adopt the sophistry which was exploded by Paine, J., with such dignity of ridicule in *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269, adopting the views expressed in *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172. Where the very existence of a fact is essential to the power of a court to consider a matter, that it cannot have such power to consider when the fact does not exist seems an axiom. To concede the necessity of existence of the fact as a condition to the court's deciding at all, and then to hold that, though it does not exist, yet the court's decision that it does in effect creates the fact, is magic. It endows courts with

omnipotence. It creates something out of nothing. It sanctions the logic of the man who would lift himself by pulling on his own boot straps. The power of the state of Wisconsin to exercise any control, either by its courts or other branches of government, over the property left by a decedent, must depend on either the fact of his residence here or the presence of effects within the state. *Moyer v. Koontz*, 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cunnius v. Reading School District*, 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721. In absence of those facts, it cannot confer on anyone authority to meddle with such decedent's property, to take it into possession, sell it, or give it away. The acts of one so attempted to be authorized must be entirely futile and ineffective whenever questioned by the government having lawful jurisdiction over such property, or by its administrative agents. Hence the payment of money to one appointed administrator without jurisdiction will not protect appellant against an administrator duly appointed. So I cannot doubt that appellant had right to question whether plaintiff was administrator at all.

That a jurisdictional fact must actually exist before any decision of a court can be conclusive has been declared repeatedly by this court; and the illogic of those courts, some of which are cited in the majority opinion, which hold that a finding that such fact exists suffices, has been reviewed and repudiated. *Rape v. Heaton*, *supra*; *Pollard v. Wegener*, 13 Wis. 569; *Carr v. Commercial Bank*, 16 Wis. 52; *St. Sure v. Lindsfelt*, 82 Wis. 346, 19 L. R. A. 515, 33 Am. St. Rep. 50, 52 N. W. 308; *Toepfer v. Lampert*, 102 Wis. 465, 469, 78 N. W. 779; *Johnson v. Turnell*, 113 Wis. 468, 472, 80 N. W. 515. The same principle has been declared by the Supreme Court of the United States, which in this field is our superior, for the enforcement of a judgment rendered without jurisdiction is a taking of property without due process of law. *Rose v. Himely*, 4 Cranch, 241, 269, 2 L. ed. 608, 617; *Griffith v. Frazier*, 8 Cranch, 9, 3 L. ed. 471; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Bell v. Bell*, 181 U. S. 175, 178, 45 L. ed. 804, 807, 21 Sup. Ct. Rep. 551; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 10 Sup. Ct. Rep. 506; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. New York has repeatedly applied the same doctrine, following *Starbuck v. Murray*, *supra*, the reasoning of which this court deemed unanswerable. *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *O'Donoghue v. Boies*,

159 N. Y. 87, 98, 53 N. E. 537, and cases cited; *Hoes v. New York*, N. H. & H. R. Co. 173 N. Y. 435, 66 N. E. 119. The following are some of the jurisdictional facts, absence of which has been held to preclude jurisdiction and render judicial action void, even collaterally considered, although in such original proceedings the fact had been found and recited, viz.: The fact of service of process (*Rape v. Heaton*, *Pollard v. Wegener*, and *Carr v. Commercial Bank*, *supra*); the fact of actual appearance to the action and of authority of attorney (*Christ v. Davidson*, 116 Wis. 621, 93 N. W. 532; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506); the fact of death before administration (*Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *Wisconsin Trust Co. v. Wisconsin Marine & F. Ins. Co. Bank*, 105 Wis. 464, 81 N. W. 642; *Griffith v. Frazier*, and *Scott v. McNeal*, *supra*); the fact of domicile in divorce (*St. Sure v. Lindsfelt*, 82 Wis. 346, 19 L. R. A. 515, 33 Am. St. Rep. 50, 52 N. W. 308; *Andrews v. Andrews*, and *Bell v. Bell*, *supra*); the legal sufficiency of publication proceedings (*Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596); existence of property in state of the judgment (*Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562, 29 Am. St. Rep. 850, 50 N. W. 783); seizure of property by sheriff (*Toepfer v. Lampert*, *supra*); fact of capture and location of property in prize condemnation (*Rose v. Himely*, *supra*); location of a trespass (*Thompson v. Whitman*, *supra*); domicile of a decedent (*Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39; *Id.* 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603); location of property in administration proceeding (*Overby v. Gordon*, and *Hoes v. New York*, N. H. & H. R. Co. *supra*).

There certainly is no distinction between such facts and that of the existence of property within a state, and none is suggested either by counsel or by the opinion filed on behalf of the court in this case. I do not find that the citations in that opinion, with one exception, at all support the holding that a jurisdictional fact cannot be denied and examined in collateral proceedings. Some are to the effect either that, if the court has jurisdiction, the judgment cannot be attacked collaterally, which is, of course, begging the present question. Others declare that the recitation of the jurisdictional fact in the record establishes it *prima facie*,—a rule with which I not only agree, but would enlarge to the extent that the mere judgment of a superior court of general jurisdiction *prima facie* establishes every jurisdictional fact not expressly contradicted by the record. The exceptional 1 L.R.A. (N.S.)

case is *O'Connor v. Huggins*, 113 N. Y. 511, 21 N. E. 184, wherein it is said that all jurisdictional facts are concluded against collateral attack by a recitation of them in the record; but it supports this *dictum* by citation and quotation of argument from *Roderigas v. East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555, holding that the fact of death is so concluded and cannot be contradicted. Obviously the *O'Connor* Case is the logical deduction from the *Roderigas* holding, and *vice versa*. If the record can conclude one jurisdictional fact, it can another. No more omnipotence is necessary to kill a live man than to create property where there is none. However, the former has been held impossible in Wisconsin, and neither the *Roderigas* Case nor the logical deduction from it in *O'Connor v. Huggins* is very cogent authority here. I do not understand that either is authority in New York, for I find that *Roderigas v. East River Sav. Inst.* *supra*, is spoken of as that "much cited and overruled case" in *Re Killan*, 172 N. Y. 557, 63 L. R. A. 95, 65 N. E. 561. In my opinion, the question whether there existed in Wisconsin any property of decedent was open to denial by defendant and to trial in the present action.

WISCONSIN SUPREME COURT.

CARRIE FRIEND, Appt.,
v.

FRANCIS WARD et al.,

And

FERDINAND T. YAHR, Appt.,

And

THOMAS H. BOWES et al., Exrs., etc., of
James Lawrie, Deceased, Respts.

(... Wis.)

1. Authority to fill blanks.

A person having executed an instrument, leaving blank spaces therein to be filled, and

Headnotes by MARSHALL, J.

Case Note.—That an agency to collect will be presumed to continue until collection is made, although no express authority upon the point is found, clearly comes within the general rule that, where a general authority is once shown to have existed, it may be presumed to continue until it is shown to have been revoked, and notice of the revocation communicated to the party acting upon its supposed existence. *Mechem, Agency*, § 224, citing many cases; *Wigmore*, Ev. § 2430.

The rule finds illustration in *Hall v. Union Cent. L. Ins. Co.* 23 Wash. 610, 51 L. R. A. 288, 83 Am. St. Rep. 844, 63 Pac. 505, where it is held that payment of premiums on a life insurance policy to a party, where

delivered the same in such imperfect condition to another for use, the presumption is, nothing appearing to the contrary, that such person intended to confer upon such other authority to complete the instrument.

2. Same—instruments under seal.

The rule above stated applies to instruments required by law to be executed under seal, and to be witnessed and acknowledged in order to entitle the same to be recorded, as well as to simple contracts.

3. Same—re-execution.

In case of implied authority, in the circumstances stated in the foregoing propositions, being performed, the instrument does not require re-execution or acknowledgment to give it full validity.

4. Mortgage—extinguishment.

Payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without any satisfaction thereof of record or in writing.

5. Same—satisfaction piece.

A mortgage having been extinguished by payment of the indebtedness, it is not necessary to valid record evidence thereof that a satisfaction piece shall be executed by the actual or apparent owner of such indebtedness for delivery to the mortgagor, or that there should be such delivery.

6. Assignment of security—power of attorney.

If a person, acting for himself or another, for value acquires a promissory note before maturity, secured by a mortgage upon real estate, taking the title to such mortgage in the name of another by his consent, evinced by a general power of attorney, but without his knowledge as to the particular transaction; and thereafter such other, by consent of such third person, evinced by such power of attorney, but without his knowledge as to the particular transaction, assigns his security in writing to a fourth person, the

agency for the defendant company was not shown by the evidence to have been revoked, was sufficient, the agency being presumed to continue.

The delivery of proofs of loss to one who appeared by an indorsement upon the back of a fire policy to be the agent of the insurance company is held, in *McCullough v. Phenix Ins. Co.* 113 Mo. 606, 21 S. W. 207, to be a sufficient delivery to the company, since the continuance of the relationship, and its existence at the time of delivery, are presumed in the absence of evidence to the contrary.

The continued existence of an agent's authority to permit the removal of goods covered by a fire policy from one location to another is presumed in *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539, 31 S. W. 265, in favor of an insured who received no notice of a revocation of such authority before giving the customary notice to the agent and removing his goods.

An authorization to sell a specific piece of property is held, in *Hensel v. Maas*, 94 Mich. 1 L.R.A. (N.S.)

assignment being neither witnessed nor acknowledged, the *bona fides* of the transaction as to the latter, or as to such first person, is not affected by the mere use of the third person's name as assignee and subsequently as assignor, nor by the fact that he was not pecuniarily interested in the transaction, nor by the circumstance that the second instrument of assignment was not so executed as to be entitled to record.

7. Same—rights of assignee.

In the circumstances above stated, the final holder of the legal title to the security can rely on the *bona fides* of the transaction between the vendor and the person dealing with him in the first transaction.

8. Reliance on record title.

A person, in dealing with another in respect to real estate, may rely upon the record title to the property, in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto.

9. Same—right of mortgagee.

A person, in taking a mortgage on real estate, may rely on the record of a satisfaction by the record owner of a prior mortgage on the same property, in the absence of knowledge, actual or constructive, of the ownership of such prior mortgage by some other person than such owner.

10. Record of mortgage—what notice of.

The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another.

11. Attorney to collect note—authority of.

A person in possession of a note belonging to another, secured by a mortgage upon real estate, with authority to collect the same, cannot rightfully accept in payment anything but money; nevertheless, if such person takes from the mortgagor a new mort-

563, 54 N. W. 381, to continue in force six months, where no revocation of the authority is made meanwhile, and consequently entitles the agent to commissions on a sale effected for, but not ratified by, his principal.

Payment by a father of a prior account contracted by his son is held in *McKenzie v. Stevens*, 19 Ala. 691, to be a recognition of the latter's authority to bind his parent, and to justify the plaintiff in advancing goods to the son on the father's credit, on the assumption that such authority continues. The lapse of fifteen months since the first account is held not to be evidence that the former authority had come to an end. A similar case is found in *Bryan v. Jackson*, 4 Conn. 288.

The mutual agency created by the partnership relation continues, presumptively, until notice of dissolution. *Butler v. Henry*, 48 Ark. 551, 3 S. W. 878; *Inby v. Brigham*, 9 Humph. 750; *Cooper v. Dedrick*, 22 Barb. 516.

gage on the real estate covered by the first mortgage, for the purpose of providing means with which to pay off the latter, and thereafter, by the use of such second mortgage, he acquires such means before his agency to collect is terminated, such authority is thereby executed, and the first mortgage indebtedness and lien extinguished.

12. Same—continuance of agency.

If a person intrusted with authority to collect a mortgage indebtedness enters upon the execution of such authority, and continues efforts in that regard until he obtains the necessary money therefor, nothing appearing to the contrary, the agency to collect and possession of the securities by the agent is to be presumed to continue correspondingly; and the legal effect of obtaining the money is the extinguishment of the note and mortgage, regardless of whether such money in due course, or otherwise, reaches the rightful owner.

(October 24, 1905.)

APPPEAL by plaintiff and the defendant Yahr from a judgment of the Circuit Court for Milwaukee County determining the priority of certain mortgages against the estate of the defendants Ward. Reversed.

Statement by Marshall, J.:

Action to foreclose a mortgage. The complaint was in the usual form. Defendants Thomas H. Bowes and Mary Kurtz, as executors of the last will of James Lawrie, deceased, pleaded ownership of a note for \$1,600, secured by a mortgage on the premises described in the complaint, given to their testator in his lifetime by defendants Francis Ward and Alice Ward, the makers of plaintiff's mortgage, and that the said mortgage was paramount to that of the plaintiff. They ask for appropriate relief. Defendants Francis Ward and his wife, Alice Ward, pleaded extinguishment of the Lawrie mortgage by payment of the indebtedness secured thereby to Henry Herman, as agent for Lawrie in his lifetime. Defendant Yahr pleaded ownership of a \$600 note made by said Francis Ward, secured by a mortgage on the premises described in the complaint, executed by said Francis Ward and his wife, and that the same was paramount to the Lawrie mortgage. The facts established by the evidence as found by the trial court, so far as necessary to be stated, are these: December 12th, 1893, defendants Francis Ward and Alice Ward mortgaged the real estate described in the complaint to Henry Herman to secure payment in five years of Francis Ward's note for \$1,600, and interest thereon at the rate of 7 per cent per annum, payable semiannually. The mortgage was duly recorded December 16th, 1893.

January 10th, 1894, Herman, for value, in writing assigned the mortgage and indebtedness secured thereby to James Lawrie. The assignment was not recorded till April 23d, 1903. The failure in that regard was in accordance with a then existing custom. Interest on said note was duly paid to Lawrie or his agent until 1898. In October, 1902, Lawrie delivered the mortgage, note and assignment to Henry Herman with instructions to collect. Herman delivered the same to an attorney with instructions to commence foreclosure proceedings, but not to file any papers. The attorney did as directed, Lawrie verifying the complaint, and service thereof being duly made in the action. No papers in such action were filed. No bill for legal services was rendered to Lawrie, nor was the latter notified of the termination of the action, which thereafter occurred. November 14th, 1902, by previous arrangement, Alice Ward, Ferdinand T. Yahr, and Henry Herman met at the latter's office. Neither Lawrie nor his attorney knew of such meeting. The amount due on the mortgage indebtedness for interest and unpaid taxes was then determined. An outstanding mortgage for \$300, on the premises in question to a corporation represented by Yahr, was satisfied, a new note for \$1,600, payable in five years with interest at 5 per cent per annum, and a mortgage on such premises to secure the same was signed by Alice Ward. Later in the day the mortgage and note were signed by Francis Ward, and the mortgage was duly witnessed and acknowledged so as to be entitled to record. At this time the Wards were assured that a release of the Lawrie mortgage was ready for delivery and would be recorded with the new mortgage. No release was in fact ready for delivery. The mortgage was duly recorded the next day after its execution. At the time of making the second \$1,600 mortgage the Wards gave a note for \$600, due in five years thereafter with 5 per cent interest per annum, to defendant Yahr, and mortgaged the premises in question to secure payment thereof, the same to be subject to the \$1,600 mortgage. The consideration for the Yahr mortgage was the satisfaction of the \$300 mortgage and a loan of \$300. At the same time the Wards further mortgaged the premises to Herman to secure payment of Francis Ward's note for \$600, given to Herman, which by its terms drew interest at the rate of 5 per cent per annum and was payable in five years. Thereafter such note and mortgage were duly assigned to defendant Vedder, who is now the owner thereof. That note was due at the time of the commencement of this action. By agreement with defendant Yahr

his mortgage was made subject to the Vedder mortgage. At the time of the transactions of November 14th, 1902, Yahr had actual notice that Lawrie was the assignee of Herman of the first \$1,600 mortgage, and Vedder had constructive notice of such fact. Herman from the time he transferred the mortgage to Lawrie till he left the country in 1903, knew that the mortgage indebtedness had not been paid and that Lawrie had never released his mortgage. As a result of negotiations between Herman and Charles Friend, plaintiff's son and attorney, between the date of the second \$1,600 mortgage and the 24th day of November thereafter, the former transferred such mortgage and the indebtedness secured thereby, delivering the papers to said Friend. In consummating the deal, Herman delivered with the note and mortgage an assignment executed so as to entitle the same to be recorded, except the name of the assignee was left blank, a satisfaction, in form, of the Lawrie mortgage executed by Herman without the knowledge of or consent of Lawrie, and an abstract of title showing the first \$1,600 mortgage to be unsatisfied of record. In January, 1903, Friend completed the assignment by writing in the name of A. G. Stein, of New York, as assignee. Neither Stein, Herman nor Lawrie knew of this. Friend acted for Stein under a duly recorded power of attorney authorizing him to do such business. Before the commencement of this action Friend, under such power, assigned the securities acquired by him as aforesaid to the plaintiff, though the assignment was not executed so as to be entitled to record, and the same has never been recorded. Stein did not furnish any money to carry out the transaction aforesaid, or know of the same. When Friend acquired the mortgage from Herman he had notice of the state of the record as to the Lawrie mortgage. He made no inquiry therefor, nor was the mortgage or the note secured thereby produced at the time of the transaction, nor was there any evidence produced on the trial that such securities were then in Herman's possession. Herman did not execute said satisfaction with the intention of delivering the same to the mortgagors. It was not received by Friend with the understanding that it was to be so delivered. He retained the same until April 10th, 1903, when he caused it, together with the assignment, to be duly recorded. Shortly thereafter Herman absconded. Friend knew, prior to such departure, of Herman's intentions in the matter. At the time of the transaction between Friend and Herman in respect to the mortgage, the latter delivered to the former \$3,000, face value of corporate

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stock to secure payment of \$1,800, he at the same time giving Herman his check for that amount, which was subsequently paid. The stock was later returned to Herman. Plaintiff knew nothing of this transaction. For some fifteen years prior to Herman's departure he was an active business man in Milwaukee, where all the transactions referred to occurred. During such period he was engaged in many business matters and enterprises, in some of which Friend was associated with him, and their relations were very close and friendly. On the eve of Herman's departure he transferred to Friend some property in settlement of various claims the latter had against him. The Lawrie note and mortgage were returned to Lawrie some time after the execution of the second \$1,600 mortgage. Other facts were found sufficient to support the judgment, if correct conclusions of law were drawn by the trial court.

The court held thus: The Lawrie mortgage is in full force and the first lien upon the premises described in the complaint. The second \$1,600 mortgage and note were taken by Herman, and the money obtained therefrom from Friend, with the intention on the former's part of converting the same to his own use. The assignment of such mortgage was too incomplete when delivered to be effective for any purpose, and it was not made effective thereafter, in that it was not reworded and acknowledged after its completion by filling in the name of an assignee. Friend took the mortgage with constructive notice of Lawrie's rights under the first mortgage, and not as a bona fide holder. The satisfaction, in form, of Lawrie's mortgage was ineffective for want of delivery thereof to the mortgagors. Herman was not the agent for Lawrie in taking and disposing of the second \$1,600 mortgage. The several mortgages mentioned, as regards priorities, rank as follows: The Lawrie mortgage first, the Vedder mortgage second, the Yahr mortgage third, and the plaintiff's mortgage fourth.

Judgment was entered accordingly, from which plaintiff and Yahr separately appealed.

Messrs. Turner, Hunter, Pease, & Turner, for appellant Yahr:

The Lawrie mortgage was paid.

The Lawrie note and mortgage in Herman's hands for collection on November 14th, 1902, must be presumed to have remained there until the contrary is shown.

Smith v. Hardy, 36 Wis. 417; Eaton v. Woydt, 26 Wis. 383; Wells v. Burbank, 17 N. H. 393; Robson v. Rawlings, 79 Ga. 354, 7 S. E. 559; Drummond v. Clinton & P. H.

R. Co. 7 Rob. (La.) 234; Newman v. Bank of Greenville, 67 Miss. 770, 7 So. 403; Jones, Ev. § 52.

Agency once shown is presumed to continue until the contrary is shown.

Merchants' Ins. Co. v. Oberman, 99 Ill. App. 357; Gross v. Owen (Misc.) 86 N. Y. Supp. 266; McKenzie v. Stevens, 19 Ala. 697; Burlington Ins. Co. v. Threlkeld, 60 Ark. 539, 31 S. W. 265; Henkel v. Welsh, 41 Mich. 664, 3 N. W. 171; Hensel v. Maas, 94 Mich. 563, 54 N. W. 381; McCullough v. Phenix Ins. Co. 113 Mo. 606, 21 S. W. 207.

When an agent holding securities for collection accepts other securities upon which he realizes cash, he receives the money as agent of the creditor, and the original obligation is discharged to the extent of the money received.

Smith v. Lambert, 7 Gratt. 138; Wiley v. Mahood, 10 W. Va. 206; Spence v. Rose, 28 W. Va. 333; Harbach v. Colvin, 73 Iowa, 638, 35 N. W. 663; Millbiser v. Marr, 130 N. C. 510, 41 S. E. 872; Hawkes v. Dodge County Mut. Ins. Co. 11 Wis. 188; Black v. Drake, 2 Colo. 330; Poorman v. Woodward, 21 How. 266, 16 L. ed. 152; Bridges v. Garrett, L. R. 5 C. P. 451; Brooke v. Struthers, 110 Mich. 562, 35 L. R. A. 536, 68 N. W. 272.

Messrs. Charles Friend and Arthur S. Friend for appellant Friend.

Mr. G. W. Hazelton, for respondents:

The failure of Lawrie to record his assignment of the prior mortgage was absolutely unimportant and immaterial, so long as Mr. Friend had knowledge of the mortgage.

2 Pom. Eq. Jur. §§ 734-738; Mueller v. Brigham, 53 Wis. 173, 10 N. W. 366; Rowell v. Williams, 54 Wis. 636, 12 N. W. 86; Prickett v. Muck, 74 Wis. 205, 42 N. W. 256; Fallass v. Pierce, 30 Wis. 443; Erwin v. Lewis, 32 Wis. 276; Brinkman v. Jones, 44 Wis. 498; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939; Purdy v. Huntington, 42 N. Y. 338, 1 Am. Rep. 532; Babcock v. Young, 117 Mich. 155, 75 N. W. 302; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Oregon & W. Trust Invest. Co. v. Shaw, 5 Sawy. 336, Fed. Cas. No. 10,556; Campbell v. Vedder, 3 Keyes, 174; Wilson v. Campbell, 110 Mich. 588, 35 L. R. A. 544, 68 N. W. 278; Jones, Mortg. § 474; Franklin Sav. Bank v. Colby, 105 Iowa, 424, 75 N. W. 346; Dixon v. Hunter, 57 Ind. 278.

He purchased the second mortgage without asking Herman if he still owned the prior mortgage, without seeing or asking to see it, absolutely without exchanging a word with Herman or anyone else on the subject. This is not the diligence the law requires.

Brinkman v. Jones, *supra*; Pringle v. 1 L.R.A. (N.S.)

Dunn, 37 Wis. 465, 19 Am. Rep. 772; Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 506.

Due delivery is as essential to the validity of a release or satisfaction of a mortgage as to the delivery of a deed, or a lease, or a promissory note.

Neither of the parties intended that this instrument should be delivered to the mortgagors.

Everts v. Agnes, 6 Wis. 462; Patterson v. Ball, 19 Wis. 244; Harmon v. Myer, 55 Wis. 85, 12 N. W. 435; Brunn v. Schuett, 59 Wis. 260, 48 Am. Rep. 499, 18 N. W. 200; Watson v. Hillman, 57 Mich. 607, 24 N. W. 663; Stiles v. Brown, 16 Vt. 563; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Goodwin v. Owen, 55 Ind. 243; Bailey v. Gilliland, 2 Kan. App. 558, 44 Pac. 747; Bell v. Farmers' Bank, 11 Bush, 34, 21 Am. Rep. 205.

Herman was a fraudulent mortgagee and his assignee can acquire no preference over an assignee of a prior recorded mortgage of which Herman had knowledge, notwithstanding the prior assignment had not been recorded.

Erwin v. Lewis, and Fallass v. Pierce, *supra*; Decker v. Boice, 83 N. Y. 219; Fort v. Burch, 5 Denio, 187; Westbrook v. Gleason, 79 N. Y. 23.

Authority to receive payment only forbids any arrangement short of an actual collection of the money.

Mathews v. Hamilton, 23 Ill. 470; Earnhart v. Robertson, 10 Ind. 8; Taylor v. Robinson, 14 Cal. 396; Powell v. Henry, 27 Ala. 612; McCarver v. Nealey, 1 G. Greene, 360; Aultman v. Lee, 43 Iowa, 404; Kent v. Ricards, 3 Md. Ch. 392; Wilkinson v. Holloway, 7 Leigh, 277; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Harlan v. Ely, 68 Cal. 522, 9 Pac. 947; Broughton v. Sillo-way, 114 Mass. 71, 19 Am. Rep. 312; Padfield v. Green, 85 Ill. 529.

The disposition of this case as it stands means the sanction of a fraudulent satisfaction piece never delivered to the parties entitled to it, turned over and accepted with the understanding that it was not to be delivered to the parties entitled to it, and withheld from record to avoid making the transaction public.

The rule of agency does not apply, and cannot be involved where no inquiry was made and no deception practised by the party to whom the payment was made.

Gibson v. Trow, 105 Wis. 288, 81 N. W. 411.

Obtaining the papers by a trick, to be used to defraud Lawrie, clearly distinguishes this case from the case where a client volun-

tarily places securities in the hands of his attorney or agent to collect.

Walker v. Ebert, 29 Wis. 195, 9 Am. Rep. 548; Everts v. Agnes, 4 Wis. 343.

Upon the question of notice.

The decisions relied on by the court are distinctly based on the record.

If one buys with knowledge of an outstanding encumbrance, or information sufficient to put him on inquiry, he is not a purchaser in good faith.

Purdy v. Huntington, 42 N. Y. 338, 1 Am. Rep. 532; Wilson v. Campbell, 110 Mich. 588, 35 L. R. A. 544, 68 N. W. 278; Babcock v. Young, 117 Mich. 155, 75 N. W. 302; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Oregon & W. Trust Invest. Co. v. Shaw, 5 Sawy. 336, Fed. Cas. No. 10,556; Mueller v. Brigham, 53 Wis. 173, 10 N. W. 366; Rowell v. Williams, 54 Wis. 636, 12 N. W. 86; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939.

Knowledge of the primary lien called for investigation by Friend, which it is conceded was not made.

Brinkman v. Jones, 44 Wis. 526.

Marshall, J., delivered the opinion of the court:

The finding that appellant is not the bona fide holder of the \$1,600 mortgage of November 14th, 1902, is grounded, in the main, on the following supposed infirmities in her position: (1) The transfer of the mortgage was ineffective because the assignment was incomplete when delivered, in that the space for the name of the assignee was blank, and it was not reacknowledged after being completed. (2) Charles Friend had constructive notice of the first \$1,600 mortgage, referred to as the Lawrie mortgage, when he took and paid for the one in question, and did not make any inquiry as regards whether Herman, the owner of record, had parted therewith, or require production of papers showing that he was such owner in fact, or indicating that he had authority to make the satisfaction thereof. (3) The satisfaction, in form, of such first mortgage delivered to Friend by Herman, was invalid because the latter neither had authority to make it, nor was it made to be delivered by him to the mortgagors, nor given to Charles Friend to be so delivered. (4) The assignment was completed, in form, by writing in the name of Stein without his knowledge or his having furnished any funds with which to purchase the securities. (5) The note and mortgage were by Charles Friend, acting under a power of attorney from Stein, but, without the latter's knowledge, assigned in writing to the plaintiff, the writing not being witnessed or acknowledged. 1 L.R.A. (N.S.)

We will consider such supposed infirmities in their order.

1. This court has repeatedly held that one who holds a paper executed by another, as in this case, with express or implied authority to fill up the blanks therein, may do so, and then record the instrument if that is necessary, with the same effect as though the paper had been fully made before delivery; that we hardly need do more than refer to a few of the instances. Vliet v. Camp, 13 Wis. 198; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; Nelson v. McDonald, 80 Wis. 605, 27 Am. St. Rep. 71, 50 N. W. 893.

Numerous decisions, most of them being quite ancient, may be found holding to the contrary of the foregoing. Those, however, of this court in respect to the matter are in harmony with the now prevailing rule. Dixon, Ch. J., in Van Etta v. Evenson, *supra*, said, as to the supports of conflicting decisions: "They are grounds of the purest and most unalloyed technicality, originating in a state of things and condition of the law which have long since passed away." The rule deducible from that decision is clearly indicated in the syllabus in these words: "Where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure (from whomsoever he could) a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery."

It will be found decided in some cases holding that blank spaces, such as the one in question, may be filled up after delivery of the paper by authority in writing, that parol authority is insufficient, and that if it were otherwise authority could not be implied from the mere delivery of the paper in its incomplete condition; but the general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied.

2. True, Friend had constructive notice of the first mortgage, but he had no notice, constructive or otherwise, of its assignment to Lawrie. The idea that one is not protected in dealing with the record owner of a mortgage, as regards a satisfaction thereof, unless the latter produces the securities, showing affirmatively that he is the right one to enter such satisfaction of record, is

not in harmony with the recording act nor with the adjudications on the subject. There is nothing which we can discover charging Friend with knowledge of a state of things sufficient to put him on inquiry as to whether Herman was in fact the owner of the first mortgage. He had a right to assume that, if Herman had assigned the mortgage, that fact would appear of record. No such fact so appearing, and no circumstance coming to his knowledge indicating the true state of things, or suggesting the probability of such state being inconsistent with the record, when Herman delivered the satisfaction to him he was warranted in supposing, as he did, that the note had been paid and with the mortgage delivered to the mortgagor.

The law as above indicated is supported by the following authorities: *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531; *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37; *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677; *Ogle v. Turpin*, 102 Ill. 148. In *Girardin v. Lampe*, *supra*, the facts were these: The assignee of the mortgage took a defectively written transfer thereof and recorded it. Subsequently the assignor discharged the mortgage. Later a third person for value acquired an interest in the mortgaged property without notice of the assignment, other than such as was afforded by the defective record. That was not effective because the instrument of assignment was not so executed as to entitle it to be recorded. It was held that the third person's interest in the property was paramount to the mortgage. The gist of the decision in *Ogle v. Turpin*, *supra*, and the facts involved are stated concisely in the syllabus in these words: "An assignee of notes secured by mortgage may protect his equitable lien on the mortgaged premises, by taking and putting upon record an assignment of the mortgage, so as to give notice of his interest, and thereby prevent others from being deceived by any subsequent satisfaction entered of record by the mortgagee." "A person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record, as showing title in his mortgagor."

The other cases cited are quite as decisive on the point under discussion. The purpose of the record is too obvious, and the law in respect to the matter, as indicated, too plain, to require any very extended discussion of the matter. When one deals with another respecting real estate, in the absence of actual notice of the true state of the title

or of facts sufficient to put him on inquiry in respect thereto, he may safely rely on the record. If that works hardship to a third person, as in a case like this, it is chargeable to the latter's negligence in not exercising ordinary care to guard his own interest by causing the record to show the actual state of the case. The rule applies that, as between two innocent persons, one of which must suffer pecuniary loss, the one is to be preferred who is without fault.

3. The point that Herman did not have authority to make the satisfaction has been sufficiently answered. He had apparent authority and that was sufficient. The record, which persons circumstanced as Friend was had a legal right to rely upon, indicated the existence of such authority. Delivery of the satisfaction piece to the mortgagor, or preparation of it for that purpose, was not essential to its validity. The only purpose of such an instrument is to create record evidence of that which is accomplished by mere payment of the indebtedness. Since Ward and Lawrie were responsible for the state of the record, indicating that Herman was the proper person to make the instrument of satisfaction, as to innocent third persons, it was competent for him to do so. This is unlike a case where the person appearing of record to be authorized to satisfy a mortgage deposits a satisfaction piece with a third person for delivery to the mortgagor upon condition, and he makes delivery regardless thereof. In such circumstances the instrument is held to be void, because the person purporting to be bound never in fact acted in the matter. *Franklin v. Killilea* (Wis.) 104 N. W. 993.

4. The fact that Stein's name was added to the satisfaction piece as that of the assignor without his knowledge, and that he did not furnish the funds given in exchange for the securities, has no significance in view of the power of attorney. It is undisputed that the title to the property was placed in Stein's name for convenience, and by his permission.

5. The circumstance that Stein did not know of the assignment of the securities, in form, to Mrs. Friend, is of no significance in view of the power of attorney. The circumstance that Mrs. Friend did not know of the acquirement of the securities when it occurred is not important, since the evidence shows that her son Charles had ample authority to act for her in such matters, and parted with full value in her money, or his own, in exchange for the property. Whether in the transaction the money was regarded by the parties as a loan, as the court in effect found, is immaterial since the evi-

dence is undisputed that the same was not repaid, and was finally treated as purchase money. Whether it was the one or the other does not affect the *bona fides* of the transaction. The circumstance that the assignment to Mrs. Friend was not witnessed or acknowledged is likewise of no significance. Neither was essential to transfer title. The *bona fides* of her ownership rests on the transaction between Charles Friend and Herman.

The findings to the effect that Herman absconded soon after the transaction with Charles Friend; that the latter knew of the former's secret intentions in that regard; that the relations between the two for years prior had been very close and friendly,—do not seem to require any extended notice. Counsel laid considerable stress on these circumstances upon the oral argument, as if they should be regarded as of some weight as to whether Friend knew, or ought to have known, when he obtained the mortgage that Herman had no right to satisfy the Lawrie mortgage. However, it does not seem that the conclusions of law were grounded on such circumstances. At best they are sufficient to create mere suspicion. They do not warrant the belief that Friend colluded with Herman in the fraudulent transaction as to the Wards and Lawrie, or that he had knowledge, or ought to have had, at the time he acquired the note and mortgage, that Herman was acting corruptly in the matter. Knowledge only came to him, as appears, of Herman's secret intentions to leave the country months after he obtained the securities. He certainly had a right to suppose, as the fact was, that the second \$1,600 mortgage was given to provide means to take up the first one. He testified that he so understood the matter when he took the mortgage, and that he then had no knowledge of Herman's being financially embarrassed. There is no satisfactory evidence to impeach that.

It is contended on behalf of both appellants that the evidence clearly shows that the Lawrie mortgage was discharged in fact by the indebtedness to which it was incident being collected by Herman as Lawrie's agent, and that the findings in respect to that branch of the case are clearly wrong.

It must be conceded that if, while the securities were in Herman's possession for the purpose of collecting the indebtedness, he executed such purpose, the money obtained belonged to Lawrie, and the mortgage lien was extinguished regardless of any formal entry to that effect upon the record. The trial court found that there was no claim on the trial that the Lawrie papers were in Herman's hands November 24th, 1 L.R.A. (N.S.)

1902, when the transaction with Friend occurred, and no evidence that he then had such possession. That was excepted to, as were other findings touching the question of payment. It seems that the attitude of counsel for appellants on this branch of the case and the effect of the evidence must have been misunderstood. Counsel must have claimed from the first to last that Herman was the agent of Lawrie to collect the latter's claim, during all the transactions in relation thereto. It was important to show that he was armed with the proper evidence of such authority, not only when the mortgages were made November 14th, 1902, but when the transaction occurred with Friend. No one claimed at the trial, we assume, certainly no one does upon appeal, that authority to collect of Ward authorized acceptance in payment of anything but money. It was obviously and properly claimed that if he trusted Herman to provide means out of the new mortgages made November 14th, 1902, to pay Lawrie, and the latter did so before his authority was terminated, extinguishment of the Lawrie mortgage was the legal effect thereof.

Now the court found that Herman had the Lawrie papers a short time prior to November 14th, 1902, with authority to collect of Ward. While such authority did not by implication include authority to accept in payment anything but money, it included authority to exercise reasonable discretion as to the means to be used to accomplish the purpose of the agency, such as the employment of an attorney to foreclose the mortgage. When did the agency terminate? The findings do not cover that directly. They, in effect, hold that it ended when the papers were placed in Comstock's hand. We infer that because of silence as to whether Comstock returned the papers to Herman prior to the occurrences of November 14th, 1902, leaving it to be assumed that he did not, and because of the finding that he did not participate in such occurrences. The views thus taken of the evidence by the trial court, which seem to be clearly unwarranted, resulted in the making of the finding as to there being no evidence that Herman had the Lawrie papers at the time of the transaction with Friend November 24th, 1902. It appears to be clearly established by the proofs, that Comstock returned the papers to Herman on or prior to November 14th, 1902; that he had them at that time; that Comstock had notice of the meeting on that date at Herman's office and participated therein; and that such papers did not leave Herman's possession till after November 24th thereafter.

The evidence, as we read it, is to the

effect that the amount necessary to discharge the indebtedness to Lawrie and other claims upon Ward's property existing November 14th, 1902, and the costs of the foreclosure were determined by Comstock and a statement thereof made by him in writing at the request of Mrs. Ward and Mr. Yahr, and that the three then went to Herman's office to settle the matter. This is Yahr's testimony on the subject: "We met up in Comstock's office, and he then had the final figures showing how much money it would take to settle these whole amounts; that is, the amount due on the Lawrie mortgage, and on my mortgage, and on the unpaid taxes and interest. By my mortgage I mean the \$300 mortgage held by the Baumback Company. Then we all went down to Mr. Herman's office, Mr. Comstock, Mrs. Ward, and I. Mr. Herman was waiting there for us. The Lawrie note and mortgage were in his office at that time. That was on the 14th day of November, 1902, the day the papers were executed. Mr. Herman had the note and mortgage there." The witness testified further, in effect, that at such meeting he discharged his mortgage, and advanced \$300 in money, taking a new mortgage for \$600; that he insisted upon seeing the satisfaction of the Lawrie mortgage before doing so; that Herman exhibited the same to him, and that Comstock remained with Herman and Mrs. Ward till after he concluded his part of the business and went away. Mrs. Ward testified to the same effect. Comstock testified that nothing positively was concluded as to the settlement of the Lawrie indebtedness in his office, or at any office when he was present. He did not testify that he had no notice of the meeting at Herman's office on November 14th, 1902. The trial court seems to have accepted the witness's general conclusion as to warranting the finding that he had no such notice, though Mrs. Ward and Mr. Yahr testified to the contrary, and his evidence is contradictory and very unsatisfactory. He testified that Mrs. Ward and Mr. Yahr called on him at his office in relation to the settlement of the Lawrie indebtedness, and that a conversation was then had resulting in an agreement in respect to the matter. He said nothing at first as to Herman being present, or in respect to the Lawrie papers. Later he said: "Mr. Herman had possession of the Lawrie note and mortgage at that time." (Referring to the time of the conversation in his office.) "I had two interviews. The conversation I am speaking of was in my office, and I had also previous to that time met with them in Mr. Herman's office. After this conversation I had nothing more to do with the matter one

way or the other. At the time of the last interview Mrs. Ward, Mr. Herman, and Mr. Yahr were present. That was previous to the interview to which I testified." (Again referring to the conversation in his office.) "At that time Mr. Herman had the mortgage and note there." Thus it will be seen the witness said that Herman was present at the time of the conversation in the former's office when the agreement was made (obviously the same agreement testified to by Mrs. Ward and Mr. Yahr, which was concluded in Mr. Herman's office), and that Herman then had possession of the Lawrie papers. He spoke of that as the last he had to do with the matter, and of the last interview (the one when Mrs. Ward, Mr. Yahr and Mr. Herman were present), as having occurred previous to the interview in his office, which he declared was the last interview. How one of two interviews could be the last, and yet have occurred previous to the other, would be difficult to explain. The witness was evidently confused in respect to the matter. Probably there were two interviews. Mrs. Ward and Mr. Yahr testified that there were; that one occurred in Comstock's office some days prior to November 14th, 1902; and that the other occurred on such date partly in Comstock's office and partly in Herman's office. Comstock could not reasonably be expected to remember the transaction as clearly as Mrs. Ward and Mr. Yahr. His office was but a few steps from Herman's, both being in the same building. A circumstance of going from one to the other was probably not of much significance to him. The transaction involved was an ordinary one in a lawyer's professional career, while to Mrs. Ward and Mr. Yahr, particularly the former, it was an unusual matter. On the main point all the witnesses agree, in this, when the negotiations took place for a settlement of the Lawrie indebtedness and the giving of a new mortgage to accomplish it, Herman was in possession of the Lawrie papers.

So the true state of the case appears to be this: On the 14th day of November, 1902, Herman then having the Lawrie papers and authority to accept payment of the indebtedness, Ward intrusted him with three mortgages on his property for the purpose, in the main, of raising the necessary money to make such payment. Three hundred dollars was at that time obtained from Yahr. Subsequently by the transaction with Charles Friend the balance of the money for such payment was obtained. Yahr and Ward acted in the matter on the faith of Herman's having possession of the Lawrie papers and authority, as record owner of the mortgage, to discharge it. There is no evi-

dence that Herman parted with the Lawrie papers after November 14th, 1902, and before the occurrence of November 24th, thereafter, or as to when Lawrie regained such possession. The reasonable inferences all indicate that Herman had them till some time subsequent to the transaction with Friend. Such is the legal inference. One of the most familiar rules of evidence is that "when . . . the existence of a . . . personal relation . . . is once established by proof, the law presumes . . . that the . . . relation . . . continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question." 1 Greenl. Ev. 15th ed. § 41; *Body v. Jewsen*, 33 Wis. 402; *Eames v. Eames*, 41 N. H. 177.

We cannot escape the conclusion that the finding of the trial court that there is no proof that Herman was in possession of the Lawrie note and mortgage November 24th, 1902, and the finding, in effect, that he was not then the agent of Lawrie to collect of Ward, is contrary to the clear import of the evidence. During the continuance of Herman's agency for Lawrie to collect of Ward, and his agency for the latter to use the mortgages executed November 14th, 1902, for the purpose of securing money to pay such indebtedness, he performed in both those respects. Thereby the Lawrie mortgage was extinguished leaving its equivalent in Herman's hands for Lawrie. Herman's failure to pay the money to his principal is a misfortune which the latter's representatives cannot rightfully shift to the holders of the other mortgages. Herman embezzled Lawrie's money, not Ward's.

The judgment is reversed on both appeals, and the cause remanded with directions to render judgment in accordance with this opinion.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

RICHARD Y. COOK et al., Assignees, etc.,
of Chestnut Street Trust & Savings Fund
Company,

v.

RICHARD L. CARPENTER et al.,
And
M. W. LIPPER, Appt.

(212 Pa. 165.)

1. Suit on stock subscription—equity jurisdiction.

The right to maintain suits against the individual stockholders of an insolvent corporation to enforce their liability on unpaid 1 L.R.A. (N.S.)

stock subscriptions does not constitute such a plain, full, and adequate remedy at law as to defeat a suit in equity against all the stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of creditors.

2. Same—necessity of accounting.

The necessity of an accounting does not determine equitable jurisdiction of a suit against the stockholders of an insolvent corporation to enforce payment of unpaid stock subscriptions as an asset for the benefit of creditors.

3. Same—limitation of action.

The statute of limitations does not begin to run upon an unpaid stock subscription until demand is made for payment, where, by the terms of the contract, it is not payable until called for.

4. Same—demand.

Demand for unpaid stock subscriptions need not be made within six years to prevent the right to make the demand from being barred by the statute of limitations, under a contract of subscription to the stock of a corporation which is payable from time to time, as called for.

(May 22, 1905.)

A PPEAL by defendant Lipper from a decree of the Court of Common Pleas No. 2, for Philadelphia County, in plaintiffs' favor, in a suit to enforce unpaid subscriptions to the stock of an insolvent corporation. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. Ellis Ames Ballard and Rufus E. Shapley, for appellant:

The call must be made before six years have elapsed after the call is possible, otherwise the right of collection is barred.

Cook, Corp. § 195; *McCully v. Pittsburgh & C. R. Co.* 32 Pa. 25; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770; *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. 77; *Shackamaxon Bank v. Disston*, 4 Pa. Co. Ct. 201; *Mack's Appeal*, 18 W. N. C. 289, 7 Atl. 481; *Thomp. Corp.* § 2008.

Admitting that the capital stock of a corporation, both paid in and unpaid, is a trust fund for the benefit of the creditors of the corporation, yet, on the insolvency of a corporation, the statute of limitations begins to run, so that a suit by assignee or creditor more than six years after insolvency, to collect unpaid subscriptions, is barred.

Swearingen v. Sewickley Dairy Co. 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Glenn*

v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Lehman v. Glenn, 87 Ala. 618, 6 So. 44; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265; Glenn v. Priest, 48 Fed. 19, 2 C. C. A. 311, 4 U. S. App. 509, 51 Fed. 405; Glenn v. Williams, 60 Md. 122; Glenn v. Howard, 81 Ga. 383, 12 Am. St. Rep. 318, 8 S. E. 636; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Codman v. Rogers, 10 Pick. 112; Howland v. Edmonds, 24 N. Y. 307; Goshen Turnp. Co. v. Hurtin, 9 Johns. 217; Raegener v. Hubbard, 167 N. Y. 301, 60 N. E. 633; Great Western Teleg. Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45.

Messrs. William S. Stenger, R. M. Schick, Joseph H. Brinton, John Weaver, and James H. Wolfe also for appellants.

Messrs. John G. Johnson and P. F. Rothermel, for appellees:

There is a duty upon the stockholders of an insolvent corporation, independently of the duty to pay upon calls and demands of the directors. This duty is to pay, to the extent of the unpaid capital represented by their shares, whatever may be demanded in liquidation of debts. It commences with the occurrence of the insolvency.

Swearingen v. Sewickley Dairy Co. 198 Pa. 73, 53 L. R. A. 471, 47 Atl. 941; Sanger v. Upton, 91 U. S. 60, 23 L. ed. 222.

A corporation, even though not insolvent, may collect from subscribers whose contract of subscription has been perfected by their becoming in fact stockholders, to whom shares have been delivered, the full amount

Subject Note.—When does the statute of limitations begin to run against the unpaid balance of a stock subscription.

- I. Introduction, 901.
- II. Actions by solvent corporations.
 - a. From a fixed period, 901.
 - b. From demand, 902.
 - c. After sale of forfeited stock, 902.
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- III. Actions after insolvency of the corporation.
 - a. By assignee or trustee for the benefit of creditors, or by receiver.
 1. After demand, 903.
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 - c. By creditors of the corporation.
 1. After demand, 910.
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 - d. Actions against representatives of deceased stockholder, 913.
- IV. Statutory liability for unpaid balance, 914.
- V. Actions on premium or "stock" notes of mutual insurance company, 914.
- VI. When should demand be made, in cases where a demand is necessary, 915.
- VII. Miscellaneous, 917.

I. Introduction.

It will be assumed, for the purposes of this note, that the subscription is a valid one, and the corporation duly organized. Only such cases will be considered as have arisen in an attempt to enforce an unpaid stock subscription. Suits arising upon the statutory liability of stockholders for debts of the company are foreign to the scope of this note, except in so far as they are intended to reach only unpaid balances of subscriptions.

A stock subscription is a contract, oral or 1 L.R.A. (N.S.)

in writing, between the subscriber and a corporation, whereby the subscriber agrees to take a certain number of shares of the capital and pay for the same. Upon the acceptance of the subscription by the corporation, a contractual relation arises, to be governed by the terms of the agreement. Upon those terms are founded the rights and remedies of the contracting parties. When a suit is brought by the company against a defaulting stockholder, the rules applicable are rather simple; but when a company has ceased to be a going concern, and the rights of creditors of the corporation must be considered, difficulties have arisen in determining when the cause of action has accrued; and it is in this class of cases that there is much less uniformity than in the other.

II. Actions by solvent corporations.

a. From a fixed period.

The relation between the corporation and a subscriber to its stock is that of debtor and creditor. The terms of the contract govern the relation, and the general rule may be said to be that no cause of action accrues in favor of the company against the subscriber until a demand has been made in the usual form by a call upon the subscriber. It must be remembered that the statute of limitations is a statute affecting the remedy, and not the right, and though in some of the earlier cases there seems to be a stronger leaning against the stockholder, nevertheless it has been held to be a statute of repose, and to be received with no less favor than other defenses. These rules must be kept in mind in considering all cases: First, there must be in existence a party to sue; second, a party to be sued; and third, that the debt sued upon must have become due. These must be applied in order to determine when the cause of action has accrued; for when the cause of action accrues, then the statute of limitations begins to run.

There is a class of cases which have held that the cause of action accrues as soon as the subscription has been made, and that, unless the demand is made within a period

of their unpaid subscriptions within six years of every assessment, with notice.

Pittsburgh & C. R. Co. v. Graham, 36 Pa. 77; *Allibone v. Hager*, 46 Pa. 54.

Mitchell, Ch. J., delivered the opinion of the court:

The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law, by suits against the several stockholders defendant, where each can defend upon his own case, untrammelled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of

similar to that of the statutory period of limitations, the suit is barred by analogy to that statute. These cases will be considered at the end of the note, under subdivision VI.

In *Baltimore & H. de G. Turnp. Co. v. Barnes*, 6 Harr. & J. 57, a subscription to be paid for in certain instalments according to the terms of the statute incorporating the turnpike company was held to have been barred because the limitation attached at the time that the instalments respectively fell due.

Also in *Western R. Co. v. Avery*, 64 N. C. 491, it was held that the statute of limitations began to run on each instalment on the day upon which it became due by the call for its payment.

b. From demand.

The general rule is that the statute does not begin to run on a cause of action, where a demand is to be made, until the demand has actually been made. One of the earlier cases is *Sinkler v. Indiana & E. Turnp. Road Co.* 3 Penr. & W. 149, where it was decided that the statute was no bar to an action brought within the statutory period after the time fixed by the managers of the corporation by a resolution on its books, followed by notices which constituted a demand for the payment of the subscription, under a charter authorizing the managers to ascertain the time in which it should be made, and to give notice thereof. The subscription referred to such authorization. This case was distinguished in *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770, noted under subdivision VI.

In many cases the subscription is made subject to calls by the managers or directors of the corporation. And in such cases it has been almost universally held that the statute does not begin to run until the call has been made and notice given. *Taggart v. Western Maryland R. Co.* 24 Md. 563; *Lexow v. Pennsylvania Diamond Drill Co.* 5 Pa. Dist. R. 499; *Macon & A. R. Co. v. Vason*, 52 Ga. 326; *Laughlin v. Orangeville & Mt. S. l L.R.A. (N.S.)*

the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in *Lane's Appeal*, 105 Pa. 49, 65, 51 Am. Rep. 166: "When insolvency and exhaustion of assets [of corporations] exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered, inures

Turnp. Co. 1 Ky. L. Rep. 348; *Lindsay's Estate*, 19 Pa. Co. Ct. 3, 27 Pittsb. L. J. N. S. 235; *Citizens Bank v. Hyams*, 42 La. Ann. 729, 7 So. 700; *Garner v. Hall*, 114 Ala. 166, 21 So. 835.

Even in some cases where nothing is shown in the report to indicate what the terms of the subscription were, it has been held that the statute did not begin to run until a call by the company. *Gibson v. Columbia & N. R. Turnp. & Bridge Co.* 18 Ohio St. 396.

And in *Marr v. Bank of West Tennessee*, 4 Lea, 578, it was held to run from a call, although, by the terms of the subscription, 5 per cent was to be paid at the time of the subscription and 10 per cent on the 1st of October, 1860, nothing further appearing in the report as to the conditions.

Where several assessments are made, the statute begins to run from the time that each assessment becomes due, according to the terms of the call. *Union Sav. Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441.

And in the same case it was also held that the running of the statute as to one assessment did not affect a subsequent assessment by liquidators.

In *Kent County R. Co. v. Wilson*, 5 Houst. (Del.) 49, a written contract of subscription in the hand of the subscriber was declared not barred until the expiration of six years from the accrual of the cause of action. It was stated that the contract was not like a promissory note, payable on demand, "for, when it was entered into, the company was not yet organized, and there was no person legally authorized to receive the money. Moreover, by the terms of the charter, the company had no power or authority, when organized, to require immediate payment of the subscription." But it should be observed that in this case the charter of the company required the subscription to be paid at such times as should be determined by the president and directors.

c. After sale of forfeited stock.

The charter of a navigation company provided that stock might be sold for failure to

to the benefit of all, and must be distributed among all ratably." This result as to collection, and still more forcibly as to distribution, is not reasonably practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in Lane's Appeal, *supra*, by creditors in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should not oust in one case the jurisdiction that must be sustained in the other.

It is earnestly argued by appellants that in all the cases where a bill has been sus-

tained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue; that would at once have made the case one cognizable in equity. Citizens &

pay subscriptions. After the sale of forfeited stock, following assessment, an action was brought against the defaulting subscriber for the balance due. The court declared the action not barred, for it was commenced within the statutory period, after the balance was ascertained by the sale. *Cape Fear & D. River Nav. Co. v. Wilcox*, 52 N. C. (7 Jones, L.) 481, 78 Am. Dec. 260.

To the same effect is *Cape Fear & D. River Nav. Co. v. Costen*, 63 N. C. 264.

d. When statute not applicable.

The prescription of the Louisiana statutes of three years upon "all other open accounts" is not applicable to an action to recover a stock subscription. *New Orleans, J. & G. N. R. Co. v. Estlin*, 12 La. Ann. 184; *New Orleans, J. & G. N. R. Co. v. Lea*, 12 La. Ann. 388.

In *Otter View Land Co. v. Bolling*, 24 Ky. L. Rep. 1157, 70 S. W. 834, the decree of a sister state adjudging the statute of limitations a bar against suits on stock subscriptions is not sufficient, if the statute of that state is not pleaded, and there is no plea of the lapse of time under that statute as a bar.

In *Falmouth & L. Turnp. Co. v. Shawhan*, 107 Ind. 47, 5 N. E. 408, it was determined that a written contract to take stock payable at such times as the director may require is not, for that reason, a contract partially in writing and partially oral, so as to make applicable a six years' limitation of action.

In *Great Western Teleg. Co. v. Stubbs*, 55 Ill. App. 210, a cause of action to recover the balance of a subscription was determined to be barred because it arose outside of the state and was barred by the laws of that state. The Illinois statute provides that "when a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state." 1 L.R.A. (N.S.)

III. Actions after insolvency of the corporation.

a. By assignee or trustee for the benefit of creditors, or by receiver.

1. After demand.

When a company becomes insolvent and its assets are vested in an assignee or trustee for the benefit of creditors, or an assignee or trustee in bankruptcy, then first arises the right of the creditors to be paid out of its assets. Included among such assets are unpaid subscriptions to its capital stock.

Difficulties have arisen when applying the statute of limitations, in determining when the cause of action has accrued; and the cases do not agree. Probably most of them could be reconciled by observing whether, by the terms of the subscription, it was intended that payment should be made at once, or should be left to the determination of the company's directors.

When a corporation has made an assignment or has gone into bankruptcy, the assignee or trustee represents the company for the purpose of collecting its assets and paying its creditors. He has control over the assets, but the right or franchise to make a call or assessment upon the stockholder for his balance of subscription has not passed to him by the assignment, and when demand is required the directors are the proper persons to make it.

The rule as laid down by the Federal courts grew out of what may be termed the "Glenn" cases. A history of the facts underlying them all is interesting and instructive, as disclosing the length to which the courts have gone in holding that the statute of limitations begins to run only after a demand has been made.

The National Express Company was chartered in Virginia. December 12, 1865, became insolvent the following year, and, in obedience to a resolution of its directors, the president executed a deed of trust to three trustees for the benefit of its creditors. This deed was soon after ratified by the stockholders present at a meeting of the stock-

M. Sav. Bank & T. Co. v. Gillespie, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was

well said by the learned judge below: "There are more than forty defendants. Most of them live within the jurisdiction: some do not: and it is quite conceivable that there might be hundreds living without the jurisdiction, not reachable by our process at law. The question involved in all the cases is substantially the same, namely, Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape."

In the absence of chancery powers in our courts, equitable relief was afforded wher-

holders, and at that meeting the president and directors were instructed to make a call for the payment of its debts. But no call was ever made and the corporate affairs were absolutely abandoned. No further meeting of the stockholders was held. Glenn, a creditor, obtained judgment against the company in Maryland, and filed a creditor's bill in the chancery court of Richmond against the company, the president and directors, and the trustees, December 4, 1871. But no process was actually issued against the company itself, and nothing further was done in the suit until August 4, 1879, when an amended and supplemental bill was allowed to be filed and was finally heard on the merits. A decree was entered Dec. 4, 1880,—fourteen years after the notorious insolvency of the company. By that decree the deed of trust was declared valid, the trustees removed, and another trustee, Glenn, appointed in their place. The only assets were unpaid subscriptions. It was decreed that an assessment of 30 per cent should be made upon the stock unpaid, and that "the stockholders of said company . . . be and they are hereby severally required to pay the several amounts hereby called for and assessed, to the said John Glenn . . . and the said trustee is hereby authorized and directed to collect and receive the said call and assessment . . . by suit or otherwise." *Lewis v. Glenn*, 84 Va. 957, 6 S. E. 866.

Many suits were brought by Glenn in the Federal and state courts. In the Federal courts there was a difference of opinion, some holding that a lapse of nearly eighteen years before bringing suit was a bar, because the liability of the stockholder was fixed by the assignment to trustees in 1866. *Glenn v. Dorsheimer*, 23 Fed. 695.

And in another case, 24 Fed. 536, it was said: "If it be that no cause of action accrued, technically, until a formal call was made, it is equally true that the assignees should have made the call in a reasonable time after the assignment, or caused the same to be made."

In *Glenn v. Priest*, 28 Fed. 907, the court, 1 L.R.A. (N.S.)

while confessing to be somewhat shaken in its opinion in former cases, still insisted "that the statute of limitations does stand as a bar to a claim which could have been enforced by proceedings eighteen years ago."

But in *Glenn v. Soule*, 22 Fed. 417, the doctrine that was finally laid down by the United States Supreme Court was enunciated that the statute did not begin to run until a call was made by the trustees appointed by the chancery court of Richmond, because a call was made necessary by the terms of the subscription.

The disagreement in the Federal courts was set at rest by the case of *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739, in which it was stated that "the decree of the Richmond chancery court determined the validity of the assessment, and that the lapse of time between the failure of the company and the date of the decree did not preclude relief, by creating a bar through statutes of limitation or the application of the doctrine of laches. . . .

The court may have erred in its conclusions, but its decree cannot be attacked collaterally, and, indeed, upon a direct attack it has already been sustained by the Virginia court of appeals. *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129." The Supreme Court also declared that "by the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment; and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitations could not commence to run until after the call was made." The court further held that as, by its charter, a call could only be made by the president and directors, that, as they had failed to do their duty, the court could order the assessment. "Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts," it was stated that, after a creditor had exhausted his

ever practicable in common-law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. *Wesley Church v. Moore*, 10 Pa. 273. The question in such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. *Kirkpatrick v. M'Donald*, 11 Pa. 387; *Bierbower's Appeal*, 107 Pa. 14; *Brush Electric Co.'s Appeal*, 114 Pa. 574, 7 Atl. 794; *Johnston v. Price*, 172 Pa. 427, 33 Atl. 688; *Gray v. Citizens' Gas Co.* 206

Pa. 303, 55 Atl. 988. In the last case it was said by our Brother Dean: "The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, 'You have a remedy at law in an action for damages;' such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously

legal remedies against the corporation, "he could subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made."

This case was deemed conclusive in *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867, in which it was further held that the Missouri legislation, by which the liability of the stockholder was fixed through the insolvency of the corporation and the running of the statute from that event, had no application, because the case was to be adjudicated according to the Virginia laws. These cases were followed in *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914.

After the decision in *Hawkins v. Glenn*, the Federal courts, of course, followed that case in holding that the statute began to run only from a call by the trustee appointed by the court in 1880. *Glenn v. Foote*, 36 Fed. 824; *Glenn v. McAllister*, 46 Fed. 883; *Priest v. Glenn*, 2 C. C. A. 305, 4 U. S. App. 478, 51 Fed. 400.

In *Glenn v. Macon*, 32 Fed. 7, the court declared that in a suit which formerly was pending in the circuit court in 1867, a decree directing the receiver therein to collect any sums due upon the shares of the stock "and for that purpose may prosecute actions," did not amount to a call or assessment, and the plea of prescription under the Louisiana statute could not apply. A similar ruling was made in *Liggett v. Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, and in *Glenn v. Marbury*, *supra*.

The refusal of a stockholder to pay a draft drawn on him by the company for an assessment did not set the statute running as to subsequent calls, but only as to the first call. *Dorsheimer v. Glenn*, 2 C. C. A. 309, 4 U. S. App. 500, 51 Fed. 404.

Nor will an adjudication that a call is also barred. *Priest v. Glenn*, 2 C. C. A. 311, 4 U. S. App. 509, 51 Fed. 405. And both the assignor and assignee of stock not fully paid are liable until the par value of the stock is called in. 48 Fed. 19. The state courts in which *Glenn* brought actions laid down 1 L.R.A. (N.S.)

the same principle, that a call was necessary to set the statute running, some of them being decided before the case of *Hawkins v. Glenn*. *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265; *Lehman v. Glenn*, 87 Ala. 618, 6 So. 44; *Calloway v. Glenn*, 105 Ky. 648, 49 S. W. 440; *Glenn v. Williams*, 60 Md. 93; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866; *Hamilton v. Glenn*, *supra*; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806; *Glenn v. Sothoron*, 4 App. D. C. 125.

But some of them, while adhering to the principle, do so with reluctance. In *Glenn v. Howard*, 81 Ga. 383, 12 Am. St. Rep. 318, 8 S. E. 636, the court says: "I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer [*Glenn v. Dorsheimer*, 23 Fed. 695, *supra*], but the weight of authority is unquestionably against the ruling of the court below in this case."

In *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265, the court declared that the prescription of twenty years from the date of the assignment might be pleaded as a defense, saying: "This court has adhered with uniform tenacity to the doctrine of prescription, and has repeatedly held that the lapse of twenty years, without recognition of right, or admission of liability, operates an absolute rule of repose." And in *Glenn v. Saxton*, 68 Cal. 353, 9 Pac. 420, it was held that the California statute of two years (Cal. Code Civ. Proc. § 339) applied to a contract "founded upon an instrument of writing executed out of the state."

It should be observed that the "*Glenn*" cases all turn upon a contract in which the subscriber agreed to pay when the president and directors should demand payment. There seems no reason, therefore, why they should not have been deemed to continue liable until the call was made by the proper authority, and if that authority would not act, why the court should not act for it, unless it be held that the insolvency of the corporation worked a change in the contract, or terminated it, and the right of the credi-

inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of." Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction.

The remaining question, the substantial issue in the case, concerns the statute of limitations. Stated generally, it is whether, when demand is necessary to start the running of the statute, it must be made within six years of the contract. Stated in detail, with reference to the particular facts of the case, it is well expressed in the twelfth assignment of error, thus: "The stock sub-

scription having been made in 1888, and all the calls made in 1888 having been paid, and no further call for the unpaid portion of the stock having been made by the directors, and the insolvency of the company having occurred more than six years from the date of the last call and the payment thereof, this action for the unpaid portion of the stock subscription, begun more than ten years thereafter, is barred by the statute of limitations." In *Swearingen v. Sewickley Dairy Co.* 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941, the law was thus stated: "The general rules are: First, that on an obligation for the payment of money on demand the statute begins to run at once. Suit is a sufficient demand, and must be brought within six years. *Andrews's Appeal*, 99 Pa.

tors to sue at once attached upon the happening of that event. It would seem that the United States court does not take the view that insolvency affects the contract, although apparently the decision in *Hawkins v. Glenn*, *supra*, turns upon the fact that the decree of the chancery court of Richmond was sustained by the court of last resort in Virginia, and could not be attacked collaterally, or, at least, that such reason had great force in the determination.

The following cases in the state courts are in substantial agreement with the rule that when a demand is required, the statute will begin to run only when the demand is made by the directors, whatever be the lapse of time, or by the court if the directors refuse to act. *Great Western Teleg. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214; *Stark v. Burke*, 9 La. Ann. 341; *Clinton & P. H. R. Co. v. Eason*, 14 La. Ann. 828; *Shropshire's Succession*, 12 La. Ann. 527; *Re Haggert Bros. Mfg. Co.* 19 Ont. App. Rep. 582; *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288; *Liberty Sav. Bank v. Otter View Land Co.* 96 Va. 352, 31 S. E. 511; *Cherry v. Lamar*, 68 Ga. 541.

In this last case the rights of the creditors of the bank, no longer a going concern, were declared to rest upon judgments, still alive, against the bank, as to the bank, and, as against the subscribers, "upon the contracts of subscription by which the subscriber became bound to the bank." *Cherry v. Lamar* was held not in conflict with the case of *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, because in the *Cherry* Case the charter made a call and notice by the directors conditions precedent to the collection of unpaid subscriptions, while in *Terry v. Anderson* such provisions were absent from the charter, and, for all that appeared, the stockholders were liable to suit at any time for the recovery of the balance. *Terry v. Anderson* held that, under the circumstances of the case, the legislature might constitutionally shorten a statute of limitations in force when the bank made an assignment, since the prescribed time was not too short or unreasonable.
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The statute begins to run when the instalments, as fixed by a call for them, fall due. *Haynes v. Wall*, 13 La. Ann. 258; *Consolidated Asso. v. Lord*, 35 La. Ann. 425; *Modern Life Ins. & Improv. Trust Co. v. Keller*, 3 Pa. Co. Ct. 118.

In two cases in Maryland subscriptions to the stock required a payment of \$1 at the time of subscription, and \$1 per share each sixty days thereafter, until such payments should be declared unnecessary by the directors. A call for the second instalment was made a month later, thereupon the other instalments fell due each month thereafter, ending in April, 1892. Several instalments were paid by the subscriber, amounting to 50 per cent, when, in November, 1891, the directors passed a resolution declaring that dividends would pay the remaining instalments. In 1892 the legislature amended the charter, declaring that the stock should not be liable for further assessments after 50 per cent was paid in, and that full-paid certificates might be issued to the subscribers, and that they should not be liable for debts contracted after the passage of the act. It was decided that as to a debt contracted before the act was passed the statute began to run from April, 1892, when the last instalment was due. *Williams v. Waters*, 97 Md. 113, 54 Atl. 767; *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641.

A company made several calls which were adopted by the court in a report made to it in creditors' proceedings. As between the company and stockholders the statute was declared to have begun to run from the time when the assessments became due and payable. Subsequently the legislature passed an act Dec. 22, 1897, chap. 20, § 2, pp. 16, 17, *Laws of Virginia*, which the court construed to enable the stockholder, sued by a representative of the creditors, "to make the same defenses, including the plea of the statute of limitations, that he might have made to an action brought by the corporation." The court determined that the statute began to run against an action on the assessment when it became due and payable

421; Milne's Appeal, 99 Pa. 483; Boustead v. Cuyler, 116 Pa. 551, 8 Atl. 848. Secondly, where the contract is to pay on the future performance of a condition or happening of an event, or at a certain time after demand, there a demand is necessary to a right of action, and the statute does not begin to run until demand is made. *Smith v. Bell*, 107 Pa. 352; *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229; *Taylor v. Witman*, 3 Grant, Cas. 138. Whether there is a third rule, that, if demand is necessary, it must be made within six years from the contract, has been both affirmed and denied in our cases, which are much at variance on the question. It was asserted in *Laforge v. Jayne*, 9 Pa. 410, and expressly held in *Pittsburgh & C. R. Co. v. Byers*, 32

Pa. 22, 72 Am. Dec. 770, *McCully v. Pittsburgh & C. R. Co.* 32 Pa. 25, *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. 77, and *Franklin Savings Bank use of Miller v. Bridges*, 5 Sadler (Pa.) 238, 20 W. N. C. 43, 8 Atl. 611. On the other hand, it was denied generally in *Taylor v. Witman*, *supra*, and expressly rejected in *Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507, *Smith v. Bell*, *supra*, and other cases." The case then before us did not call for a decision on the last question, and it was accordingly passed with only the foregoing incidental reference. In the present case, however, the same point is squarely presented, and is now to be met.

The cases, as already said, are much at variance, and require critical examination.

on the company's calls. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

A verbal subscription to stock was construed by the court in *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861, which subscription was made upon terms and conditions as set forth in the prospectus. The subscription was an agreement to pay "\$1 down, . . . \$1 per share at the call of the directors, and \$1 per share sixty days thereafter, if needed, until the whole amount is paid." The prospectus was in the same terms, but ended: "Until by a sale of the lots of the company such payment shall be declared unnecessary by the board of directors." The court held the words "if needed" should be construed together with the terms of the subscription as appearing in the prospectus, and, therefore, after the first call of the directors, "the instalments became due automatically every sixty days thereafter until fully paid," or until the sale of the lots, "which latter contingency never arose."

In this case it will be observed that, although the instalments after the first were automatic, they were dependent upon the call for the first to set the time running as to each instalment thereafter.

In *McCarter v. Ketcham*, 62 Atl. 693, the New Jersey court of errors and appeals had before it an action brought by the receiver of an insolvent corporation to recover a balance due on unpaid subscriptions. A certificate of incorporation had been filed setting forth the objects of the company, the amount of its stock, and the name and residence of the stockholders, with the number of shares subscribed. Nothing is shown in the report as to when the subscriptions were to be paid, and it is not disclosed that any statute determined that. But the directors were authorized to call in from the stockholders a part of their subscription at a special meeting of the directors, to be paid at a certain date. This assessment was not paid by defendant. The corporation became insolvent, a receiver was appointed, and, ten years subsequent to the above call, was directed by the chancellor to levy an

assessment on the stockholders. This was done and demand made. In the same year action was brought. The court said: "The original subscription for stock in the certificate of organization was liable to be paid immediately and as soon as call for the same was made. . . . This amount then became due and payable, and left 60 per cent subject to be called when required."

2. From insolvency.

The courts have not been a unit in declaring that a statute will begin to run only after a demand has been made upon the stockholders, for some have held that, by the act of insolvency itself, the cause of action to the creditor accrues immediately. This was held so even in a case where the subscription was to be paid in instalments "as called for by the board of directors" of a bank. Calls were made within a few months after the bank ceased to be a going concern. The court says: "As creditor it had the power to fix at once its debtor's liability. Delay for a single day was inexcusable, and the statute commenced to run at once;" that is, when, "by order of the board of directors, the bank suspended." It was further held in the same case that a statute prescribing the times when stock subscribed for should be paid, where passed subsequently to the contract of subscription, determined within the limits of the contract the time and amount of payments of the balance, and the statute began to run when the default occurred. *West v. Topeka Sav. Bank*, 66 Kan. 524, 63 L. R. A. 137, 97 Am. St. Rep. 385, 72 Pac. 252.

In *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736, in an action to compel stockholders, to whom stock had been issued for land at an excessive valuation, to pay the balance of subscription, the statutes of limitations of six and of ten years were held inapplicable, although more than twelve years had expired since the conveyance of the land for the stock, the court declaring that the statute begins to run when a call is made either by the directors or by a court of equi-

In favor of the rule, and as contended for by appellants, are *Laforge v. Jayne*, *Pittsburgh & C. R. Co. v. Byers*, *McCully v. Pittsburgh & C. R. Co.*, *Pittsburgh & C. R. Co. v. Graham*, *Franklin Sav. Bank use of Miller v. Bridges*, *supra*, and some other cases, such as *McKelvy's Appeal*, 72 Pa. 409, in which the foregoing have been cited, though generally *arguendo* and *obiter*. *Laforge v. Jayne*, *supra*, was an action of assumpsit on a duebill for "one hundred and seventy-two dollars in Pike county checks, which I promise to return on demand." Suit, being brought after six years, was supported by the plaintiff on the ground that "Pike county checks" were a specific kind of personal property, and therefore demand for their return was a necessary prelimi-

nary to suit. But this court held that the obligation was to pay money on demand, and therefore the statute began to run from the date. In the opinion, Coulter, J., refers to *Codman v. Rogers*, 10 Pick. 112, the leading case on the view that where demand is necessary it must be made in a reasonable time, and, where no cause for delay is shown, such time is measured by the period of the statute. But the case was decided on the other ground, and therefore is not really in point in the present discussion. In *Franklin Sav. Bank use of Miller v. Bridges*, *supra*, the syllabus is that six years is a bar to an action by a corporation on a subscription when no call or assessment has been made in that time; but there the corporation had been insolvent for more than

ty. It was also further stated that it would begin to run when the insolvency of the corporation is established, either by a general assignment or by a judgment and return *nulla bona*. In this case, in the absence of a call, or of judgments and return, the insolvency of the company and an assignment of the corporate property set the statute running.

The Michigan statute, chap. 282, § 12, 2 How. Anno. Stat., providing for the dissolution of corporations, was construed in *Webber v. Hovey*, 108 Mich. 49, 65 N. W. 619. The statute required a receiver to proceed immediately to collect any sums remaining due upon any share of stock subscribed, authorizing a suit in equity or at law. The court construed this statute to require the receiver to call in immediately unpaid subscriptions, and made it his duty to do so, "unless the person indebted shall be wholly insolvent." It was determined that, although if the corporation were a going concern no right of action would accrue until a call by the directors, the corporation having been dissolved by the appointment of a receiver the balance of subscriptions then became due and the statute began to run from that time. The court felt called upon to distinguish the case of *Scovill v. Thayer*, 105 U. S. 155, 26 L. ed. 973, declaring that the court in that case was dealing with and construing a statute under which the only duty of the assignee was to collect in, upon unpaid stock, a sum which would be sufficient to satisfy the creditors. And it was said there: "If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock; for if, in a bankruptcy proceeding, any surplus remained after payment of debts, it would go to the company, and not to the stockholders; and we have seen that the company in this case would have no right to any surplus." But in this case the statute required a receiver to collect unpaid subscriptions, and distribute the surplus, if any, among the stockholders.

Another statute was construed in *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, 1 L.R.A. (N.S.)

firming 105 Ill. App. 271, chap. 32 of Hurd's Rev. Stat. (Ill.) § 25. Where a right of action accrued to a creditor against a stockholder whose stock had been paid for by property taken at a fraudulent overvaluation, when the corporation ceased doing business, leaving debts unpaid, it was held to be "a civil action not otherwise provided for" within the meaning of chap. 83, § 15, of Hurd's Rev. Stat. (Ill.), and governed by the five years' statute of limitations, which began to run from the time the corporation ceased business, leaving unpaid debts. It was further held in this case that, where there are two methods provided to enforce a stockholder's liability for unpaid subscriptions, the statute of limitations begins to run when the creditor can proceed by either method; and "when the statutory period counting from that time has elapsed, the right to proceed by either method is barred." It was further held in this case that, by chap. 83, § 22, Hurd's Rev. Stat. 1901, limiting an action after the person entitled to bring the same discovers that he has such a cause of action, it must be averred that the person liable "fraudulently conceals the cause of such action."

In *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257, it was held, in an action by a receiver appointed as ancillary receiver in Iowa, that the cause of action on a subscription as modified by the Nebraska Constitution could not accrue until the debts of the corporation should be ascertained and the corporate property exhausted; therefore it was not barred by the Iowa statute. In this case the defendants had stock in a Nebraska corporation, and gave notes for the unpaid portion of the subscription, payable at such time as the board of directors should prescribe; but four years later they sold their stock to others, thereby modifying their contract into a guaranty to pay corporate debts to the amount of the unpaid subscriptions, when those debts should be ascertained, and the corporate property exhausted, as provided under Neb. Const. art. 11b, § 4. The defendants had pleaded a five years' limitation on unwritten contracts

six years and the decision was put explicitly on that ground, which is now well settled. The case, therefore, is not in point. *Pittsburgh & C. R. Co. v. Byers* and *McCully v. Pittsburgh & C. R. Co.*, *supra*, are the main authorities in appellant's favor. Both were actions by the corporation to recover the amount of subscriptions to the stock, and in each the call on which the action was based was made more than six years after the subscription. This court, citing *Codman v. Rogers*, *supra*, held that the statute of limitations was a bar. But it is notable that the defense was not rested on the mere lapse of time, but also on the abandonment of the corporate enterprise. In the *Byers* Case, Woodward, J., says: The act "contemplated an early commencement

and completion of the road. . . . It is not reasonable to suppose the legislature meant that subscribers to such a stock should be indefinitely bound. The road was to be promptly commenced and vigorously maintained." And in the *McCully* Case the same judge still more explicitly said: We have held in the case against *Byers* that "the company were bound from analogy to the statute of limitations to call in payments on stock subscriptions within six years after their date; or, if the delay was not satisfactorily accounted for, subscribers would be at liberty, after that lapse of time, to consider the enterprise abandoned and their subscriptions canceled. The presumptions of abandonment in such cases are very reasonable and necessary.

and also a ten years' limitation on written contracts, as provided by a statute of Iowa.

3. When statute not applicable.

In *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015, in an action against all defaulting stockholders, it was held that the statute did not apply until the creditors had exhausted their remedy against the corporation, and had all of its property applied to their claims.

In *Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.* 64 N. J. Eq. 517, 54 Atl. 450, in directing a receiver to call upon stockholders for a certain amount of their subscriptions, the court of chancery held that the defense of the statute of limitations was not available in an application of that nature, but could only be set up and considered in an action to recover a subscription.

In *Chrisman-Sawyer Bkg. Co. v. Independence Wool Mfr. Co.* 168 Mo. 634, 68 S. W. 1020, it was declared that a statute making stockholders personally liable for the debts of a company without regard to the amount of stock owned by them has no application to the indebtedness of a stockholder to the company on his unpaid stock, and that the statute of limitations applicable to such statutory liability does not apply to actions to recover such unpaid balances.

In England the statute is held not to be applicable, because the debt is founded on a statute, and therefore a specialty. *Cork & B. R. Co. v. Goode*, 13 C. B. 827, 22 L. J. C. P. N. S. 193, 17 Jur. 555. But in Canada the case of *Barnes's Bkg. Co. v. Reynolds*, 36 U. C. Q. B. 256, determined that such a debt was not a specialty debt in Canada, although proceeding brought under the English "company's act 1862."

b. By assignee or trustee in bankruptcy.

In *Foreman v. Bigelow*, 4 Cliff. 508, 18 Nat. Bankr. Reg. 457, Fed. Cas. No. 4,934, a suit was brought by an assignee in bankruptcy to compel owners of stock to pay the unpaid balance of stock issued to them as 1 L.R.A. (N.S.)

fully paid through fraudulent action of directors. The action was brought after call made by him, pursuant to the order of the bankrupt court. The court referred to the rule that "liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment," and for all that appeared in the record "the stockholders were liable to suit at any time for the recovery of the balance due from them as such stockholders. . . . Apply that rule to the case before the court, and it follows that, even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two two years' limitation of the bankrupt act."

In *Scovill v. Shaw*, 4 Cliff. 549, Fed. Cas. No. 12,552, it was declared that "for the reason given in *Foreman v. Bigelow*, *supra*, the claim is barred by the statute of limitations." The court further said: "Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment; and it is equally clear that the assignee might have sued the moment the title to the estate of the bankrupt was duly conveyed to him as such assignee. . . . Stockholders, under such circumstances, are debtors to the corporation; consequently, as Chief Justice Waite held, the claim against them passed to the assignee as part of the property, estate, and credits of the bankrupt. *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365. Since that decision, it seems to be unnecessary to argue in support of the proposition, as it is established by the highest authority known to our law."

In *Payson v. Coffin*, 5 Dill. 473, Fed. Cas. No. 10,859, the bankruptcy court ordered an assessment on unpaid stock nearly four years after the adjudication in bankruptcy and the execution of the deed of assignment. The charter of the company provided that "in all cases of losses . . . each stock-

. . . But this case is not left to stand on presumptions of abandonment. We have direct and conclusive evidence of it in the testimony of Addison, Kelly, and Robinson. Not only was the project abandoned, but the money of many subscribers was refunded to them, and they released from all further obligations to the company." Special attention was called to this feature in *Hanover Junction & S. R. Co. v. Grubb*, 82 Pa. 36, 46, and some other cases which will be referred to later on. It must be conceded, however, that, notwithstanding the references to the peculiar facts, the court put the cases fairly on the principle that the action for subscriptions to stock must be brought within reasonable time, and, unless cause for delay be shown, such time is measured

by the statute of limitations. *Morrison v. Mullin*, 34 Pa. 12, was an action by the sheriff on a refunding receipt stipulating to repay if, on settlement of the liens, it should [appear] that I am not entitled to this money. Suit was brought twenty-three years after the date of the receipt, and the point made by the plaintiff that until a settlement of the liens was shown the statute did not begin to run. But the court, on the authority of *Pittsburgh & C. R. Co. v. Byers*, *supra*, held that, the plaintiff not having shown a settlement within a reasonable time, the statute was a bar. It is notable that two of the five justices dissented on this point; one of them being Woodward, J., who wrote the opinions in the *Byers* and *McCully* Cases. And in *Gir-*

holder shall be liable to the amount of unpaid stock held by him." The court said: "The contention of the defendant is that the statute commenced to run at least from the time when the deed of assignment was executed. If so, the action is barred." The court quoted from and followed *Scovill v. Shaw*, *supra*.

The decision in *Payson v. Coffin* was declared, in *Walker v. Towner*, 4 Dill. 165, Fed. Cas. No. 17,089 to have "authoritative force in this circuit, and it is needless to enforce the arguments by which it may be sustained as a sound exposition of the limitation provisions of the bankrupt act."

But in the case of *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, the court declared that the action does not accrue to the assignee until a call, when a call is required, has been made either by the directors of the company or by a court of equity, where the directors fail to do their duty. The court says: "But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand. . . . Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then, his obligation to pay did not become complete. . . . The proceeding for an assessment in the bankruptcy court was . . . to accomplish two purposes . . . second, to fix the amount which . . . [the stockholder] should be required to pay. Until these things were done the cause of action . . . did not accrue, although his primary obligation was assumed 1 L.R.A. (N.S.)

at the time when he subscribed the stock." *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, was distinguished.

c. By creditors of the corporation.

1. After demand.

While an assignee for creditors or in bankruptcy is acting for the creditors to collect the assets belonging to the corporation in order to pay its debts, and therefore represents them, he also represents the company. But creditors have been allowed in many cases to bring proceedings directly against the stockholders, in some cases also joining the corporation, to collect the unpaid subscriptions due from defaulting subscribers. In these cases there is considerable contrariety as to whether the statute of limitations should begin to run only after demand by the company or by the court, or whether the cause of action has accrued upon the insolvency, and the statute begins to run from that period.

Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74, is probably the leading case on this point. It was there held that the statute did not run until call made in an action by a creditor to compel a subscriber to bank stock to pay the unpaid balance after return *nulla bona* upon judgment against the company. The court declared that the stock subscribed was in the nature of a trust fund for the payment of its liabilities. "The stock is the fund which the creditors trust. They have no direct means of compelling its payment until they have obtained judgments at law. They become the beneficiaries of the trust by receiving the notes, and the stockholders, as the persons bound by the trust, cannot oppose the statute of limitations to their claim to have the stock paid up. If the corporation does not compel payment of the stock, the subscribers must be deemed to hold it for the corporation, subject to its call. It is a continuing, subsisting trust and confidence to which the statute of limitations has no application." To the same effect are *Curry v.*

ard Bank v. Bank of Penn Twp. 39 Pa. 92, 102, 80 Am. Dec. 507, the suggestion is made that this case can be sustained on the presumption of payment after twenty years. *Pittsburgh & C. R. Co. v. Graham*, *supra*, was an action by the same railroad under substantially the same facts as *Pittsburgh & C. R. Co. v. Byers*, and *McCully v. Pittsburgh & C. R. Co.*, *supra*, except that the subscription was conditional "that the construction of said road is prosecuted." The element gave additional force to the defense of abandonment, and the previous cases were naturally followed.

The cases holding the other view may be said to begin with *Sinkler v. Indiana & C. Turnp. Road Co.* 3 Penn. & W. 149, where it was held that on a subscription to stock

payable at such times as the managers may determine, the statute of limitations does not begin to run until a call is made. The defense was that the action was brought more than six years after the subscription, though within six years from the call. The call, however, was within six years from the subscription, and this fact is referred to in the *Byers Case*, 32 Pa. 22, 72 Am. Dec. 770, as sustaining a distinction. But the court in *Sinkler v. Indiana & C. Turnp. Road Co.* *supra*, puts its decision plainly on the other ground. "No action," said Kennedy, J., "could have been maintained for defendant's subscription, or any part of it, until the managers had first fixed a time for the payment of it. . . . The statute of limitations does not begin to run before

Woodward, 53 Ala. 371; *Athens Car & Coach Co. v. Elsbree*, 19 Pa. Super. Ct. 618; *Thompson v. Reno Sav. Bank*, 19 Nev. 171, 3 Am. St. Rep. 881, 7 Pac. 870; *Warner v. Callender*, 20 Ohio St. 190.

In *Brown v. Union Ins. Co.* 3 La. Ann. 177, the charter of a corporation having divided the subscriptions into two portions, one to be paid in instalments at fixed times, and the other at such times as the directors should see fit, the statute was declared to run from the time when the last instalment fell due under the first division, and from the time when calls were made under the second division.

There is no direct evidence as to the terms of the oral subscription in *Vermont Marble Co. v. Declez Granite Co.* 135 Cal. 579, 56 L. R. A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057, but in a resolution passed by the directors after organization, the secretary was directed to notify the subscribers that the stock was ready to issue, "and that all subscriptions are now due and payable at the office of the company." It will be observed that there is nothing to indicate that the subscription was to be made when the directors called for it, and there is nothing to show that it was not due when the notice thus directed was given. Only a part of the subscription was paid, and no further call was made, and yet it was held that the statute had not run because no further call had been made.

2. From fixed period.

Of course, if the subscription is, by its terms or by the charter of the company, or by any other statute, fixed as to times of payment, a cause of action upon the unpaid balance will accrue to the company at least as soon as the instalments become due, without any call being required by the company. Therefore, in *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. 227, stock being required to be paid at certain times during four years, an action by the creditors was held barred because the company was barred, and the creditors had no greater 1 L.R.A. (N.S.)

right than the company to the rights to which they were subrogated.

In *Moses v. Ocoee Bank*, 1 Lea, 398, notes given for subscription to bank stock were declared not to be such payment as was required by the statute, and were held subject to the limitation of actions which began to run from the time they fell due according to their terms. No formal call was shown upon which a defaulting subscriber could have been sued by the bank.

Where the by-laws of the company and agreement of subscription provided for payments by monthly instalments, the statute began to run from the day when each instalment became due, no call being necessary. *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 601, 908. But a voluntary appearance of the defendant in this suit when the statute had not yet run was held to entitle the plaintiff to recover.

In *Harris v. Gateway Land Co.* 128 Ala. 652, 29 So. 611, on demurrer to the complaint, it was averred that the cause of action was barred by the statute of limitations. The complaint alleged that the subscriptions were made payable on call of the company, but on amendment the subscription paper, so termed, was inserted and showed as to the subscription only this,— "that the names of shareholders, and the number of shares held by each, are as follows, to wit (the names and number of shares being set forth). The court said: "If this paper by itself had been set out to show the subscriptions and how they were to be paid, it could not be contended that they were payable on call of the board of directors. There is nothing in it limiting the payments of stock to a call, or other contingency. Since the complainants have set up this document as the written evidence on which they rely to show that the subscriptions were payable on call, they are bound by it; and the instrument itself, thus set up as the highest and best evidence of the subscriptions and how they are payable, must control. It contradicts and nullifies the other averments in construction of the writ-

the plaintiff has a right to bring his suit." The decision was cited as authority for this principle in *McCarty v. Selinsgrove & N. B. R. Co.* 87 Pa. 332, and again in *Smith v. Bell*, 107 Pa. 352. *Sinkler v. Indiana & C. Turnp. Road Co.* *supra*, was decided before the Byers and McCully Cases, and, though antagonistic in principle, did not expressly pass upon the distinction set up in those cases. With the next case in order of time, however,—*Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507,—the conflict really began. That was an action by the holder of a certified check against the certifying bank more than six years after the date of the check, the date of the certification not appearing. The court held that the holder of such check stood upon the same

footing as a depositor, and as the contract of the bank with its depositor was not to pay absolutely and immediately, but when payment should be required, a demand was necessary, and the statute did not begin to run until it was made. The Byers and McCully Cases were cited, but the court, per Strong, J., distinguished them on the ground of their special facts, saying: "The contract of subscription was a peculiar contract; the legislature had fixed five years limit within which the construction of the road should be commenced. It was the duty of the company to commence it, and to prosecute it vigorously, and, of course, to make the calls without delay." He then cited *Morrison v. Mullin*, *supra*, and, after suggesting that in that case "the twenty-

ing, that the subscriptions were payable on call. . . . It follows that this being the only subscription ever made by defendants, it imports, without more, no obligation on them to pay at the call of the directors. If it imported any obligation to pay at all, it was to pay presently. We do not decide, however, that the paper by itself created any obligation of the parties signing it, to pay in any event. From what we have said, it follows that the complainants, if they ever had a right to maintain the bill for the alleged subscriptions of stock, were long barred of their right to maintain it, before the commencement of this suit."

3. From insolvency.

Does the cause of action accrue to the creditor immediately upon the insolvency of the company, or only after he has exhausted his remedy against the corporation? Upon this rock the courts usually split. But since the liability of the stockholder to the creditor, except when fixed by statute, is usually regarded as secondary, and not primary, it is not clear how the cause of action could accrue until the remedy against the company had been exhausted. Perhaps in cases where insolvency alone has been regarded as the starting point, the court has looked upon this liability as primary; but it is not always clear that such was the ground for the holding. Here, also, the contract of subscription should be carefully observed, for the subscriber should certainly be held to his contract, unless, by the insolvency of the company, what had been a continuing liability becomes thereby fixed without call.

In *First Nat. Bank v. Greene*, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754, the creditor had a right of action for his debt against the company in 1875, but did not bring action and recover judgment until 1878. Execution was not issued until 1880, and the suit against the stockholder was not brought until 1881,—more than five years after the cause of action accrued against the company. It was alleged in the answer, which 1 L.R.A. (N.S.)

was demurred to, that the company was insolvent in 1875 and had no property upon which an execution could have been levied.

The court stated that the liability of the stockholder for unpaid balance was fixed, under the Iowa Code, §§ 1082-1084, by the "inability of the creditor to collect his claim from property owned by the corporation, or, more properly, the fact that the corporation has no property from which the claim may be collected," and asks: "When did plaintiff's cause of action accrue? Clearly, when his claim became the ground of proceedings against the stockholder; that is, a claim against him. . . . But plaintiff insists that a judgment against defendant could not have been recovered until an action was prosecuted against the corporation and judgment recovered." But, the court said: "The action and judgment against the corporation are simply matters of preparation for the trial of the action against the stockholder. . . . It could not be said that a plaintiff had no cause of action until he had secured and prepared his evidence." The statute, Code, § 2529, limits actions within the prescribed time after "their causes accrue, not after a time when the plaintiff has prepared his proof, and is thereby able to recover judgment." The action was held barred.

In *Branch v. Knapp*, 61 Ga. 614, it was declared that the unpaid stock became payable to the assignees without further call or notice to the shareholder, and, further, that the statute of limitations began to run as soon as the surrender of the charter was accepted by the legislature. The assignees were barred when the bill of the creditors was filed. Hence the creditors also were barred.

In *Washington Sav. Bank v. Butchers & D. Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644, it was held that, as against the company, where the stock was payable upon call of the directors, the statute would not run until that call had been made. In the case of notorious insolvency the statute began to run from the time of insolvency. But it was held further, that if the

years [redacted] [redacted]
 recovery [redacted] [redacted]
 of the [redacted] [redacted]
 to the [redacted] [redacted]
 and [redacted] [redacted]
 but with [redacted] [redacted]
 is necessary [redacted] [redacted]
 bringing an [redacted] [redacted]
 made with [redacted] [redacted]
 contract [redacted] [redacted]
 that, though [redacted] [redacted]
 follow it [redacted] [redacted]
 facts, they are [redacted] [redacted]
 principle [redacted] [redacted]
 soundness [redacted] [redacted]
 On the [redacted] [redacted]
 Pa. 368, 31.

indebtedness [redacted] [redacted]
 tended by [redacted] [redacted]
 action [redacted] [redacted]
 due, because [redacted] [redacted]

Bonds [redacted] [redacted]
 Hospes v. [redacted] [redacted]
 Minn. 134, 30 N. W. 221,
 637, 50 N. W. 221, made,
 cover the [redacted] [redacted]
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 fore, that [redacted] [redacted]
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 ration [redacted] [redacted]
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In [redacted] [redacted]
 British [redacted] [redacted]
 s. Atl. [redacted] [redacted]
 holder [redacted] [redacted]
 through [redacted] [redacted]
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 insurance law.

At [redacted] [redacted]
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 corporation became insolvent
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 Strauss, 55 N. Y. 672, notes
 mutual fire insurance company
 to be payable on demand, and
 statute began to run from the
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s. Co. v. Batcheller, 62
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 while they are in some appar-
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 rection of a general principle ad-
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 R. A. 471, 47 Atl. 941, already
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 begins to run at once. Suit is a suf-
 demand, and must be brought within
 years. Secondly, where the contract is
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 tion, or happening of an event, or at a
 certain time after demand, there a demand

cover the whole amount of his deposit note
 or notes," the statute was held to begin run-
 ning from the time when the plaintiff might
 first maintain an action to recover the full
 amount, and that was when first default
 was made and without demand. This case
 was declared not antagonistic in New Eng-
 land F. Ins. Co. v. Haynes, *supra*.

In Boyd v. Mutual Fire Asso. 116 Wis.
 155, 61 L. R. A. 918, 96 Am. St. Rep. 948, 90
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 were issued, a premium note being given,
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 unpaid stock were ordered by a court in
 Illinois in 1886, and an action begun in 1889.
 In 1872 the board of directors had ordered
 all arrearages on the subscriptions to be

can be brought, that demand must be made or that act done within six years from the date of the promise or the statute will begin to run from the date," was clearly stated and distinctly repudiated; Strong, J., referring to Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507, as having settled the law to the contrary. Allibone v. Hager, 46 Pa. 48, was a suit by a creditor against subscribers to the stock of a manufacturing company under the act of April 7, 1849 (P. L. 563), for unpaid subscriptions, and it was held that, though no call had been made for eleven years, the statute of limitations was not a defense; the court saying that the Byers, McCully, and Graham Cases, where the work had not been prosecuted as required by the act of incor-

poration, did not apply. The next case (Smith v. Bell, *supra*) was an action against a former policy holder in the mutual insurance company, more than six years after his policy had expired and he had ceased to be a member. His contract, however, was to pay his share of losses when an assessment should be levied by the directors. It was held that the right of action did not accrue, nor the statute begin to run, until such assessment, and he was, therefore, liable, although the loss occurred more than six years before the assessment was made, which was not until after he ceased to be a member. Pittsburgh & C. R. Co. v. Byers and Morrison v. Mullin, *supra*, were referred to by the court, but set aside with a citation of Girard Bank v. Bank of Penn

clared that the liability of the stockholder to the creditor of a corporation was a secondary one, but when the corporation was dissolved it became primary, and, not having been presented to the administrator within two years, was barred. To the same effect is Washington Sav. Bank v. Butchers & D. Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

In Illinois the case of Snyder v. Swan Land & Cattle Co. 154 Ill. 220, 40 N. E. 466, Reversing 51 Ill. App. 211, determined that an assessment for unpaid stock against a decedent's estate was barred as to assets then disclosed, since the claim was not made within two years from the grant of letters of administration, although the assessment itself was not made until after the two years had expired.

But in Payson v. Hadduck, 8 Biss. 293, Fed. Cas. No. 10,862, it was held that an assessment ordered by the court after the administrator had distributed the assets to the heirs and been discharged was not barred by such two-years' statute.

In Priest v. Glenn, 2 C. C. A. 311, 4 U. S. App. 509, 51 Fed. 405, which was one of the "Glenn" cases referred to *supra*, it was declared that the two-year period for presenting claims against decedents' estates in Missouri did not begin to run until the cause of action accrued. And in this case it did not begin to run until the assessment was made.

In Moses v. Ocoee Bank, 1 Lea. 398, where the bar had run in favor of the personal representative of a deceased stockholder upon notes taken for stock, resort was allowed to his original liability for stock, which, remaining unpaid, and not due, because not called, was not barred by the statute.

The plea of the statute was held good in Saytes v. Bates, 15 R. I. 342, 5 Atl. 497.

IV. Statutory liability for unpaid balance.

In several of the states, statutes have been passed making the stockholder liable for the debts of the corporation. This has 1 L.R.A. (N.S.)

taken several forms in the various states, but in some the liability attaches only to the unpaid portion of the stock subscription. For this reason these cases are included here. The general rule to be deduced from them is that the remedy against the corporation must have been exhausted before the creditor can resort to his right of action against the stockholder. And this has been held generally to mean a return *nulla bona* after judgment against the company. Handy v. Draper, 89 N. Y. 334, Reversing 23 Hun, 256; King v. Pony Gold Min. Co. 28 Mont. 74, 72 Pac. 309; Kelly v. Clark (Kelly v. Fourth of July Min. Co.) 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959; Van Pelt v. Gardner, 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874; Phillips v. Therasson, 11 Hun, 141.

Under a statute making stockholders liable for debts of the company until the capital is all paid in and certificates recorded, and further providing that all the capital must be paid in within two years, it was decided that an action against a stockholder would be barred at the expiration of six years from the termination of the said two years. Phillips v. Therasson, 11 Hun, 141. But it was held in Knox v. Baldwin, 80 N. Y. 613, that such an action was barred after the expiration of six years from the time that the liability was incurred.

V. Actions on premium or "stock" notes of mutual insurance company.

The general rule as to premium or deposit or "stock" notes, as they are sometimes called, of a mutual insurance company, is that the statute does not run until a demand has been made by the directors of the company or by the court. These notes are regarded as capital stock.

Cooke v. Pomeroy, 65 Conn. 466, 32 Atl. 935; Re Slater Mut. F. Ins. Co. 10 R. I. 42; Bigelow v. Libby, 117 Mass. 359; Wardle v. Hudson, 96 Mich. 432, 55 N. W. 992; Peake v. Fuller, 123 Mich. 684, 82 N. W. 847; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Langworthy v. C. C. Washburn Flour-

Twp. *supra*, as governing the case. Smith v. Bell, *supra*, was reaffirmed and followed in the latest case on the subject (Eichman v. Hersker, 170 Pa. 402, 33 Atl. 229), although, as our Brother Dean called attention to in the opinion, "the assessment was not made within six years from the date of the policies and the premium note, nor within six years from the date of the losses, the payment of which had created the debt now sought to be satisfied by assessment." Distinctions based on the wording of the charters or the statutes under which they were conferred were repudiated, and the decision put explicitly on the general principle that the obligation was not to pay at once, but upon a future event,—the levying of an assessment by the directors,—and the stat-

ute did not begin to run until such assessment.

This detailed review of the cases shows clearly that, while they are in some apparent conflict, yet there has been a uniform trend in the later ones to rest on the correct application of a general principle admittedly sound. The rules, as stated in *Swearingen v. Sewickley Dairy Co.* 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941, already quoted, are: First, that on an obligation for the payment of money on demand, the statute begins to run at once. Suit is a sufficient demand, and must be brought within six years. Secondly, where the contract is to pay on the future performance of a condition, or happening of an event, or at a certain time after demand, there a demand

ing Mills Co. 77 Minn. 256, 79 N. W. 974; *Howland v. Cuykendall*, 40 Barb. 320; *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Solly v. Moore*, 11 Pa. Co. Ct. 333; *Smith v. Bell*, 107 Pa. 352; *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229; *New England F. Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

In all these cases the notes were made, substantially, payable as the directors might require, and clearly fall within the general rule that when a demand is required the statute will not run until a demand has been made. The courts declare that they are not similar to notes payable "on demand," because they were clearly intended to be a fund for the payment of the corporate debts.

In *Raegener v. Medicus*, 67 App. Div. 127, 73 N. Y. Supp. 574, the requirement of the statute under which the mutual company was incorporated was printed on the back of the note, while on the face thereof such note was made subject to the conditions and limitations of that insurance law.

In *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171, the stock note was a promise to pay "on demand after date," and yet it was decided that the parties "must have intended that they should be paid upon call by the corporation, when it required part or all the proceeds thereof, and not before," and that such a note was "not merely to be governed by the law controlling ordinary negotiable instruments." In this case the corporation became insolvent before a call was made.

But in *Howland v. Edmonds*, 24 N. Y. 307, and *Osgood v. Strauss*, 55 N. Y. 672, notes given to a mutual fire insurance company were declared to be payable on demand, and therefore the statute began to run from the time the notes were given, although by their terms they were payable "at such time or times as the directors of said company may require."

In *Lycoming F. Ins. Co. v. Batcheller*, 62 Vt. 148, 19 Atl. 982, on a note somewhat similarly worded, but where an act provided that on neglect or refusal to pay the sum assessed the directors "may sue for and re-

cover the whole amount of his deposit note or notes," the statute was held to begin running from the time when the plaintiff might first maintain an action to recover the full amount, and that was when first default was made and without demand. This case was declared not antagonistic in *New England F. Ins. Co. v. Haynes*, *supra*.

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VI. When should demand be made, in cases where a demand is necessary.

Must a demand upon a stockholder be made within a reasonable time after his subscription, when, by the terms thereof, the demand must be made before payment? Can a corporation wait an indefinite time before demanding payment when it is within its power to make a call, and within its discretion to make the call at any time?

In *Great Western Teleg. Co. v. Purdy*, 83 Iowa, 430, 50 N. W. 45, a subscription was to be paid in instalments, as the directors might, from time to time, order. A receiver was appointed in 1874 and assessments on unpaid stock were ordered by a court in Illinois in 1886, and an action begun in 1880. In 1872 the board of directors had ordered all arrearages on the subscriptions to be

is necessary to a right of action, and the statute does not begin to run until demand is made.

The question is then suggested whether there is a third rule, that, if demand is necessary, it must be made within six years from the contract. On this our cases were said to be much at variance, and the review of them has to some extent confirmed the statement. It will not be amiss at this point to consider on principle the foundations of rules 1 and 2. Negotiable instruments payable on demand were originally classed together, and held, like checks and bills of exchange, necessary to be presented with due diligence according to the residence of the parties. Byles, Bills, *213. "But a common promissory note payable on

demand is very often originally intended as a continuing security, and . . . is not necessarily to be presented the next day after it has been received in order to charge the indorser." But the term "payable on demand" imports that the debt is already due, and therefore the statute of limitations begins to run from the date. Byles, Bills, *347. The obligation to pay in such case is absolute and present; the only element not fixed with certainty is the time of payment; and as that is at the option of the creditor, and the debtor must be prepared *eo instante*, the time of payment, and with it the statute, begins to run at once. If, however, the debt is not absolutely or presently due, but either the obligation to pay or the time of payment is contingent on the

paid, and directed the secretary to notify the stockholders and demand payment. But it does not appear that these notices were ever given. The statute was declared to be a bar to the action, the court saying: "It rested with the corporation, by proper orders and notices, or other acts, to acquire the right to maintain an action." And again: "It would be wholly unreasonable to say that the company had not the right to commence an action for the reason that it had not ordered payment and given notice thereof."

This case went to the Supreme Court, reported in 102 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810. That court declared that limitations of actions are governed by the *lex fori* and controlled by the legislation of the state in which the action is brought, even if the judicial construction there differs from that of other jurisdictions. It is declared by the court: "The question at what time the cause of action accrued in this case within the meaning of the statute of limitations of Iowa was not a Federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court." It should be observed that this corporation was an Illinois corporation, and that the courts of Illinois have held that the cause of action would have accrued at the time the assessment was called for in an order for an assessment, and not before.

But it is in Pennsylvania that this question has been mostly discussed, and where most of the cases on the point are to be found.

In *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770, it was held that the company was bound to demand payment of subscriptions to its stock within six years from the date of the subscription, or, at least, to call in an instalment in that period, although the contract was to pay "in such manner and proportions, and at such time and places, as shall be determined by the board of directors" pursuant to statute. It is worthy of 1 L.R.A. (N.S.)

note that the court seems to have put great stress upon the fact that the company meant to abandon the contract. "We ground a presumption on the statute that a party who did not employ the other means afforded for enforcing the contract within the period of the statute meant to abandon the contract."

McCully v. Pittsburgh & C. R. Co. 32 Pa. 25, was to the same effect. And the doctrine was reaffirmed in *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. 77.

In *Shackamaxon Bank v. Disston*, 4 Pa. Co. Ct. 201, 20 W. N. C. 297, an action on a subscription of bank stock was held barred by failure to make a call for eleven years, during which time the bank was solvent, and the defendants had transferred the stock at least eight years before the action. The stock was subscribed subject to demand and call by the bank. The cases of *Pittsburgh & C. R. Co. v. Byers*, and *McCully v. Pittsburgh & C. R. Co.*, *supra*, were approved, and the doctrine there laid down sustained.

And in *Franklin Sav. Bank use of Miller v. Bridges*, 20 W. N. C. 43, 8 Atl. 611, the appellate court declared that the trial court had not committed any error in ordering a nonsuit, at which time it filed an opinion holding that, as the company was insolvent, "the creditors were at that time in the position of one to whom an obligation is due on demand, or who can make demand upon the doing of an act himself."

"In such cases the statute of limitations begins to run at the time of the promise. Was an assessment or decree of the court necessary to entitle the plaintiff to sue? If so, it could have been made then; and the creditors or their representative, the assignee, should have taken that action. Immediately upon the assignment, the plaintiff or creditors, through him, were entitled to demand the execution of the subscribers' contracts to pay."

But the cases in Pennsylvania apparently are not all in unison on this point. For in *Allibone v. Hager*, 46 Pa. 48, it was held that it by no means followed that the statute

performance of some act, the happening of some event, or the lapse of a specified period of time, then the happening of the event is a condition precedent to the present obligation to pay, and the debtor is not in default, nor the creditor entitled to call for performance, until the condition is fulfilled, and the statute cannot begin to run until that time.

These principles are of uniform application and lie at the foundation of all our cases. Applying them to the present case, it is plain that, where a subscription to stock is not presently payable in full, but, by its terms, is to be payable from time to time as called for by the company, there is no substantial basis for the existence of a third rule, as queried in *Swearingen v.*

was a defense because the company had not once, in eleven years, called for the balance of the stock. It declares "calls may have been made and paid within six years; the delinquent stockholders may have been all the time directors. . . . Nothing to the contrary of this appears, and it would be strange if, in addition to this, the stockholders, being the directors, could, by a failure to call in subscriptions from themselves, raise a bar in favor of themselves." The cases in 32 and 36 Pa. *supra*, were distinguished.

In *Bell's Appeal*, 115 Pa. 88, 2 Am. St. Rep. 532, 8 Atl. 177, the court seems to have determined that the cause of action on the unpaid subscription began to run from the date of the incorporation, but ceased to run from the time of an amendment by which defendant was brought in, on the same principle as the bringing of an action stops the running of the statute, and therefore the plea was not a defense. Some doubts seem to have assailed the court later, however, for in *Swearingen v. Sewickley Dairy Co.* 198 Pa. 68, 53 L. R. A. 471, 47 Atl. 941, while the court declared that the cases of *Pittsburgh & C. R. Co. v. Byers*, and *McCully v. Pittsburgh & C. R. Co.*, *supra*, and kindred cases were still the law in Pennsylvania, never having been overruled, it "leaves" the necessity of "demand in six years open to consideration."

In *Athens Car & Coach Co. v. Elsbree*, 19 Pa. Super. Ct. 618, the court also evaded this point, declaring that "it is safe to say that a call made by a board of directors within six years from the date of a subscription payable under the by-laws as required by the directors fixes the liability of the subscriber for the amount so called, and that suit for the said amount by an assignee for creditors brought within six years from the date of the call is not barred by the statute."

But the conflict in the Pennsylvania supreme court has, of course, been finally set at rest in *COOK v. CARPENTER*.

It should be noted here that in *Alabama* 1 L.R.A. (N.S.)

Sewickley Dairy Co. supra. Until such call, there is no obligation on the stockholder to pay. It may never be made. If the enterprise is successful and profitable from the start, or the provision for capital has been larger than actual needs require, the duty of payment is only a reserve duty for possible contingencies; and until they happen, either by calls by the corporation on the subscriptions or by the rights of creditors, there is no duty of the subscriber to pay, no right of action against him for nonpayment, and no starting point for the statute of limitations. As already said, the principles at the basis of the decisions are clear and undisputed, and the later and more authoritative cases have tended distinctly to rest upon them. We conclude, there-

a demurrer was sustained to a complaint, on the ground that the action was barred by the statute, in which complaint there was set forth, as a subscription, a writing stating the object of the proposed company, the amount of the capital stock, and "that the name of shareholders and the number of shares held by each are as follows, to wit" (with the means and number of shares following). The complaint had averred that the subscription was made subject to call. The court said: "This being the only subscription ever made by defendants . . . if it imported any obligation to pay at all, it was to pay presently." And further: "It follows that the complainants, if they ever had a right to maintain the bill for the alleged subscriptions of stock, were long barred of their right to maintain it." *Harris v. Gateway Land Co.* 128 Ala. 652, 29 So. 611.

VII. Miscellaneous.

In *Georgia Mfg. & Paper Mill Co. v. Amis*, 53 Ga. 228, in an action brought on a note made by the company to the plaintiff, defendant pleaded as a set-off a subscription to its stock. The trial judge instructed the jury: "In the absence of proof to the contrary . . . the right of action accrued at the time of the subscription, and that the right of the defendant to plead the subscription . . . as a set-off . . . was barred by the statute of limitations." This charge was held not to be erroneous.

In *Pittsburgh & C. R. Co. v. Plummer*, 37 Pa. 413, the statute was held to run only from the time when a subscriber, acting as agent to obtain other subscriptions, delivered the subscription book to the company, and not from the time that he first appended his own name.

In *Meyer v. Bristol Hotel Co.* 163 Mo. 59, 63 S. W. 96, a stockholder was denied the right to intervene in an action by a creditor of the corporation against the corporation, in order to plead the statute of limitations against the debt. S. P. M.

fore, that Pittsburgh & C. R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770, McCully v. Pittsburgh & C. R. Co. 32 Pa. 25, Pittsburgh & C. R. Co. v. Graham, 36 Pa. 77, and the cases which have followed them, are not authorities for a general rule in cases of subscriptions to corporate stock, but must be sustained, if at all, as exceptions, resting on their own peculiar facts of abandonment of the corporate enterprise, which released the subscriber's contract to pay further. The court below was right in applying the general rule to this case.

Decree affirmed.

MISSOURI SUPREME COURT.

CITY OF ST. LOUIS, Resp.,
v.

T. LIESSING, Appt.

(.... Mo.)

1. Milk—standard of purity.

An ordinance forbidding the sale of milk containing less than seven tenths of 1 per cent of ash is not unreasonable or oppressive.

2. Same—inspector—constitutional rights.

Designating only one officer to determine whether milk reaches the required standard

does not deprive the dealer of any constitutional right.

3. Same—registration—license fees.

Prescribing a registration fee of \$1 per annum for milk venders, and an occupation tax of \$2.50 per wagon for each six months, and \$25 for wholesalers, does not render an ordinance regulating the sale of milk invalid.

4. Seizure for inspection.

Seizure of necessary milk for inspection without a warrant may be authorized under the police power.

5. Ordinance—severable provisions.

The court will not examine provisions of an ordinance alleged to be invalid where the section under which the prosecution is instituted is valid and severable from the rest.

6. Ordinance—entitling—generality.

The generality of the title of an ordinance is not objectionable so long as it is not made to cover legislation incongruous in itself.

7. Judicial notice—ordinance.

Judicial notice will not be taken of municipal ordinances.

8. Appointment of officer—validity.

Appointment of a city chemist under a provision of a municipal ordinance requiring the approval of the board of health to the act of the mayor and common council is not ineffectual, although the charter places the appointing power in the mayor and council.

(June 28, 1905.)

Case Note.—The group of cases here reported well illustrate the attitude of the courts generally toward police regulations of the milk supply. The importance of securing to the community at large cleanliness, wholesomeness, and purity in so important a food as milk, has led to the very general enactment throughout the country of regulations as to the standard of quality of milk sold, the care and feeding of milch cattle, and the sale of the product. And, while such regulations have been frequently assailed upon the ground that they deprive the dairyman and milk vender of their property without due process of law, or unjustly discriminate against them, the regulations have been sustained with practical unanimity, whether made by the state through the operation of a general statute, or by the municipal council through local ordinances.

The regulations most frequently tested in the courts are those establishing an arbitrary standard of quality without regard to the question of adulteration or extraction, and prohibiting, under penalty, the sale of milk falling below the required standard. *St. Louis v. Liessing* is typical of the decisions upon this question. The authorities are there very thoroughly gathered; but see, especially, also, as sustaining regulations of similar character, *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *State v. Stone*, 46 La. Ann. 147, 15 So. 11; 1 L.R.A. (N.S.)

Com. v. Hough, 1 Pa. Dist. R. 51; *Kansas City v. Cook*, 38 Mo. App. 660; *State v. Crescent Creamery Co.* 83 Minn. 284, 54 L. R. A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People v. Kibler*, 106 N. Y. 323, 12 N. E. 795; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, *Reversing* 37 Hun, 319; *State v. Groves*, 15 R. I. 208, 2 Atl. 384.

The intent to evade the regulation is no part of the offense, and a dealer is guilty though he sells the milk exactly as drawn from the cows, when it falls below the required standard. *State v. Campbell*, *supra*; *Pain v. Boughtwood*, L. R. 24 Q. B. Div. 353; *People v. Kibler*, *supra*; *People v. Schaeffer*, 41 Hun, 23; *Com. v. Farren*, 9 Allen, 489; *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308.

Milk so found deficient may be condemned upon the spot, taken into custody of the officers, and poured upon the ground, without violating the constitutional provision of due process of law. *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. 469; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648.

Provision that the dairyman shall give up a sample to inspectors without compensation is also sustained as a valid exercise of the police power. *State v. Dupaquier*, 46 La. Ann. 577, 26 L. R. A. 162, 49 Am. St. Rep. 334, 15 So. 502; *Com. v. Carter*, 132 Mass. 12.

A PPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting him of violation of an ordinance regulating the sale of milk. Affirmed.

The facts are stated in the opinion.

Mr. E. F. Stone for appellant.

Messrs. Charles W. Bates and William F. Woerner, for respondent:

If the wholesomeness of a food article is at all bona fide disputable, the legislative determination is conclusive, and the courts will not interfere.

State v. Layton, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; People v. Cipperly, 37 Hun, 324; State v. Schlenker, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360, 84 N. W. 698.

Municipalities may fix a standard of purity for milk, and the test by which the analysis shall be governed.

State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; People v. Cipperly, *supra*; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 354; Weigand v. District of Columbia, 22 App. D. C. 559; State v. Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; State v. Dupaquier, 46 La. Ann. 577, 26 L. R. A. 162, 49 Am. St. Rep. 334, 15 So. 502; State v. Stone, 46 La. Ann. 147, 15 So. 11; Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Blazier v. Miller, 10 Hun, 435; Norfolk v. Flynn, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; State ex rel. Smith v. Smith, 69 Ohio St. 196, 68 N. E. 1044; Com. v. Tobias, 141 Mass. 129, 6 N. E. 217; Com. v. Proctor, 165 Mass. 38, 42 N. E. 335; State v. Nelson, 66 Minn. 166, 34 L. R. A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; State v. Schlenker, *supra*; McQuillin, Mun. Ord. § 484, p. 766.

The authority of the city chemist and of the inspector is ministerial in carrying out the directions of the ordinance; and no notice, even, is required to be given defendant so far as the acts of the chemist or inspector are concerned.

Blazier v. Miller, 10 Hun, 437; St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The possibility of the abuse of power does not disprove its existence.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

This ordinance is reasonable, consonant with the general powers and purposes of the city, and consistent with the laws and policy of the state.

with the general powers and purposes of the city, and consistent with the laws and policy of the state.

St. Louis v. Galt, 179 Mo. 8, 63 L. R. A. 778, 77 S. W. 876; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Gundling v. Chicago, *supra*; Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; State v. Layton, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; St. Louis v. Weber, 44 Mo. 547.

Gantt, J., delivered the opinion of the court:

This is a prosecution by the city of St. Louis against the defendant for violation of § 18 of ordinance 20,808 of said city. The defendant was fined, and appealed to the St. Louis court of criminal correction. The third count in the information is as follows: "It is further charged that T. Liessing, the defendant aforesaid, on the 14th day of January, 1903, and on divers other days and times prior thereto, did, opposite 3027 S. Broadway, in the city of St. Louis and state of Missouri, then and there control, carry, and expose for sale milk, which said milk did show on analysis less than seven tenths of one per cent ash; the said ash being estimated by weighing the residue after incineration of the total solids at a dull red heat until all the organic matter had been destroyed. Contrary to the ordinance in such cases made and provided."

A motion was made by the defendant to quash this information on 12 different grounds, as follows: "(1) Because the statement filed herein against the defendant charges the defendant with no violation of the city ordinance. (2) Because the charge herein contained in said statement is so indefinite, vague, and uncertain, and that no valid judgment can be rendered under the same against the defendant. (3) Because the ordinance upon which the prosecution is based and predicated is unconstitutional and void, in that it is repugnant to the provisions of § 28, art. 4, of the Constitution of the state, and also § 13, art. 3, of the charter of the city of St. Louis, in that said ordinance contains more than one subject, and the subject-matter of said ordinance is not clearly expressed in the title to the same. (4) Because said ordinance is unconstitutional and void for the reason that the same is unreasonable in the provisions, and it is practically impossible to comply with and enforce the same. (5) Because said ordinance is unconstitutional and void for the reason that it is repugnant to § 4, art. 2, and § 30, art. 2, of the Constitution of this state, in that it deprives the defendant of

his natural rights to liberty and enjoyment of the gains of his own industry and of his property and liberty without due process of law. (6) Because the ordinance is unconstitutional and void, in that it is inconsistent with the statutes of this state. (7) Because said ordinance is unconstitutional and void, in that it is beyond the power of the municipal assembly of the city to enact the same. (8) Because said ordinance is unconstitutional and void, in that the charter of the city of St. Louis contains no express grant to the municipal assembly of the city to enact the same. (9) Because said laws and ordinance on which this prosecution is based are void and unconstitutional, in that they were enacted under and contain an unlawful delegation of power. (10) Because the laws and ordinances in question are void and unconstitutional, in that they are a class legislation, and provide for taxation under the form and name of a license. (11) Because said ordinance as a whole is void and in violation of § 28, art. 3, of the charter of St. Louis, in that §§ 27 and 29 of said ordinance are in conflict with the general ordinance of a prior date, to wit, article 9, chap. 11, of ordinance 19,991, which ordinance has not been repealed in express terms by the ordinance under which this prosecution is brought. (12) Because said ordinance is void and unconstitutional for the reason that it is repugnant to § 1, art. 14, of the Amendments of the Constitution of the United States, in that it deprives the defendant of his liberty and property without due process of law, and denies to him the equal protection of the law."

Section 18 of ordinance 20,808 of the city of St. Louis is as follows: "Sec. 18. No milk shall be sold, kept, offered or exposed for sale, stored, exchanged, transported, conveyed, carried, or delivered, or with such intent as aforesaid be in the care, custody, control, or possession of anyone, unless it show on analysis not less than 3 per cent by weight of butter fat, 8 5-10 per cent solids not fat, and seven tenths of 1 per cent ash, of which 50 per cent shall be insoluble in hot water. Provided, however, that in contested analysis of milk condensed under this ordinance, butter fat shall be estimated gravimetrically by the Adams paper coil process; total solids by evaporation, and nonfatty solids by difference between total solids and butter fat, and ash by weighing the residue after incineration of total solids at a dull red heat until all the organic matter is destroyed. Anyone violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than \$25 nor more than \$100 for each and every offense."

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The testimony of Milk Inspector Comer showed that the defendant was on the day charged in the information delivering milk in his regular milk wagon at 1227 South Broadway, St. Louis. The inspector "took a sample of milk from his wagon," or, rather in his presence, from the customer to whom he had just sold the same, and gave as a reason why he did not take it from the can in the defendant's wagon was because the defendant dumped some cream into the can before the inspector could get a chance to take a sample out of the can. This sample, with proper precaution to preserve same in proper condition, was turned over to the city chemist for analysis on the same day, within an hour or two. City Chemist Walter Bernays testified as to the identity of the sample, and that it was received by him on the same day it was taken by the inspector. About 12 o'clock he made the analysis, and testified that this milk contained "65/100 per cent of ash." Dr. Bernays described the method used to determine the ash, as follows: "Weigh accurately a platinum dish, add approximately 5 cubic centimeters of milk; weigh the platinum dish plus the milk accurately; that gives the weight of the milk; evaporate in water both to apparent dryness brought to constant weight, thus determining the total solids. The dish containing the total solids is placed in a larger nickel dish, and the whole heated at a low heat, somewhat less than a dull red, until all the organic matter is destroyed and the ash perfectly white. I tested the heat to see that there was no chloride of sodium and potassium. I did this by heating a weighed quantity of pure sodium chloride and potassium in the same manner, and ascertained there was no loss of weight. . . . In other words, the method used for determining the ash is accurate; there is no loss." He further testified that there was another method known, which, however, "is a modification of the same method in which, before incineration, some nitric acid is added to facilitate incineration, and that, with this exception, it is the same identical method." On cross-examination, he defined "ash" to be the mineral constituent of milk left after all the organic matter is destroyed by incineration. He stated that he followed the ordinance and incinerated the total solids in the analysis of the sample of defendant's milk to a dull red heat until all the organic matter was destroyed. He explained that there were other methods of ascertaining the amount of ash in milk, but there was no decided difference in the results, and that they must give practically the same results, though there might be a very slight difference. He also testified that compared with the average cow's milk, the amount of ash

required by the ordinance was below the average. The defendant on his part called three experts, Gottschalk, Richter, and Keiser. There were some discrepancies between their testimony and that of Dr. Bernays on scientific points. Gottschalk testified that other methods might be used than that prescribed by the ordinance to determine the per cent of ash. The one he thought the most reliable was a long method, not ordinarily carried out on that account. In his opinion, as well as the other two experts, the test imposed by the ordinance was not the best. None of them, however, testified as to any facts in this case, nor did the defendant call any witness to contradict any of the city's testimony as to the actual facts.

At the conclusion of the testimony the defendant asked an instruction in the nature of a demurrer to the evidence, which was overruled, and defendant excepted. He then prayed the court to give the following instructions: "The court, sitting as a court, instructs the court, sitting as a jury, that the ordinance upon which the statement in this case is based is unconstitutional and void, and for that reason this suit cannot be maintained, and the verdict of the court, sitting as a jury, must be for the defendant." "The court, sitting as a court, instructs the court, sitting as a jury, that the ordinance upon which the statement in this case is based is invalid, for the reason that it is unreasonable as a matter of law and as shown to be by the evidence in this case, and the court, sitting as a jury, must find and return a verdict for the defendant." These were denied, and the defendant duly excepted. As already said, the court found the defendant guilty of violation of the ordinance, and fined him \$25 and costs. In due time the defendant filed motions for new trial and in arrest of judgment, which were overruled, and exceptions saved and an appeal allowed to this court. This appeal is in this court on two grounds: First. Because the city of St. Louis, a political subdivision of the state, is a party to the action, and second, because the constitutionality of the St. Louis milk ordinance is directly challenged and involved in the determination of this appeal.

1. The ordinance upon which this prosecution is based is challenged as unconstitutional on various grounds, and we will endeavor to examine them seriatim. It is first said that the production, sale, and distribution of milk is a legitimate and lawful occupation, conducted as a matter of right, and not as a privilege, and that unusual and arbitrary restrictions cannot be lawfully imposed upon it by ordinance; nor can harsh, expensive, and burdensome provisions be enacted against persons engaged in an innocent and

useful business, so as to deprive them of the right to devote their property thereto and destroy their freedom and liberty. The ordinance assailed has for its subject-matter the inspection of milk and cream and the regulation of the sale thereof. It is obviously a police regulation to guard against the sale or dissemination of an unwholesome and injurious quality of milk and cream, and to protect the public against imposition, fraud, and deception as to an article of food almost universally used by the people. The city of St. Louis, as has been repeatedly declared by this court, derives its charter in pursuance of constitutional provisions, and the police powers delegated therein are conferred by the state upon the municipality, and, so long as they are not inconsistent with the Constitution and laws of the state, they are valid upon all who come within their scope and authority. *St. Louis v. Fischer*, 167 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943. By the express provision of § 26, art. 3, of the charter of St. Louis, authority is given "for the inspection of butter, cheese, milk, lard, and other provisions," and "to secure the general health of the inhabitants by any measure necessary," and "to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." None of the objects sought to be secured by the charter are of more importance than the health of its inhabitants, and ordinances having such in view have been often upheld as an exercise of the police power of the state delegated to the city. *St. Louis v. Galt*, 179 Mo. 8-18, 63 L. R. A. 778, 77 S. W. 876; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Smith*, *Modern Law of Mun. Corp.* §§ 1322 et seq.; *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234. The provisions of the Federal Constitution, invoked by appellant, were not designed to interfere with the exercise of the police power by the states, and they have not shorn the states of their police power to regulate trades and occupations so as to guard against injury to the public, nor of regulating the use of property so as to prohibit that which is injurious and dangerous to the community. *St. Louis v. Fischer*, *supra*; *State v. Addington*, 77 Mo. 110; *State v. Bockstruck*, 136 Mo. 335, 33 S. W. 317; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. Perhaps on no one subject has this police power been affirmed as often as the right to inspect and regulate the sale of milk and cream. Numerous decisions of courts of last

resort sustain the right of cities in safeguarding the health of their citizens and in the prevention of deception upon them by fixing a reasonable standard of purity, to be scientifically ascertained, of milk and cream sold within their limits, and prohibiting the sale of milk of the quality inferior to that required by such municipal standard. When the courts have come to deal with such municipal regulation, they have announced the rule that, if the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the Constitution has no right to absolutely prohibit it; but, if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves, upon the fundamental principles of our Constitution, that the act of the legislature or municipal assembly is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. *State v. Layton*, 160 Mo. 498, 499, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171, and cases cited.

Subject to the foregoing qualification, the courts start out with a presumption in favor of an act of the general assembly or the municipal authorities passed for the regulation and inspection of food products. It will scarcely be asserted that all milk is so wholesome and nutritious that there can be no doubt in the mind of the court of its wholesomeness. To do so would be to deny our common experience and to condemn legislation on this subject in almost every state in the Union. In *People v. Cipperly*, 37 Hun, 324, Learned, P. J., announced that the court could not take judicial notice whether milk below the standard is or is not unwholesome or dangerous to the public health. In that case the defendant took the ground that the legislature of New York could not, under the Constitution, prohibit the sale of milk drawn from healthy cows, which, in its natural state, fell below the standard fixed by the act, unless such milk, or articles made from it, were in fact unwholesome or dangerous to the public health. The learned justice asked the question: "Is that to be a question for the jury? If so, the court must charge a jury in each case that, if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or, rather unsettled, in that way. The constitutionality would vary with the varying judgments of juries. Either, then, the leg-

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islature can . . . forbid the sale of milk below a certain standard, whether such milk be in fact wholesome or not, or else they cannot do this, whether that milk be in fact wholesome or not. If they may fix a standard, they must judge whether or not milk below that standard is wholesome. The courts cannot review that judgment." His views were adopted by the court of appeals in the same case, in 101 N. Y. 634, 4 N. E. 107. That it was within the legislative power he adds: It may be known to the legislature that certain kinds of foods produce different degrees of richness in milk, and it may be known to the legislature that certain kinds of foods "will cause a great flow of watery milk, and it may be known to the legislature that this watery milk supplied as food to children cheats them with the appearance of nourishment and deprives them of that nutritious food which they need. It may be known to legislators, then, that milk below the standard which they fix by this law is unsuitable for food and should not be sold. At any rate, all this is a matter for the legislature." And the learned judge applies the test that the courts may declare a law unconstitutional when it appears on its face that it is not intended to promote the public health and would have no such results, but that a law fixing the standard for the purity of milk on its face is evidently intended for the public health, and, such being the case, it was within the legislative power to enact it. That case is in entire harmony with the decision of this court in *State v. Layton*. In *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585, a statute prohibiting the sale of adulterated milk, and providing that milk should be deemed adulterated, whenever it showed on analysis over 87 per cent water or under 13 per cent milk solids, was sustained by the supreme court; and this, though the defendant offered to show that pure milk from his cows showed less than the required solids. The court said: "The statute tends to discourage the breeding of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the legislature in fixing a standard of richness. Practically it makes no difference whether the milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution regarded by the legislature as excessive arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of its value is a fraud which the statute was designed to suppress. It is a valid exercise

by the legislature of the police power for the prevention of fraud and the protection of the public health, and as such is constitutional." And the court quoted with approval from Learned, P. J., in *People v. Cipperly*, *supra*. In *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344, a statute fixing the standard of milk at not over 88 per cent water, nor less than 12 per cent solids, and not less than 2½ per cent milk fats, and providing that milk not of that standard shall be deemed adulterated, was sustained by the supreme court of the state; the court saying: "It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated. Again, since it may sometimes happen, though we presume infrequently, that milk as it comes from the cow is below the standard of quality, . . . it would . . . be difficult . . . to prove that its poor quality was due to adulteration, although in a very large majority of cases such would probably be the fact. By putting such milk in the same category with adulterated milk, the prosecution is relieved from the difficulty," etc. It was held, further, that the law was not unconstitutional on the ground that it was unequal and partial in its operation and discriminated in favor of owners of cows which gave rich pure milk and against owners of cows giving milk of inferior quality.

Without repeating the reasoning of the courts, it must suffice to say that the same principle is announced in *Weigand v. District of Columbia*, 22 App. D. C. 559; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *State v. Dupaquier*, 46 La. Ann. 577, 26 L. R. A. 162, 49 Am. St. Rep. 334, 15 So. 502; *State v. Stone*, 46 La. Ann. 147, 15 So. 11; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Blazier v. Miller*, 10 Hun, 435; *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; *State ex rel. Smith v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *Com. v. Proctor*, 165 Mass. 38, 42 N. E. 335; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Schlenker*, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360, 84 N. W. 698. So that the validity and constitutionality of the ordinance as a police regulation in its general characteristics and its general scope and purpose rest upon satisfactory reasons, as well as upon the great weight of authority in this country. The specific provision, the validity of which is in question in this case, is that part of § 18 prohibiting the sale of milk showing an analysis of less than seven

tenths of 1 per cent of ash. This in effect is the same as fixing the amount of milk fats, or solid matter, that the milk must contain, which is one of the nutritious ingredients in milk, and the diminution of which deteriorates the quality of milk in a corresponding degree. Authorities above cited are all in harmony on the proposition that it is perfectly competent in the interest of the health of a community to fix the standard of quality, and that there is nothing unreasonable or oppressive in the ordinance in that respect.

2. The specific objection to the ordinance made by the defendant is that it commits to the will of a single officer perfectly absolute power in controlling this necessary article of food. It may be seriously doubted whether this objection is open for review in the condition of the pleadings and evidence, inasmuch as § 18 is the only portion of the ordinance involved in the pleadings or proof or motion for a new trial; but, as the case is thoroughly briefed on both sides on this proposition, we do not deem it amiss to consider this objection at this time. Referring to this first section of the ordinance, providing that the inspection shall be placed in charge of the city chemist, in connection with § 18, it is plain that the fixing of the legal standard to which all milk is subjected is not left to the city chemist, but was adopted by the municipal assembly itself, and not only so, but the method and the standard by which milk is to be tested is also fixed as a definite rule of action by which all persons dealing in milk are to be governed. Dealers in milk would unquestionably have a much more valid grievance if each case had to be submitted to the police justice or a jury, to determine the standard of milk according to their own ideas, and making their individual judgment a standard of right and wrong. The ordinance, as passed, instead of leaving the standard of milk to the caprice of the city chemist, contains a permanent legal provision which operates generally and impartially for its enforcement. The fact that the city chemist has charge with the duty of analyzing all milk submitted to him by the various inspectors in no sense deprives the seller of milk of any constitutional right. It was pointed out by the Supreme Court of the United States in *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673, that it was perfectly competent to delegate such a power as is conferred upon the city chemist by this ordinance to a single individual. In *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317, an ordinance providing that no person should move any building into or upon any of the public streets, etc., without a written

permission of the mayor or president of the city council or any other person a councilor, was challenged on the ground that it committed the rights of the plaintiff to the unrestricted discretion of a single individual, and thereby removed them from the domain of law; but the Supreme Court of the United States held that the ordinance was valid, and was based on the necessity of the regulation of rights by uniform and general laws; and in *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, an ordinance of the city of Chicago authorizing the issue of a license by the mayor of the said city to sell cigarettes, and forbidding their sale without license, was held no violation of the Federal Constitution, and the amount of the tax named for the license was in the power of the state to fix. In that case the contention was that the ordinance vested arbitrary power in the mayor to grant or refuse such license, and that such arbitrary power was a violation of the 14th Amendment to the Constitution of the United States; but the court held that it was not an unusual case that discretion should be lodged by law in public officers or bodies to grant or withhold licenses to keep divers other places for the sale of spirituous liquors and the like, when one of the conditions is that the applicant should be a fit person for the exercise of the privilege, and the fact of such offenses submitted to the judgment of an officer or board named. Nowhere in the ordinance before us is an analysis of the city chemist made conclusive of the quality of the milk sold or offered for sale by a dealer in milk, but the particular section challenged in this case simply provides one uniform standard of quality of milk and for a uniform test in case of contested analysis of milk condemned under this ordinance. The owner of the milk is in no manner deprived of his right to contest the analysis of the city chemist; but it is his right and privilege, when prosecuted for violation of this section, to have his milk tested by other competent chemists and by the same standard, so that it cannot be said that such dealers are deprived of the due process of law in the protection of their personal rights or property. *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. loc. cit. 475, 476. The validity of the provision providing for the inspection of milk violates no law or constitutional right of the defendant.

The registration fee exacted for the conducting of the milk business is only \$1 per annum, and the occupation tax is only \$2.50 for each six months of the year, and \$25 for wholesalers. It is apparent that there is nothing oppressive in the amount of the registration fee or the occupation tax. In *State v. Dupaquier*, *supra*, an ordinance of 1 L.R.A. (N.S.)

the city of New Orleans requiring venders of milk to the public to furnish gratuitously, on application of the sanitary inspector, samples of milk not exceeding one-half pint for inspection and analysis, was held not unconstitutional as forcing dairymen to furnish evidence against themselves or as taking private property for public use without compensation. In that case the decision in *Com. v. Carter*, 132 Mass. 12, was freely quoted from. In the latter case it was held that a statute of Massachusetts authorizing inspectors of milk to enter all carriages used in the conveyance of milk, and, whenever they have reason to believe any milk found therein is adulterated, to take specimens thereof for the purpose of analyzing or otherwise satisfactorily testing the same, was constitutional; the court saying private property is held subject to the exercise of such public rights for the common benefit, and in the case of licensed dealers in merchandise the injury followed by inspection is accompanied by advantages which must be regarded as a sufficient compensation. *Bancroft v. Cambridge*, 126 Mass. 438. Such a seizure of milk for the purpose of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws by a public officer of a trade which concerns the public health, and is within the police power of the commonwealth. *Com. v. Ducey*, 126 Mass. 269. In *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. 469, it was held that the ninth section of the act, which conferred upon the city inspector of milk power to condemn, to pour upon the ground, or return to the consignor, any milk which he finds upon inspection to be adulterated, was constitutional, and it was further held that the provision as to the analysis of milk was not intended to operate as a rule of evidence to be conclusive of the guilt of the defendant in selling adulterated milk, but it was simply intended to prohibit the sale of milk under a certain standard of excellency, and this exercise of authority was within the police power of the city.

3. The learned counsel for the defendant has attacked various and sundry other provisions of this ordinance outside of § 18, under which this prosecution was begun and has been maintained. Section 18 is clearly severable from any other provision of this ordinance concerning which there can be any doubt, and can be enforced independently of any of the other provisions attacked. The rule is well settled in this state that, where certain provisions of ordinances or law are assailed which of themselves are valid and are severable from, and not dependent upon, invalid parts, the whole enactment will not

be declared void because of such invalid portions, provided this will not defeat the general object of the enactment. We must decline to investigate and decide upon the validity of various provisions of this ordinance to which counsel have referred us, because in our opinion § 18 is a valid provision and susceptible of enforcement without any reference to such other sections of the ordinance. *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

4. It is insisted, however, that this ordinance is unconstitutional and invalid for the reason that it contains more than one subject and the subject-matter of said ordinance is not clearly expressed in the title of the same. In *Tarkio v. Cook*, 120 Mo. 1, 7, 41 Am. St. Rep. 678, 25 S. W. 202, it was held that the constitutional provision of this state, that no bill should contain more than one subject, which should be clearly expressed in the title, was intended to apply only to state legislation, and has no application to ordinances of cities; but § 13, art. 3, of the charter of St. Louis is also invoked. Conceding, as we do, the charter must control, it is perfectly obvious, we think, that this ordinance is not violative of this charter provision. The title of the ordinance is an ordinance to license and regulate the sale of milk and cream, to provide for the inspection thereof, and prescribe penalties to prevent the sale and distribution of any but pure, wholesome milk and cream, and to fix the minimum limit of its composition and defining its quality, being ordinance No. 20,808, approved August 27, 1902. All the provisions of the ordinance are germane to the one subject of regulating the business of vending milk and cream, and the generality of the title is not an objection, so long as it is not made to cover legislation incongruous in itself. Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of enactments to maintain their validity. There is but one subject to this ordinance, and that is clearly expressed in the title. *St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

5. Again, the defendant asserts that this ordinance 20,808 is void because it conflicts with the former general ordinance not expressly repealed, to wit, ordinance 17,157, or §§ 478, 481, 483, 484, 519, 522, of the Municipal Code; such expressed repeal of bill or inconsistent or conflicting ordinances being required by § 28 of article 3 of the city charter. Ordinance 17,157 was not offered in evidence or referred to in any way in the criminal court, nor is it referred to in the motion for a new trial. Nothing is better settled in this state than that courts

will not take judicial notice of the ordinances of municipalities. *St. Louis v. Roche*, 128 Mo. loc. cit. 544, 31 S. W. 915, and cases there cited. It is plain, therefore, that, if ordinance 20,808 is in any manner in conflict with that ordinance, it was not made to appear in the trial of the case, and this court cannot consider it.

6. But learned counsel of the defendant, while urging that ordinance 20,808 is invalid because it does not expressly repeal ordinance 17,157, asserts that the latter ordinance is unconstitutional and void because the mode and manner of the appointment of the city chemist is not in compliance with the provisions of the charter, §§ 2, 5, 7, 8, 9, 11, and 14 of article 4 of the charter placing the appointing power in the mayor and city council, and nowhere else. His contention is based upon the fact, as urged by counsel, that § 478 of the Municipal Code creates the office of city chemist, and provides that he should be appointed by the mayor, with the approval of the board of health, and subject to confirmation by the city council. The insistence is that, because the ordinance requires the approval of the board of health in the appointment of the city chemist, it violates the charter provision. Several answers suggest themselves to this proposition. Sections 478 to 485, inclusive, of the Municipal Code, creating the office of city chemist, were not introduced in evidence, and therefore, strictly speaking, are not before us for review; but, if they are, and conceding all that the counsel claim they are, we think there is no merit in the contention. By that ordinance the city chemist is appointed by the mayor and confirmed by the council, just as the charter requires, and the charter does not anywhere prohibit other qualifications which may be deemed necessary by the municipal assembly. The mere fact that he should be approved by the board of health, in addition to the other qualifications provided by the charter, certainly in no manner disqualifies him. If that requirement was contrary to the charter, it would simply be void, but would not affect the other legal steps which were followed in his appointment in pursuance of the charter; but certainly it does not lie in the mouth of the defendant in this case to object that greater qualifications were required and demanded of the city chemist than provided by charter; and the same may be said of the other point that under § 484 the removal of this officer differs from that pointed out in the charter, since the ordinance itself says that he should be subject to all the laws and regulations governing city officers; that the municipal assembly had the right to create the office of city chemist and define his duties under §§ 28

and 45 of article 4 of the charter and to provide for his removal, § 26 of article 3 of the charter, there can be no sort of question.

7. The information was and is sufficient. It specifically advised defendant of the time and place and the particular in which he had violated the ordinance. Nothing more definite was necessary to apprise the defendant of the nature of the complaint against him. The testimony was sufficient to justify the court in finding for the plaintiff, and, outside of the attack on the validity of the ordinance, there was practically no defense. That the defendant sold milk at the time and place charged which fell below the legal standard there can be no reasonable doubt.

We hold the ordinance to be a valid exercise of the police power conferred upon the city and not open to any of the objections urged against it; and the judgment is accordingly affirmed.

Brace, Ch. J., and Marshall, Burgess, Valliant, Fox, and Lamm, JJ., concur.

MISSOURI SUPREME COURT.

CITY OF ST. LOUIS, Plff. in Err.,

v.

GRAFEMAN DAIRY COMPANY.

(.... Mo.)

Milk—regulation of standard—reasonableness.

A municipal ordinance prohibiting the sale of milk containing less than 3 per cent by weight of butter fat, to be estimated gravimetrically by the Adams paper coil process, cannot be declared void for unreasonableness as matter of law.

(June 28, 1905.)

Case Note.—The cases which sustain the validity of ordinances or statutes providing for tests of the purity or quality of milk are somewhat common, as shown in the note to *St. Louis v. Liessing*, ante, 918. But in most of them nothing is decided as to any particular test or analysis.

In none of them does it appear that the particular test prescribed in *St. Louis v. GRAFEMAN DAIRY Co.* was named, though in several of the cases the amount of butter fat or milk solids has been made the standard. For instance, in *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. 469, the milk was required to show at least 12 per cent of milk solids, but the case did not show the process or method of making the analysis.

In the *Liessing Case*, just named, arising under the same ordinance as that under which the *GRAFEMAN DAIRY Co.'s Case* was 1 L.R.A. (N.S.)

ERROR to the St. Louis Court of Criminal Correction to review a judgment quashing an information which had been filed in the First District Police Court of the City of St. Louis, charging defendant with violation of an ordinance regulating the sale of milk. Reversed.

The facts are stated in the opinion.

Messrs. Charles W. Bates and William F. Woerner, for plaintiff in error:

The ordinance was within the police power.

St. Louis v. Galt, 179 Mo. 8, 63 L. R. A. 778, 77 S. W. 876; *St. Louis v. Fischer*, 167 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, 194 U. S. 362, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *State v. Dupaquier*, 46 La. Ann. 577, 26 L. R. A. 162 49 Am. St. Rep. 334, 15 So. 502; *Parker & W. Public Health & Safety*, §§ 299, 304, pp. 343, 348; *St. Louis v. Weber*, 44 Mo. 547; *State v. Layton*, 160 Mo. 474, 62 L. R. A. 103, 83 Am. St. Rep. 487, 61 S. W. 171; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Blazier v. Miller*, 10 Hun. 435; *State v. Stone*, 46 La. Ann. 147, 15 So. 11; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; *People v. Cipperly*, 37 Hun. 324; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Groves*, 15 R. I. 208, 2 Atl. 384; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *State ex rel. Smith v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; *Weigand v. District of Columbia*, 22 App. D. C. 559; *Com. v. Tobias*, 141 Mass. 129, 6 N. E. 217; *Parker & W. Public Health & Safety*, § 301, p. 345; *State v. Nelson*, 66

brought, a different provision was involved, which required the milk to show, among other things, "7-10 of 1 per cent ash." The ordinance provided that the ash should be estimated "by weighing the residue after incineration of total solids at a dull red heat until all the organic matter had been destroyed." Several witnesses testified that the test imposed by the ordinance was not the best, but the result shown by the tests made in the case were not contradicted, and the ordinance was enforced.

Tests by litmus paper and by a mechanical instrument known as a lactometer were prescribed by the ordinance considered in *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648, and, without any particular discussion of them, they were upheld as sufficient to justify destruction of the milk if it failed to stand the tests prescribed by the ordinance.

Minn. 166, 34 L. R. A. 318, 61 Am. St. Rep. 399, 68 N. W. 1036.

Mr. E. F. Stone for defendant in error.

Gantt, J., delivered the opinion of the court:

This record is before us on writ of error to test the validity of § 18 of ordinance No. 20,808. The statement filed in the first district police court charged a violation of said section by the defendant company in that it did, on April 28, 1903, carry and expose for sale, at Leonard and Washington avenues, milk, which said milk did show on analysis less than 3 per cent by weight of butter fat; the said butter fat being estimated gravimetrically by the Adams paper coil process, contrary to the ordinance in such case made and provided. On a trial in the police court defendant was found guilty and fined \$25. It appealed to the St. Louis court of criminal correction, and in that court filed its motion to quash, in the nature of a demurrer to the complaint, on twelve different grounds. The said court sustained said motion and dismissed the cause, and thereupon the city sued out its writ of error in due time and form.

Without repeating the various grounds of the motion to quash or demurrer, it will suffice to say that in substance they assailed the said section of the ordinance along the same lines that were followed in *St. Louis v. Liessing*, ante, 918, 89 S. W. 611, which was argued and submitted along with this case at the same time. We have already expressed our views on the objections to this section of the ordinance in *St. Louis v. Liessing*. The particular provision involved in this appeal is the charge in the information that the defendant company sold milk showing "on analysis less than 3 per cent by weight of butter fat; the said butter fat being estimated gravimetrically by the Adams paper coil process." In this series of cases we have already determined, in harmony with great weight of authority in this country, that under its charter the city of St. Louis has the right to fix a standard of purity for milk and cream sold and offered for sale within its municipal limits, and to prohibit the sale of milk which does not conform to that standard, even though it be natural milk from healthy cows; that the purpose of the ordinance is to prohibit, not merely the dealing in milk which has been in fact adulterated, but also the sale and offering for sale of milk of such inferior quality that it falls below the prescribed standard of purity. We also hold that, in view of scientific knowledge and the numerous legislative enactments and ordinances in other states, the standards of milk and cream fixed by this ordinance are not so un-

reasonably high as to justify this or any other court in holding it void on that ground, and this court is not justified in holding that milk below the said standard is so universally conceded to be wholesome and innocuous that the ordinance is void on that account.

The one question remaining is, Does the fact that the ordinance in contest requires that milk on analysis shall show not less than 3 per cent by weight of butter fat, "estimated gravimetrically by the Adams paper coil process," make it void? Having reached the conclusion that it was within the power of the municipal assembly to fix the standard of purity, this court cannot say, as a matter of law, that it was unreasonable for the assembly to provide that the weight of the butter fat should be estimated, calculated, or ascertained gravimetrically, or measured by weight, nor that the adoption of the "Adams paper coil process" was not a proper gravimeter. The assembly unquestionably had the right, dealing, as it was, with a scientific question, to fix a scientific standard, and, in the absence of all showing to the contrary, this court cannot take judicial cognizance that the Adams paper coil process was not a proper test. By so fixing it, a definite standard, controlling alike upon the city and one charged with a violation of the ordinance, was established, and the weight of the milk can be ascertained scientifically, and not left to the uncertain opinion of witnesses, whether experts or laymen, and the judgment of inspectors. On the contrary, if no fixed standard or test was established by ordinance, the vender of the milk might well complain that his rights had been left to the unregulated judgment of the inspectors, or, if no one gravimeter had been specified, then he might well complain that different tests might lead to different results and to varying standards of purity. This ordinance looks to his protection by providing that, when an inspector takes a sample of milk or cream for analysis, "the person, firm, or corporation from whom the sample is taken shall, on demand therefor, then and there, have a right to a duplicate of said sample, sealed with the seal of the officer, on tendering him a suitable receptacle therefor." In this manner he can have his milk of the same quality tested by any disinterested chemist by the same method, and is not conclusively bound by the analysis of the city chemist. The argument of inconvenience urged by defendant we do not regard as of great weight. The ordinance does not attempt to change the rules of evidence, but is scrupulous to preserve to the vender evidence under the official seal of the inspector which he may submit to an unbiased, disinterested chemist,

to be tested by identically the same standard as that which the city proposes to use to determine whether he has or has not violated the ordinance. He has his day in court, and by his counsel can subject the city chemist to the most rigid examination as to his method of testing the milk, and then, if adverse, meet it with the testimony of his own expert. The ordinance nowhere makes the test of the city chemist conclusive upon defendant. It simply fixes a standard, and leaves the question of whether or not his milk is up to that standard, according to the prescribed test for all alike, to be ascertained by settled principles of legal evidence.

We think there is nothing to differentiate this case in principle from the others in which we have sustained the constitutionality of the ordinance.

The St. Louis Court of Criminal Correction erred in dismissing the petition, and its judgment is reversed, and the cause remanded to be tried in accordance with the views herein announced.

Brace, Ch. J., and Marshall, Burgess, Valiant, Fox, and Lamm, JJ., concur.

MISSOURI SUPREME COURT.

CITY OF ST. LOUIS, Resp't.,

v.

JOSEPH H. SCHULER, Appt.

(190 Mo. 524.)

Milk—prohibition of preservative.

The police power extends to the prohibition of the sale of milk containing any preservative, although there may be preservatives which are not deleterious to health.

(June 28, 1905.)

Case Note.—If the establishment of a standard below which, if the quality of the milk fall, its sale shall be prohibited irrespective of the fact of actual adulteration and of its injuriousness to the health, is generally sustained as a police regulation (see *St. Louis v. Liessing*, ante, 918, and note), it is natural that the validity of a provision prohibiting the addition of any substance thereto, whether deleterious or not, should be upheld as it is in *St. Louis v. SCHULER*.

It is similarly held in *State v. Schlenker*, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360, 84 N. W. 698, that the treatment of milk with boracic acid in hot weather and with the knowledge of customers, though beneficial to the condition of the milk and harmless to health, is an adulteration punishable under a statute declaring "the

1 L.R.A.(N.S.)

A PPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting defendant of violation of an ordinance regulating the sale of milk. Affirmed.

The facts are stated in the opinion.

Mr. E. F. Stone for appellant.

Messrs. Charles W. Bates and William F. Woerner, for respondent:

A statute in Massachusetts prohibiting the sale of milk to which any foreign substance has been added has been treated, without discussion, as valid.

Com. v. Tobias, 141 Mass. 129, 6 N. E. 217; *Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709; *Com. v. Schaffner*, 146 Mass. 512, 16 N. E. 280; *Com. v. Wetherbee*, 153 Mass. 159, 26 N. E. 414.

A buyer has a right to assume that the milk he buys will go through the natural process of oxidation and decomposition.

State v. Schlenker, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360, 84 N. W. 698.

Gantt, J., delivered the opinion of the court:

The defendant in this case is charged with violating ordinance No. 20,808, § 17, in that in the city of St. Louis on the 28th of July, 1903, he did then and there carry, control, and expose for sale, at Twenty-first and Chestnut streets, milk which did contain a preservative known as "formaldehyde." On a trial on appeal he was convicted in the St. Louis court of criminal correction, and fined \$25. From that judgment he appeals to this court on the ground that said ordinance and said section thereof are unconstitutional and void, in that they deprive the defendant of his natural rights to liberty and the enjoyment of the gains of his own industry, and of his property and liberty without due process of law, and because said ordinance is unconstitutional and void, in that it is beyond the power of the muni-

addition of water or any other substance or thing" to be such.

The use of "formaldehyde" as a preservative is punished in *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40, under a statute providing against the addition of anything injurious to the health.

In *People v. Biesecker*, 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 990, a statute making it unlawful to sell dairy products containing a preservative other than salt, sugar, or spirituous liquors in specified cases, or to sell preservatives for such use, was held unconstitutional in a case of its alleged violation by sale of a preservative for butter. But the court held that the statute was not aimed against adulterations, and that it could not constitutionally prohibit the use of preservatives unless they were unwholesome or injurious.

cipal assembly to pass and enact the same. Section 17 of said ordinance provides: "Any person, firm, or corporation, who shall sell, expose for sale, exchange, deliver, dispose, or transport, convey or carry, or with any such intent as aforesaid have in his or her care, custody, control, or possession any milk or cream having therein or containing any foreign substance of any kind whatever, or coloring matter, or any adulteration, or preservative, whether for the purpose of artificially increasing the quality of the milk or cream, or for preserving the condition or sweetness thereof, or for any purpose whatever, shall be deemed guilty of a misdemeanor," etc. The evidence on the trial disclosed that on July 28, 1903, one of the deputy milk inspectors of said city did take a sample of milk from a wagon of the defendant, put it in a bottle and sealed it, and handed it to the city chemist; that this sample was analyzed by the said city chemist on the same day, and found to contain a preservative known as "formaldehyde;" that formaldehyde is an "organic compound oxidation product of alcohol," and was used by defendant to prevent the milk from becoming sour. J. C. Cabanne, an expert for the city, testified he was a milk dealer since 1868, and in business in St. Louis since 1872, and now supplied the city business to the extent of 5,000 gallons a day. He showed that milk could be kept sweet and good by simply keeping it cold, and that it was not at all necessary to use formaldehyde for that purpose, and that he "always refused to take milk with preservatives in it;" also, that he had "kept milk stored for twenty-one days without preservatives in it, just at a temperature of 34. His milk is shipped into the city from a distance as far as a hundred miles." The quantity of formaldehyde in this particular instance was not determined, as the ordinance did not require it, but the testimony was that there were only small quantities of it in the sample. There was evidence tending to show that the test used by the city chemist was not a conclusive one, but there was no pretense that either of the experts, Dr. Richter or Professor Keyser, made any test of the sample in question. On the part of the defendant, evidence was offered to show that formaldehyde in sufficient quantities to preserve milk from souring was not injurious to the health. At the conclusion of the evidence the defendant prayed the court to declare the law to be that, under the testimony and the law, the plaintiff could not recover, and that the ordinance was unconstitutional and unreasonable as a matter of law and as shown by the evidence in the case. This instruction the court refused. After motions for a new trial and in arrest of

judgment were filed, heard, and overruled, the defendant appealed to this court.

1. This case involves some of the objections to the constitutionality and validity of the ordinance in question that were made and decided adversely to the defendant in *St. Louis v. Liessing*, and hence we must decline to again consider those objections.

2. The real question in this case is whether it is competent for the legislature or the municipal assembly of the city of St. Louis to prohibit the preservation of milk by placing a preservative therein. On the part of the city, it is insisted that it was entirely competent to prohibit the addition of any foreign substance, which, of course, includes preservatives in milk offered for sale, whether the said foreign substance or added matter is or is not injurious to health; and that a buyer has the right to assume that the milk he buys will go through the natural processes of oxidation and decomposition. On the other hand, it is insisted that the legislature cannot forbid or wholly prevent the sale of a wholesome article of food, and that this section of the ordinance is clearly distinguishable from those considered in the other cases which we have decided under this ordinance at the present term, in that it cannot be justified as an exercise of power to prevent fraud or imposition, nor can it be sustained under the power of the legislature or municipality to require a standard of purity for milk or other food products, but it strikes down the preservation of food and milk, which is a proper and lawful purpose in itself. The defendant insists that the use of formaldehyde or other preservative is not to practise any form of deception or to artificially improve the standard of the milk, but its purpose is to prevent decay in a product which, without the presence of such preservative, naturally becomes unfit for use in a very short period, and that there is a marked distinction between the protection of health by requiring a proper standard of purity and the prevention of imposition on consumers and the mere preservation of an article otherwise up to the standard, and the introduction of such preservatives having no tendency to deceive consumers and purchasers. Another contention of the defendant is that the ordinance itself does not declare or ordain the adding of such a preservative an adulteration. It will be seen that these diverse contentions raise a most important question, one somewhat more difficult of solution than either of those presented in the other milk cases considered by the court at this time. The insistence on the part of the defendant has the full support of the court of appeals of New York in *People v. Biesecker*, 169 N. Y. 53, 57 L. R.

A. 178, 88 Am. St. Rep. 534, 61 N. E. 990. In that case a statute of New York, which provided that "no person shall sell, offer or expose for sale any butter or other dairy products containing a preservative; but this shall not be construed to prohibit the use of salt in butter or cheese, or spirituous liquors in club or other fancy cheese, or sugar in condensed milk,"—was held unconstitutional. In that case Judge Cullen, speaking for the whole court, reviewed previous decisions of that court, sustaining legislation which prohibited the manufacture or sale of any article so compounded as to imitate butter, as in *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, and *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795, defining what should be deemed unwholesome or adulterated milk, and *People v. Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823, forbidding the manufacture or sale of vinegar containing any artificial coloring matter, but drew a distinction between the statutes upon which those cases rest and the statute prohibiting the use of a preservative in butter, and reached the conclusion that the latter could not be justified as an exercise of the police power to prevent fraud or deception on buyers and consumers, and that the preservation of food was a lawful and laudable object. The learned judge conceded that in the use of these preservatives there was danger of adulteration and of the use of processes injurious to the public health, and that the regulation of these subjects for the protection of the public health and the prevention of imposition on consumers was within the power of the legislature, and the propriety of its exercise could not be questioned, but that, under the guise of regulation, the legislature could not destroy the industry, and that it was not a valid regulation which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act; that ingredients and processes might be prohibited as unwholesome, or causing deception, but not solely because they preserve. It is well in all these cases to keep constantly in view the fundamental principles involved in them. Under our system of government, the legislative branch is empowered to enact all laws necessary to protect the public health, but it is conceded that its acts must have such a relation to the public health that the courts by inspection can discern that they relate to and are convenient and appropriate to promote the public health, and are not mere arbitrary provisions which the courts can see have no natural connection with the professed purpose of subserving the public health. Happily in these cases it is manifest upon the face of the ordinance that the municipal

assembly was exercising its police power in regard to a subject affecting the public health, to wit, an article of food of general use and prime necessity, and that the purpose of the ordinance was to preserve the purity of the milk supply and to secure to the people of St. Louis pure and unadulterated milk. As said in *St. Louis v. Liesing*, 89 S. W. 611: "On no one subject has this police power been affirmed so often as the right to inspect and regulate the sale of milk and cream."

The subject-matter, then, was clearly within the powers of the city council to regulate, and the sole question remaining for us to determine at this time is whether, in the attempt to regulate the sale of milk, the municipal assembly went beyond the limits of legitimate legislation on that subject. It is insisted by the defendant, and in that he is supported by the court of appeals in New York, in *People v. Biesecker*, 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 990, that this provision against the use of any preservative in milk is to be distinguished from those cases sustaining the exclusion of annatto and other coloring substances, for the reason that the use of a preservative does not tend to deceive or mislead purchasers and consumers. We think the ground upon which this prohibition against the use of preservatives in milk rests is the right of the legislature, and in this case the municipal assembly, to pass all needful and proper ordinances to secure the purity of milk, and to prevent any tampering with milk by absolutely prohibiting the use of artificial preservatives therein. As said by the court of appeals of New York in *People v. Girard*, 145 N. Y. loc. cit. 109, 45 Am. St. Rep. 595, 39 N. E. 824: "Food should be pure,—absolutely and unquestionably pure. No tricks should be played with it. The legislature may resolutely protect it." The argument of the defendant that a preservative stands upon a different basis from mere coloring matter which is liable to deceive is in our opinion more plausible than sound. It is a matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and the young, that through the agency of impure milk the germs of many diseases are disseminated, and, even where there is an absence of any deleterious impurity of the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious. *Norfolk v. Flynn*, 101 Va. loc. cit. 475, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717. In *State v. Schlenker*, 112 Iowa, loc. cit. 645, 51 L. R. A. 347, 84 Am. St. Rep. 360, 84 N. W. 699, the supreme court of that state said: "But it is said that the legislature had no power to forbid

the sale, without deceit or fraud, of a harmless and wholesome article of food. This may be true as a general proposition; but it is also true that, in virtue of the police power, it may pass such laws as are, or may reasonably appear to be, necessary for the health, comfort, and safety of the people.

. . . . That the sale of milk to which water and boracic acid have been added may amount to a fraud upon the purchaser is evident. He has the right to assume that the milk he buys is unadulterated, and that it will go through the natural processes of oxidation and decomposition. He may wish to use sour milk for culinary purposes, and has the right to assume that nothing has been added to prevent chemical change.

. . . It may be conceded that the milk sold by defendant was not harmful to the health of those who used it, but it is certainly dangerous to the public to permit milkmen and those dealing in milk to adulterate it in such manner as to change its constituent properties. The statute does not deprive the defendant of his property, but it does impose upon him the duty of so using it that no injury will result to others most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts." In that case the defendant put boracic acid in the milk which he sold, and testified that he used it as a preservative, and that its use was necessary to keep the milk from souring; and he introduced experts to show that the quantity of boracic acid used tended to prevent decomposition and would have no deleterious effect on the consumer. The court held that it was not enough to show that the defendant did not intend to defraud, or that the milk he sold was not unwholesome. If that be true, almost any law intended to protect the public health and safety might be overthrown; that it was enough that the adulteration such as prescribed by the statute might defraud and prove deleterious to the public health, or comfort; that the legislature might well determine that the adulteration of milk tends to facilitate vicious processes, and that it ought to be prohibited.

In *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711, the court used the following language: "It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water, [and the argument is that] . . . the legislature has no power to make the sale of milk and water, when mixed, a penal offense unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practised with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, 1 L.R.A. (N.S.)

and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge, as to its expediency." In *People v. Biesecker*, 169 N. Y., loc. cit. 60, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 991, the court said: "There is doubtless in the prosecution of these industries danger of adulteration and of the use of processes injurious to public health." In *State v. Layton*, 100 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171, the act of March 11, 1899, making it "unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound, or preparation . . . of food, in which article, compound, or preparation, there is any arsenic, calomel, bismuth, ammonia, or alum," came before this court on a prosecution of the defendant for selling and offering for sale Layton's Health Food Baking Powder, a compound and preparation containing alum. The act was challenged as unconstitutional, because it was insisted that the said baking powder was wholesome and innocuous and the small amount of alum used therein was not deleterious. It was clear that the baking powder in question was not an imitation of any standard baking powder, and therefore did not fall within the doctrine of *State v. Addington*, 77 Mo. 110, and *State v. Bockstruck*, 136 Mo. 336, 38 S. W. 317, but the constitutionality of the statute was upheld on the ground that it was competent for the legislature to protect the health, morals, and safety of the people, so long as enactments did not transgress the rights secured by the state and Federal Constitutions, and that the court approached the charge of invalidity and unconstitutionality of the act with the presumption in favor of the law, and that, when it appeared that there was a dispute as to the wholesomeness of an article of food or drink, then it was a legislative question, and the legislature had the right to inquire for itself an either prohibit or regulate its manufacture or sale as to it might seem best; that the constitutionality of the act could not be made to depend upon the proof in each individual case whether the article was or was not wholesome. It was said in that case that, if an article of food is so universally conceded to be wholesome and innocuous that a court may take judicial cognizance of that fact, the legislature has

no right, under our Constitution, to prohibit its sale or use.

Much of the argument in this case is predicated upon this last proposition, and the defendant insists that because formaldehyde works such a chemical change in the character of milk that it will not sour, and because it is for this reason classed as a preservative, the municipal assembly could not lawfully prohibit its use in milk. The trial court refused to go into the evidence tendered that formaldehyde in proper quantities was not injurious to health. Evidently it cannot be said that the effect of formaldehyde in milk is so well known not to be deleterious that the courts must take judicial cognizance of that fact. That its action is such that it changes the chemical properties of the milk so that it will not sour was established and conceded on the trial, and it was for this reason that it was insisted that, as it preserved the milk from souring, it was claimed to be highly beneficial. We cannot accept this conclusion. It must be recognized that it was a legislative function in the passage of this ordinance for the preservation of health to insist that milk should have neither adulterants nor preservatives placed in it, and to inquire as to the effect thereof. The municipal assembly may have investigated and found this very fact, that, when formaldehyde or boracic acid was placed in milk, it would change its chemical properties and prevent its souring, and prevent it going the natural processes of oxidation and decomposition, and that thereby the housewife desiring to have the milk sour for culinary purposes, or the physician administering it as a food to children and sick persons, would be misled in his calculations as to its effect on his patients. But, in addition to this, the municipal assembly might well have reasoned that, while one preservative used in carefully prepared proportions might not be injurious to the health of consumers, it would be exceedingly dangerous to permit the venders of milk, with little or no scientific knowledge and less scruples, each to select his own so-called preservative and use it without knowledge as to the quantities which were safe which would open the door to all sorts of dangerous adulterations and to the use of highly injurious processes; and that the discovery of such practices might never be made until incalculable injury had occurred; and that the only safe course, considering the nature of the business, was to prevent absolutely the placing of such preservatives in milk having such an effect as was shown in this case. In so doing the municipal assembly in no manner destroyed or affected the defendant's right of property. He had the right to sell pure and unadulterated

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milk of the standard prescribed by the ordinance, and the purchaser and the consumer of milk had the right to purchase from him pure milk unmixed with any foreign matter added to it, and this was what the ordinance required, no more and no less, and in so doing it infringed no provision of the organic law of this state or any article of the Federal Constitution.

The judgment of the St. Louis Court of Criminal Correction is affirmed.

Brace, Ch. J., and Marshall, Burgess, Valliant, Fox, and Lamm, JJ., concur.

KENTUCKY COURT OF APPEALS.

F. SANDERS, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(.... Ky.)

Impure milk—still slop—police power.

The police power of the state extends to the prohibition of the sale of milk from cows fed by still slop, although there is nothing to show that such milk is not a pure and wholesome article of food, since the court may assume that the legislature had sufficient information to justify the belief that milk from cows fed on such food had ample opportunity to become impregnated with elements dangerous to public health.

(December 9, 1903.)

Case Note.—When the courts have upheld regulations against adulterating milk, or selling any that falls below a specified standard, as they have done in the preceding cases of *St. Louis v. Liessing*, *ante*, 918, *St. Louis v. Grafeman Dairy Co.* *ante*, 926, and *St. Louis v. Schuler*, *ante*, 928, and other cases referred to in the accompanying case notes, it is but going one step further under the police power to eradicate the sources of danger by forbidding the sale of milk drawn from swill-fed cattle, as is done by the statute considered in the **SANDERS CASE**. The only other case found after considerable search in which such a provision is considered is *Johnson v. Simonton*, 43 Cal. 242, where it was collaterally drawn in question in an action for libel. "If it indeed be a fact," says the court, "that the milk of cows fed in whole or in part upon still slops is unwholesome as human food, there can be no doubt of either the authority or the duty of the board to enact the ordinance in question."

Regulations of dairymen's business going to the extent of requiring the registration of their herds, lighting, ventilation, and drainage of the stables, the storing of the milk, etc., were sustained in full in *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771.

APPPEAL by defendant from a judgment of the Criminal Division of the Circuit Court for Jefferson County convicting him of violating the statute against the sale of impure milk. Affirmed.

The facts are stated in the opinion.

Messrs. Norton L. Goldsmith, Alfred Selligman, and Gibson, Marshall, & Gibson, for appellant:

Before the court will declare a statute to be a proper exercise of the police power, it must be able to see that its object tends towards the prevention of some offense or manifest evil, or that it has for its aim the preservation of public health, morals, safety, or welfare.

Ky. Stat. § 1274; U. S. Const. 14th Amend.; 22 Am. & Eng. Enc. Law, 2d ed. pp. 935, 936; Tiedeman, Pol. Power, pp. 295-298; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 20; Helena v. Dwyer, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206, 42 S. W. 1071; Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 200, 35 N. E. 62; Cooley, Const. Lim. § 393; Frost v. Chicago, 178 Ill. 250, 49 L. R. A. 657, 69 Am. St. Rep. 301, 52 N. E. 869; Ruhstrat v. People, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; People v. Biesecker, 33 Misc. 35, 68 N. Y. Supp. 134; People v. Bischoff, 28 N. Y. Week. Dig. 135, 14 N. Y. S. R. 581; Dunn v. Com. 105 Ky. 834, 43 L. R. A. 701, 88 Am. St. Rep. 344, 49 S. W. 813.

Mr. Warwick Miller, for appellee:

It is not only the right, but the duty, of a state to pass such laws as may be necessary for the preservation of the health of the people.

18 Am. & Eng. Enc. Law, p. 748; Sarrls v. Com. 83 Ky. 327; Tiedeman, Pol. Power, p. 295; Johnson v. Muir, 43 Cal. 542; Brock v. Com. 92 Ky. 183, 17 S. W. 337; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610.

Regulations intended for the health, safety, and comfort of society are valid as police regulations, notwithstanding that they may interfere with the enjoyment of private property.

Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; Pool v. Trexler, 76 N. C. 297; Com. v. Pennsylvania Canal Co. 66 Pa. 41, 5 Am. Rep. 329; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; People v. Girard, 73 Hun, 457, 26 N. Y. Supp. 272; People v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 1 L.R.A. (N.S.)

7 Atl. 913, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Mr. C. J. Pratt also for appellee.

Burnam, Ch. J., delivered the opinion of the court:

The appellant, Fred Sanders, was indicted, tried, and convicted in the Jefferson circuit court for having knowingly sold milk from animals fed upon "still slop," in violation of the provisions of § 1274 of the Kentucky Statutes of 1899, which reads as follows: "Whoever shall knowingly sell, or cause to be sold, to any person in this state, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or sell milk commonly known as 'skimmed milk,' with intent to defraud, or shall knowingly sell any milk, the product of a diseased animal, or from animals fed upon 'still slop,' 'brewer's slop,' or 'brewer's grains,' or shall knowingly use any poisonous or deleterious material or milk from animals diseased or fed as aforesaid, in the manufacture of butter or cheese, shall be fined in any sum not less than \$25 nor more than \$200." A reversal of the judgment of the circuit court is asked upon the ground that so much of the statute as prohibited the sale of milk from animals fed upon still slop is obnoxious to the 14th Amendment to the Constitution of the United States, which provides, in § 1, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Appellant's contention is based upon the claim that still slop, when used under proper conditions, is a wholesome and innocuous food for dairy cows, and that the milk from cows fed thereon is a pure and wholesome article of food for human beings. Our attention is called to the fact that there is nothing in the statute, nor the indictment which is the foundation of this prosecution, which negatives either of these contentions, and that no testimony was introduced by the commonwealth upon the trial of the case for the purpose of establishing that such was the fact; that the whole proceeding rests upon the naked prohibition contained in the statute itself. The section upon which the prosecution is based is one of the provisions of the statute aimed at offenses against the public health, and was exercised under the police power of the state for the protection of the health of its citizens. No exact definition of the extent of this power has, or perhaps can be, given. Judge Cooley, in his work on Constitutional Limitations, has ap-

proved that given by Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 53, as the most satisfactory and complete to which his attention has been called. It is as follows: "All property in this commonwealth . . . is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. . . . The power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." And this power, under the American constitutional system, is left with the individual states. It cannot be taken away from them, either wholly or in part. See *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593. "Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. All that the Federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution." See Cooley on Constitutional Limitations, 7th ed. 831, and authorities there cited.

The 14th Amendment of the Federal Constitution was first called to the attention of the Supreme Court of the United States in the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. ed. 394. In construing a statute of Louisiana vesting in a slaughterhouse company the sole and exclusive privilege of conducting a live-stock landing and slaughterhouse business, and requiring that all animals should be landed at the stock landing and slaughtered at the slaughterhouse of the company, and nowhere else, it was held that the statute did not conflict with the provisions of the 14th Amendment. The scope of this amendment, in so far as it relates to the question before us, has been very clearly stated by Judge Cooley as follows: "The guaranteed equal protection is not to be understood to require that every person in the

land shall possess the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is deemed to be equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds. It cannot be a mere arbitrary selection." Cooley's Constitutional Law. And the text is supported by numerous adjudged cases.

It is a canon of statutory construction that every presumption must be indulged in favor of the validity of the statute, as the Constitution confers upon the general assembly the lawmaking power. But, notwithstanding this general presumption, the courts must obey the Constitution, and determine in a particular case whether its limits have been passed. As was said in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained." "If, therefore, a statute purporting to have been enacted to protect the public health . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." See *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257, it was held that the 14th Amendment to the Constitution was not designed to interfere with the exercise of the police power by the state for the protection of health, prevention of fraud, or the preservation of the public morals; and that it was competent for the state of Pennsylvania to prohibit the manufacture of oleomargarine butter. In that case the defendant offered to prove that he made large profits from the sale of the prohibited article, and that it was a wholesome and innocuous food; that the statute upon which the prosecution was founded was not a lawful exercise of the police power, because it deprived him of the lawful use of his property without compensation. The court sustained an objection to the evidence, and the defendant was adjudged to pay a fine and the cost of the prosecution. The judgment was affirmed by the supreme court of Pennsylvania. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913. Upon appeal to the Supreme Court of the United States, the question was whether the prohibition of the sale and manufacture of oleomargarine—a wholesome article of food—was a lawful exercise by the state of the power to protect by police regulations the public health. In discussing this question,

the court, through Judge Harlan, said: "As it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large. . . . Both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property. . . . The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk, or cream from unadulterated milk, . . . will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In *State v. Layton*, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171, the supreme court of Missouri had before it an act of the general assembly prohibiting the sale of "alum baking powders," as unhealthy. In this case there was no question of deceit in the sale of the prohibited article. The statute upon which the prosecution was based embodied no idea of imitation of a superior article, and the court said: "No baking powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health. . . . While it is true that there are limits, under our system, to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any ar-

ticle of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void when the act on its face disclosed its arbitrary and unreasonable character, . . . if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of it, the legislature . . . has no right to absolutely prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. . . . 'That an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;'" citing *Cooley's Constitutional Limitations*, 6th ed., and numerous opinions.

It was decided in the case of *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 435, 73 Am. St. Rep. 201, 43 Atl. 771, that the legislature could, "under the police power," require the registration with "the live-stock sanitary board" of all herds of cattle of persons selling milk for food, and prohibit the sale of milk from premises found in an unsanitary condition.

The development in the science of bacteriology in recent years has conclusively proved that the microbe is a most potent agent in the propagation of contagious diseases, and that there is no more favorable element for their absorption, growth, and development than milk, and that milk contaminated by their presence communicates diphtheria, typhoid fever, tuberculosis, and other kindred contagious diseases, to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where "still slop" is produced are also highly favorable to the development of many forms of bacilli. The heat, dampness, and fermentation—all essential elements in the production of still slop—are favorable to germ growth. So that we may fairly assume that the general assembly, in the enactment of this statute, had sufficient information to justify the belief that milk from cows fed on still slop had ample opportunity to become impregnated with elements dangerous to the public health. Nearly every police regulation affects to some extent property rights; and, whilst this power cannot be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the legislature may not enact laws apparently necessary for the public health. We have reached the conclusion that, under the facts of this case, this court has no power to hold that the general assembly did not have under the

"police power" authority to enact the statute under which appellant was convicted.
Judgment affirmed.

Writ of error from Supreme Court of United States dismissed by stipulation January 30, 1905.

MISSOURI SUPREME COURT.

CITY OF ST. LOUIS, Plff. in Err.,
v.
GRAFEMAN DAIRY COMPANY.

(.... Mo.)

1. Information—motion to quash.

A motion to quash an information charging violation of an ordinance in several particulars will not prevail if a good cause of action is stated as to either of the defaults complained of.

2. Ordinance—severable provisions.

Provisions of an ordinance requiring milk dealers to register in the office of the health commissioner and pay a fee therefor, and those requiring them to pay a license fee, are severable, so that one may be sustained although the other fails.

3. Milk dealer—registration of.

Requiring milk dealers to register with the health commissioner and pay a registration fee is a valid police regulation.

Case Note.—The constitutionality of other provisions of the ordinance considered in this case was passed upon in *St. Louis v. Liesing, ante*, 918; *St. Louis v. Grafeman Dairy Co. ante*, 926; and *St. Louis v. Schuler, ante*, 928.

A very common method of regulating occupations and business coming within the scope of the police power is to require a license to be procured as a condition of the privilege of engaging therein; and ordinances requiring that a license be taken out by persons engaged in selling milk have uniformly been held valid when reasonable and free from discrimination.

The power of a city to exact a license fee from persons engaged in the sale of milk will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license and the regulation of the business. *Littlefield v. State*, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697, 60 N. W. 724.

An ordinance making it unlawful for any person to peddle or deliver milk in any cart, wagon, or vehicle through any of the public squares, streets, or alleys of the city, without first having been licensed to do the same; and providing that any person violating the ordinance shall be adjudged guilty of a misdemeanor and subjected to a fine; and giving to the mayor authority to grant licenses to

4. Same—authority of municipality.

Charter authority to provide for the inspection of milk empowers a municipal corporation to require venders to register in the office of the health commissioner.

5. Police regulation—fee as tax.

Requiring payment of \$1 as a registration fee for milk dealers is not invalid as a tax.

6. Milk—regulation of sale of.

The fact that selling milk is a lawful trade or business does not exempt it from reasonable police regulations.

7. Ordinance—provisions within title.

A provision requiring the registration of venders and the payment of a registration fee is within the title of an ordinance "regulating the sale of milk and cream."

8. Same—conflict with statute.

An ordinance requiring payment of a fee to the "city collector" is not void because the statute designates the one who is to receive it as the "license collector."

9. Milk venders—authority to license.

Charter authority to make provision for the inspection of milk, and to license occupations, authorizes a municipal corporation to license milk venders as distinguished from general merchants.

(June 28, 1905.)

ERROR to the St. Louis Court of Criminal Correction to review a judgment dismissing an information which had been filed in the First District Police Court of

such persons as in his judgment shall appear proper, and to fix the fees within certain limits,—was held valid in *People ex rel. Larrabee v. Mulholland*, 19 Hun, 548.

The right of a city to pass an ordinance making it unlawful for any person to sell, expose for sale, or deliver, milk within its limits without first procuring a license, and to provide punishment for its violation, was also sustained in *Chicago v. Bartee*, 100 Ill. 57.

So an ordinance requiring payment of a license fee by milk venders to pay the salary and expenses of the milk inspectors is held, in *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717, not to violate a statute forbidding the municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city.

And the requirement in an ordinance that an applicant for a license to sell milk within the city shall consent that the animals from which he obtains the milk shall be subjected to the tuberculin test was held, in *State v. Nelson*, 66 Minn. 166, 34 L. R. A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066, not to be unreasonable.

But an ordinance against selling milk without a license was held, in *Pierce v. Aurora*, 91 Ill. App. 674, to be invalidated by a provision exempting the owners of two cows only, peddling milk by hand.

the City of St. Louis charging defendant with violation of an ordinance for the regulation of the sale of milk. Reversed.

The facts are stated in the opinion.

Measrs. Charles W. Bates and William F. Woerner, for plaintiff in error:

That provision which requires venders of cream and milk to register with the health commissioner is strictly within the reasonable exercise of the ordinary police power lawfully delegated to the city.

St. Louis v. Galt, 179 Mo. 8, 63 L. R. A. 778, 77 S. W. 876; Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946; St. Louis v. Fischer, 167 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, 194 U. S. 362, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Ferrenbach v. Turner, 86 Mo. 416, 56 Am. Rep. 437; Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Blazier v. Miller, 10 Hun, 435; State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; State v. Broadbelt, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; Norfolk v. Flynn, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; State v. Nelson, 66 Minn. 166, 34 L. R. A. 318, 61 Am. St. Rep. 399, 68 N. W. 1006; State v. Dupaquier, 46 La. Ann. 577, 26 L. R. A. 162, 49 Am. St. Rep. 334, 15 So. 502; State v. Stone, 46 La. Ann. 147, 15 So. 11; Kansas City v. Cook, 38 Mo. App. 660; Weigand v. District of Columbia, 22 App. D. C. 559; Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588, 47 Am. St. Rep. 697, 60 N. W. 724; People ex rel. Larrabee v. Mulholland, 82 N. Y. 324, 37 Am. Rep. 568; State ex rel. Smith v. Smith, 69 Ohio St. 196, 68 N. E. 1044; Com. v. Wetherbee, 153 Mass. 159, 26 N. E. 414; Polinsky v. People, 73 N. Y. 65; McQuillan, Mun. Ord. § 484; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; 1 Tiedeman, State & Federal Control of Persons & Property, § 119, pp. 479, 480.

The provision requiring \$1 for registration fee is also valid.

Littlefield v. State, *supra*; Norfolk v. Flynn, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; People ex rel. Larrabee v. Mulholland, *supra*; St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Willis v. Standard Oil Co. 50 Minn. 290, 52 N. W. 652; Kinsley v. Chicago, 124 Ill. 359, 16 N. E. 260; Carthage v. Rhodes, 101 Mo. 175, 9 L. R. A. 352, 14 S. W. 181; St. Louis v. Knox, 6 Mo. App. 247; St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Tiedeman, State & Federal Control of Persons & Property, § 119, p. 483; Smith, 1 L.R.A. (N.S.)

Modern Law of Mun. Corp. § 1347; Beach, Pub. Corp. § 1255.

Mr. E. F. Stone for defendant in error.

Gantt, J., delivered the opinion of the court:

This action was commenced in the first district police court of the city of St. Louis for violation by defendant of § 10 of ordinance 20,808, relating to the licensing and regulation of the sale of milk and cream and the inspection thereof, "by carrying on the business of a vender of milk and cream without a license, and by failing to register as such at the office of the health commissioner, and for failing to pay the registration fee." A motion to quash was lodged in the St. Louis court of criminal correction, which was sustained and the suit dismissed, from which action the plaintiff city appeals to this court.

There are 17 grounds assigned for quashing the action. Seven of these grounds, to wit, 1, 2, 6, 7, 11, 15, and 17, are abandoned in this court. The remaining general grounds are as follows: "(3) Because the ordinance upon which the prosecution is based and predicated is unconstitutional and void, in that it is repugnant to the provisions of § 28, art. 4, of the Constitution of the state, and also of § 13, art. 3, of the charter of the city of St. Louis, in that said ordinance contains more than one subject and the subject-matter of said ordinance is not clearly expressed in the title of the same. (4) Because said ordinance is unconstitutional and void for the reason that the same is unreasonable in its provisions, and it is practically impossible to comply with and enforce the same. (5) Because said ordinance is unconstitutional and void for the reason that it is repugnant to § 4, art. 2, and § 30, art. 2, of the Constitution of this state, in that it deprives the defendant of his natural rights to liberty and the enjoyment of the gains of his own industry and of his liberty and property without due process of law. . . . (8) Because the said ordinance is unconstitutional and void, in that the charter of the city of St. Louis contains no express grant to the municipal assembly of the city to enact the same. (9) Because said laws and ordinances upon which this prosecution is based are void and unconstitutional, in that they were enacted under and contain an unlawful delegation of power. (10) Because the laws and ordinance in question are void and unconstitutional, in that they are a class legislation and provide for taxation under the form and name of a license. . . . (12) Because said ordinance is void and unconstitutional for the reason that it is repugnant to § 1, art. 14, of the Amend-

ments of the Constitution to the United States, in that it deprives the defendant of his liberty and property without due process of law and denies to him the equal protection of law. (13) Because the ordinance and section upon which the prosecution is based, is unconstitutional and void because it designates the wrong officer to collect the license fee, and is inconsistent with the state law, in that it gives neither the license commissioner nor license collector any authority or duty in the premises. (14) Because said ordinance and section upon which the charge herein is based and predicated is void and unconstitutional in this,—it discriminates between merchants who sell and deal in different classes of merchandise, and imposes a license upon milk venders different from and in addition to regular merchants' license. . . . (16) Section 10, upon which this prosecution is based, is void and unconstitutional because it was not uniform in its operation upon all milk venders or merchants, and is unequal, unjust, oppressive, and unreasonable."

The record does not disclose upon which of the seventeen grounds the court of criminal correction sustained the motion to quash. The 10th section of ordinance No. 20,808, is as follows: "Sec. 10. Every person, firm, or corporation who shall sell, or offer for sale, expose for sale, dispose of, exchange, or deliver, or with the intent so to do as aforesaid, have in his or her possession, care, custody, or control, milk or cream, in or from any store, stand, booth, market place, milk depot, warehouse, dairy, cow stable, or any building, erection, or establishment of any kind, or shall transport, convey, or deliver the same by wagon, carriage, or other vehicle, or by hand, shall first be licensed to do so, and shall register as a milk vender in the office of the health commissioner, and pay to the city collector the license fee provided for by this ordinance. Every person, firm, or corporation selling or disposing of milk or cream at retail shall, within thirty days after this ordinance goes into effect, and semiannually on the first Mondays of January and July thereafter, pay license fees as follows: Every milk or cream vender shall pay for the privilege of conducting a milk business, a registration fee of \$1 per annum; and, in addition thereto, each vender shall pay, for every wagon or other vehicle from which milk or cream is sold or delivered, a semiannual license fee of \$2.50. And every vender of milk or cream at wholesale, by which shall be understood, meant, and is hereby defined, a person or corporation selling to others milk or cream in quantities to any person, firm, or corporation, of 16 gallons or more on 1 L.R.A. (N.S.)

any one day, shall pay, semiannually, as aforesaid, a wholesale license fee of \$25. If any person, firm, or corporation commence or engage in the traffic or handling of milk or cream at any periods other than those hereinbefore mentioned, he or they, before doing so, shall pay the *pro rata* license fees in their cases required, which license so issued, as well as other licenses herein required, shall be good for a period ending with either the first Monday of January or the first Monday of July, as the case may be, following the issuance and delivery thereof. Every person, firm, or corporation violating this section, or any of its provisions, shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not less than \$25 nor more than \$100 for each and every offense."

The information charged four distinct violations of this § 10: First, in failing to observe that part of said section forbidding the sale of milk without a license; second, failing to register as a milk vender in the office of the health commissioner; third, failing to pay to the city collector the license fee of \$1 for registration; fourth, failing to pay the semiannual license fee of \$2.50 for each wagon used. There was no motion filed by the defendant to require a separate count for each of these offenses, nor any objection to their manner of statement in petition. The motion to quash must be treated as a demurrer to the whole statement, and, if there is a good cause of action stated as to either one of the defaults complained of, it was error to dismiss the case. It may be well to remark here that there was no evidence in the record that the defendant had already paid all that was required to pay a merchant's tax, which authorized it to sell milk, or that there is any such license required. The learned city counselor in this case waives the right to recover, but insists that the motion to quash the whole case was erroneous because the second and third offenses, to wit, the failure to register and the failure to pay the \$1 registration and inspection fee, were based on valid provisions which were not rendered invalid, even though the others were void.

1. The first assignment is that the criminal court of correction unreasonably dismissed the whole action. No motion to compel plaintiff to elect on which breach of the section it would rely was filed, and no objection was made on the ground of misjoinder in one count of the several breaches. In *Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750, this court, speaking of an ordinance, said: "Separate and distinct offenses mentioned disjunctively in the same section of the statute, all of which are of the same

class and punishable by the same penalty, may be charged conjunctively in one count, . . . and such count will be sustained by proof of one of the offenses charged." To the same effect, see also *Polinsky v. People*, 73 N. Y. 65. If, therefore, the complaint in this case alleged one or two breaches of valid provisions of the said ordinance, the court erred in quashing the whole action, even though the motion was well taken as to other alleged breaches; but it is insisted that the section in question refers to both registration and license and they are used conjunctively in the section, and are therefore not severable, and hence, if one of the provisions is invalid, then the whole section must fall. We cannot give our concurrence to this contention. That part of § 10 of ordinance 20,808, requiring a vender of cream and milk to register in the office of the health commissioner, and that part requiring the payment of \$1 as a registration fee, are clearly severable from the other provisions requiring the payment of a license tax. It has been uniformly ruled by this court that, where provisions of a statute or ordinance are severable, and are not interdependent one upon the other, the whole will not be declared void because a part is invalid, but the void parts or portions will be eliminated and the valid parts upheld and enforced, provided this will not defeat the substantial object of the enactment. *St. Louis v. St. Louis R. Co.* 89 Mo. 44, 58 Am. Rep. 82, 1 S. W. 305; *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317. The provision requiring venders of cream and milk to register with the health commissioner and pay a registration fee was clearly a valid police regulation, looking to the protection of the health and administering to the welfare of the public, and came strictly within the charter powers of the city of St. Louis, giving authority for the inspection of milk, and license from the inspector is a guaranty to the community that they can with safety purchase milk from the dealer thus registered and licensed. *St. Louis v. Fischer*, 167 Mo. 654, 64 L. R. A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, Affirmed in 194 U. S. 362, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673. This provision was clearly not a tax within the meaning of the law, but merely as an inspection fee, designed as a compensation for the service rendered. *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The fact that the selling of milk is a law-
1 L.R.A. (N.S.)

ful trade or business does not exempt it from reasonable police regulations. In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, the Supreme Court of the United States tersely stated the recognized rule on this subject: Regulations respecting the pursuit of a lawful business or trade are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the city to determine, and their determination comes within the proper exercise of the police power of the city; and, unless the regulations are so contrary, unreasonable, and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass. When it is considered that no article of food is more universally used by the public, and that no other article is perhaps so sensitive to atmosphere and vegetable influences as milk, and that it is within a common knowledge that impure milk is a fruitful source of disease and disorders, especially among children, it needs no discussion to show that the milk business is one which particularly falls within the power of the state and its municipality to regulate, and that the imposition of \$1 a year for registration is in no sense an onerous or unjust burden, and is intended as a pure police measure to cover in part the cost of inspection of milk and cream, is too plain for discussion. We have no hesitancy in holding that the statement, in so far as it charged a failure to register and the failure to pay the \$1 registration and inspection fee, stated a good cause of action, and therefore the criminal court of correction erred in quashing the whole case; nor is this section obnoxious to the objection that it infringes the charter provision requiring the subject-matter to be expressed in the title of the ordinance. This provision of the ordinance is clearly within the title and germane to the one controlling subject of regulating the sale of milk and cream. *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

2. It is, however, argued by defendant that the registration and license fees must both be paid to the city collector, and that no one else can refuse so to issue licenses thereon, and that for this reason this provision of the ordinance is void, because in conflict with an act of the legislature, approved March 26, 1901 (*Laws 1901*, p. 80), which created the office of license collector and

conferred upon him exclusive authority to collect the payment for all licenses and to issue licenses in the city of St. Louis. The answer to this contention is that there is no such officer as city collector, and that it is obvious from the ordinance itself that the person designated by that name is the license collector, and, at most, the provision of the section in this respect is an inaccurate designation of the proper officer who alone could be intended. There is, then, here no duty imposed nor authority conferred upon a wrong officer within the meaning of the argument of counsel for defendant and to sustain which he cites various authorities, but merely a misnomer of the only officer authorized to collect the registration fee.

3. Again, it is insisted by the defendant that the action was properly dismissed because there was no authority in the city to license venders of milk, and that they can only be classed as merchants and be required to pay a merchant's license, and not being specifically named in the charter a license cannot be imposed on that business. Section 26, art. 3, of the charter of St. Louis, expressly provides: "That the mayor and assembly shall have power in the city by ordinance not inconsistent with the Constitution or any law of this state, or of this charter, to make provision for the inspection of butter, cheese, milk, lard, and other provisions, and to license, tax, and regulate occupations and secure the general health." No more definite and adequate provision and authority could have well been given to the city to enable it to provide all reasonable regulations for the inspection of milk, and to exact a reasonable inspection fee therefor, and we have already ruled that, as to the inspection fee in this case, it is not a tax within the meaning of that term as understood in our Constitution and general statute; that the state and this city under this specific grant of power may make any business requiring police legislation pay the expense of regulating and controlling it; and that this may be done by exacting inspection fees from those engaged in the business is no longer an open question in this country. The authority will be found collated in a recent decision of the supreme court of Montana in *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, loc. cit. 1099. *State v. Bixman*, 162 Mo. 1, 62 S. W. 828.

4. The constitutionality of the ordinance as a whole has been examined and sustained in *St. Louis v. Liessing*, ante, 918, 89 S. W. 611, and we deem it unnecessary to again go over the various grounds upon which the ordinance has been attacked, but refer to the discussion had in that case, and content ourselves with saying that for the reasons therein given the ordinance is 1 L.R.A. (N.S.)

valid and constitutional as to the various sections assailed in this and the other cases argued with it at the same time.

The result is that the judgment of the Criminal Court of Correction of St. Louis must be, and is, reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Brace, Ch. J., and Marshall, Burgess, Valiant, Fox, and Lamm, JJ., concur.

INDIANA SUPREME COURT.

CITY OF ELKHART, Appt.,

v.

FORREST MURRAY.

(.... Ind.)

Ordinance—vesting discretion in officials.

An ordinance requiring the use on street cars of a particular fender, or "some other fender equally as good, to be approved" by certain officials, is invalid as vesting an arbitrary discretion in the officials.

(October 10, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Elkhart County in favor of defendant in an action brought to recover a penalty for the alleged violation of an ordinance. Affirmed.

The facts are stated in the opinion.

Messrs. John M. VanFleet and Vernon W. VanFleet, for appellant:

The city had power to compel the use of fenders upon street cars.

2 Rev. Stat. 1901, §§ 3541, 3615, 3616; *Walker v. Towle*, 156 Ind. 639, 53 L. R. A. 749, 59 N. E. 20; *Clark v. South Bend*, 85 Ind. 276, 44 Am. Rep. 13.

Case Note.—The above case is a distinct addition to, and development of, the previous rulings in Indiana on questions which the court says are the same in principle. It is suggested that a reference to the Indiana cases will show a distinction which, while it may not work a difference in the principle applicable to them and the **ELKHART CASE**, certainly will show that that case goes further than the early Indiana cases.

Bessonies v. Indianapolis, 71 Ind. 189, cited in the above case, held an ordinance void which made the granting of permits to locate or operate a hospital in the city discretionary with the common council. And in the case of *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 23 N. E. 312, the court declared invalid an ordinance declaring it unlawful to keep or store explosive oils without the permission of the common council, who are vested with discretion to grant such permission if the loca-

The burden rested upon appellee to show that the ordinance was unreasonable.

Booth, Street Railways, § 224; McQuillin, Mun. Ord. § 186; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351.

The city might designate the kind of fender to be used, and the burden rested upon appellee to prove that such use would be unreasonable and oppressive.

Central R. & Electric Co.'s Appeal, 67 Conn. 199, 35 Atl. 37; State, Consolidated Traction Co., Prosecutor, v. Elizabeth, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 140, 11 L. R. A. 410, 20 Atl. 1076; Paxson v. Sweet, 13 N. J. L. 196; Booth, Street Railways, §§ 224-230; Allen v. Jersey City, 53 N. J. L. 522,

22 Atl. 257; Oldfield v. New York & H. R. Co. 14 N. Y. 310; State v. Dubarry, 46 La. Ann. 33, 14 So. 298; State v. Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; State v. Stone, 46 La. Ann. 147, 15 So. 11; Boyd v. Montgomery, 117 Ala. 677, 23 So. 663; State v. Clarke, 69 Conn. 371, 39 L. R. A. 670, 61 Am. St. Rep. 45, 37 Atl. 975.

Messrs. Brick & Bates and Perry L. Turner, for appellee:

The ordinance was unreasonable, arbitrary, and void.

Pittsburgh, C. C. & St. L. R. Co. v. Crown Point, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. 587; Shelbyville v. Cleveland, C. C. & St. L. R. Co. 146 Ind. 66, 44 N. E. 929; Louisville, N. A. & C. R. Co. v. Howell,

tion, building, and the purpose of the keeping of such oils are deemed suitable and proper.

If, in the ELKHART CASE, the ordinance had forbidden the use of street cars without fenders, except with the permission of the common council, and had given to such officials the power to determine whether such permission would be granted, the ordinance would be more nearly identical with those referred to.

Certainly an ordinance which absolutely forbids the doing of a particular thing, except in cases where the consent of certain specified officials is obtained, without determining the rules that are to govern the granting of such consent, vests a more arbitrary discretion than an ordinance which, for the purpose of bringing about a well-understood and much-desired result, declares that all instrumentalities of a specified nature shall be equipped with a safety appliance, and leaves to specified officials the duty of determining whether the particular appliance furnished is sufficient to accomplish the purpose intended.

Possibly the difficulty of describing in an ordinance a fender which would be sufficient on cars of the different types and kinds likely to be operated in the municipality involved, so as to leave nothing to be done in the discretion of the officials, makes applicable the reasoning of the court in *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310, where, in upholding an ordinance forbidding the alteration or repair of wooden buildings within prescribed fire limits without the written permission of the fire wardens, it stated that no general rule could be established beforehand that would meet the emergencies of individual cases, and that, therefore, the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise that power wantonly.

The authorities are not in entire harmony in determining just how much discretion may be vested in a city official in enforcing a municipal regulation. As will appear from an examination of the following illustrations (L.R.A. (N.S.))

trative cases, some of the authorities hold that the ordinance should lay down rules and tests to guide and control the officer in the exercise of his discretion, while others are not so strict in limiting the official's discretion.

An ordinance prohibiting the use of a pleasure driveway with traffic vehicles is unreasonable and void where the enforcement of it is made to depend upon the discretion of the village trustees by requiring their permission for such use. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758. In this case the court said: "The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. . . . The ordinance should have established a rule by which its impartial enforcement could be secured."

In *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616, the court held invalid a statute providing that the board of pharmacy may, "in their discretion," issue permits to persons not registered as pharmacists, to sell domestic remedies and proprietary medicines. In so holding, the court said that the official discretion conferred upon the board is unregulated, and no conditions are prescribed upon which the permit is to issue.

In *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, an ordinance was held to be invalid which declared that all permits granted for steam boilers or engines might be revoked, and the steam engine or boiler removed, after six months' notice from the mayor, upon the ground that it did not prescribe regulations for the construction, location, or use of the engine, or lay down rules for the execution of the provision of the ordinance, but left the matter to the arbitrary discretion of a single public officer.

An ordinance is invalid which prescribes that a person must receive from the city building inspector a permit before erecting any building or addition thereto within the

147 Ind. 271, 45 N. E. 584; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261, 20 N. E. 115; *Booth, Street Railways*, § 231; *Brooklyn v. Nassau Electric R. Co.* 38 App. Div. 365, 56 N. Y. Supp. 609; *Buente v. Pittsburgh*, A. & M. Traction Co. 2 Pa. Super. Ct. 185.

Monks, Ch. J., delivered the opinion of the court:

This action was brought by the city of Elkhart for the violation by appellee of an ordinance which provides that "it shall be unlawful on and after May 1, 1903, to run any street car within the limits of said city without having securely fastened to its front end a Hunter automatic fender, made by the Hunter Automatic Fender Company, of Covington, Kentucky, or some other fender

equally as good, to be approved by the common council or its street committee." The court below held the ordinance invalid, and rendered judgment in favor of appellee.

There was no law in force in 1903, when said ordinance was passed, granting in express words to cities of the class to which appellant belonged the power to require street cars running within the city limits to be equipped with fenders. But, assuming that such power may be implied from those granted (*People v. Detroit United R. Co.* 134 Mich. 682, 63 L. R. A. 746, 749, 104 Am. St. Rep. 626, 94 N. W. 36, and cases cited), was said ordinance a reasonable exercise of that power? Such power, if possessed by the city, must be exercised by ordinance. The ordinance must contain perma-

city limits, and which gives such inspector absolute authority to grant or refuse such permit, without attempting to determine what shall be deemed necessary to constitute a safe building, or laying down any rules for the guidance or control of the building inspector in arriving at his decision, except that the building must be in accordance with the provisions of the statute which prescribes general building regulations. *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L. R. A. 621, 60 N. W. 156. *Kellam, J.*, dissented upon the ground that under the ordinance involved the granting of the permit was not left to the arbitrary, wilful, or capricious decision of the building inspector.

In *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, an ordinance was held invalid which declared it to be unlawful for any person to engage in the laundry business within the corporate limits without having first obtained the consent of the supervisors, except the same be located in a building constructed of either brick or stone, upon the ground that such ordinance does not prescribe a rule and condition for the regulation of the use of laundry property, but confers a naked arbitrary authority upon the board to give or withhold consent.

In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, where it was held that equal protection of the laws is not denied by a statute giving the mayor power to determine whether a person applying for license to sell cigarettes has good character and reputation, and is a suitable person to be intrusted with their sale, the court, in discussing the effect upon the statute of the granting of discretionary power, distinguished the *Yick Wo* Case, saying that the ordinance in question does not grant an arbitrary power such as existed in the *Yick Wo* Case, as the mayor was bound to grant a license to every suitable person of good character and reputation, and that the fact of fitness, submitted to the judgment of the officer, called for the exercise of judicial discretion.

In *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458, a statute forbidding 1 L.R.A. (N.S.)

the use of bicycles on a certain road without the permission of the superintendent of the road was upheld. In discussing the question as to whether the discretion vested in the superintendent was an arbitrary one, the court said, in opposition to this contention, that he is the agent of the law, and "is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute;" that the creation of the discretion implies that there may be occasions, or times, or seasons when bicycles may be used on the road.

The court distinguished the case of *Yick Wo v. Hopkins*, *supra*, on the ground that the manifest purpose of the ordinance in that case was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred were intentionally arbitrary. And the court also distinguished *Baltimore v. Radecke*, *supra*, in the same way.

In *Eureka City v. Wilson*, 15 Utah, 53, 48 Pac. 41, an ordinance was upheld which made the privilege of moving buildings upon a street dependent upon permission of the mayor, or the president of the city council, or, in their absence, a member of the council. This ordinance did not attempt to lay down any rules to guide the officials in granting their permission.

In *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673, it was held that equal protection of the laws was not denied by an ordinance forbidding the establishment or maintenance of a dairy or cow stable within prescribed limits without having received permission from the municipal assembly. The court, in reply to the defendant's main contention that the ordinance made it possible for the municipal assembly to discriminate between persons in granting the permit, held that the dispensing power must be vested in someone, and that the court was bound to assume that the discrimination would be made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood.

nent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action, and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons. *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312, and cases cited; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261, 20 N. E. 115; *Bessonies v. Indianapolis*, 71 Ind. 189; *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, 244; *State ex rel. Garrabad v. Dering (Re Garrabad)* 84 Wis. 585, 19 L. R. A. 858, 36 Am. St. Rep. 948, 952, 953, 54 N. W. 1104; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 27, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758, and authorities cited; *Noel v. People*, 187 Ill. 587, 591, 592, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Chicago v. Trotter*, 136 Ill. 430, 433, 26 N. E. 359; *State v. Tenant*, 110 N. C. 609, 612, 613, 15 L. R. A. 423, 28 Am. St. Rep. 715, 14 S. E. 287, and cases cited; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69, 23 Am. St. Rep. 558, and authorities cited pages 575, 576, 7 So. 885; *Newton v. Begler*, 143 Mass. 598, 10 N. E. 464; *State v. Mahner*, 43 La. Ann. 496, 498, 9 So. 480; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010.

In *Bessonies v. Indianapolis*, 71 Ind., at pages 197 and 198, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for anyone to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests in such case in the uncontrolled discretion of the common council and board of alderman. It is apparent that, under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case at their mere pleasure; and that no one can conduct or maintain a hospital within the city, however

harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them to grant or refuse the license as they might think . . . for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another under the same circumstances. No law could be valid which by its terms would authorize the passage of such an ordinance. The 23d section of the Bill of Rights provides that 'the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do." In *Richmond v. Dudley*, 129 Ind. 116, 117, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 314, this court said: "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply."

It will be observed that said ordinance requires the use of the particular fender described therein, or some other fender equally as good, to be approved by the common council or street committee. The ordinance, if valid, vests in the common council and street committee an arbitrary discretion, which they may exercise or not at their pleasure. They have the power to approve a fender for use by one street railroad company, and refuse approval of the same fender for use by another company, under the same circumstances and conditions. They also have the power to approve one or more fenders, and refuse approval of other fenders equally as good or better, whether made by the street railroad company or someone else, thus arbitrarily discriminating in favor of some manufacturers and against others. It is the fact that said officers have the power to do this, and not that they will do so, that renders said ordinance invalid.

Judgment affirmed.

TEXAS SUPREME COURT.

GULF, COLORADO, & SANTA FE RAIL-
ROAD COMPANY, Plff. in Err.,
v.

A. E. LARKIN.

(98 Tex. 225.)

Master's duty to inspect lanterns.

A railroad company which purchases lantern globes of good and standard make, from reliable manufacturers, is not bound to inspect them to protect employees, to whom they are delivered for use, from injury by their breaking while being cleaned.

(November 10, 1904.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of

Subject Note.—Duty of master to inspect tools or implements furnished servant.

- I. Scope, 944.
- II. Duty of master to inspect.
 - a. In general, 944.
 - b. When defect is obvious to employee, 948.
 - c. Ordinary tools in every-day use, 949.
 - d. When duty of inspection rests on employee, 950.
 - e. When tool is property of fellow workman, 950.
- III. Right of employee to assume that tools are safe, 950.
- IV. Right to complain of failure to inspect when safe tools are available, 952.

I. Scope.

This note is limited to a consideration of the master's duty to inspect ordinary tools and implements capable of personal use, as distinguished from machinery, and which do not form a component part of some mechanical device.

II. Duty of master to inspect.

a. In general.

It is a well-settled rule of law that the master must use ordinary care to inspect and keep appliances and tools in a reasonably safe condition for the use of his servants.

In *McDonald v. Standard Oil Co.* 69 N. J. L. 445, 55 Atl. 289, it is said that, among the legal principles fully recognized in the state, one is that, "under the contract of employment, it becomes the master's duty to use reasonable care to provide a proper and safe place in which the servant may work, to furnish suitable tools and implements with which he may work, to inspect and repair the apparatus at reasonable intervals and with ordinary prudence."

New Omaha Thompson-Houston Electric I L.R.A. (N.S.)

the District Court for Bell County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. J. W. Terry and A. H. Culwell, for plaintiff in error:

Where the evidence shows that the railway company had used ordinary care to furnish its servant with a lantern globe that was reasonably safe for the purpose for which it was intended; and that such globe was of standard make and pattern; and that, if there was a defect in the same, it was latent; and that, if plaintiff had taken any precautions he might have discovered its condition,—then no liability is shown against the railway company.

Light Co. v. Rombold (Neb.) 97 N. W. 1030, is not a case exactly in point, but the judge, in delivering the opinion, says that it is not only the duty of the employer to provide suitable tools and appliances in the first instance, but also to use all reasonable care in keeping them safe and serviceable, and to make seasonable inspection of the condition thereof with that end in view.

That reasonable care involves proper inspection is stated in *Byrne v. Eastmans Co.* 163 N. Y. 463, 57 N. E. 738.

In *Boyce v. Schroeder*, 21 Ind. App. 28, 51 N. E. 376, where an employee was injured because of the defective condition of a two-wheeled truck which he was using, it is said: The implied undertaking of the master is not that an implement furnished by him is absolutely free from danger in its uses, but that, according to its kind, it is sound and fit for the use to which it is to be put, so far as ordinary care and prudence can discover; and that he will exercise ordinary care and prudence to keep it in such condition.

A foreman in charge of workmen engaged in unloading grindstones from a car is bound to see that a stick used by thrusting it through the hole in the center of the grindstone to prevent it from sliding is ordinarily fit for the purpose for which it is used. It is his duty to use all fair means of knowing that the stick is sufficient for the purpose, to examine it, and to know its strength, to use ordinary care in selecting the stick, and to have ordinary knowledge at least of the strength of wood. *Lake Shore & M. S. R. Co. v. Corcoran*, 14 Ohio C. C. 377.

It follows, from the duty of the master to exercise ordinary care in inspection, that he is liable for an injury sustained by a servant, without fault, while using a defective tool, if the defect was discoverable by reasonable inspection.

In an action brought against a railroad company by an employee to recover for injuries sustained by reason of a defective lifting jack, there was some evidence in the record that the jack, on account of its cogs

Missouri, K. & T. R. Co. v. Dyer (Tex. Civ. App.) 8 Tex. Ct. Rep. 158, 75 S. W. 930; *Texas & P. R. Co. v. O'Fiel*, 78 Tex. 488, 15 S. W. 33; *Rogers v. Galveston City R. Co.* 76 Tex. 505, 13 S. W. 540; *Throckmorton v. Missouri, K. & T. R. Co.* 14 Tex. Civ. App. 222, 39 S. W. 174; *Quintana v. Consolidated Kansas City Smelting & Ref. Co.* 14 Tex. Civ. App. 347, 37 S. W. 369; *Fordyce v. Yarborough*, 1 Tex. Civ. App. 260, 21 S. W. 421.

If the defect in this lantern globe was patent, then plaintiff was in a better position to know and see its condition than any other man in the service, and his failure to so note the defects would preclude recovery herein.

Ft. Worth & D. C. R. Co. v. Ramp, 30 Tex. Civ. App. 483, 70 S. W. 568; *Bookrum v.*

being worn or broken, was sent in to the railroad shops of the company for repairs; and it was held that if, in repairing the worn or broken cogs of the jack, it was, or ought to have been, the practice of the shops, before the jack was sent out for use, to examine and inspect all parts, to ascertain if any other defects existed therein, and any reasonable examination or inspection at the shops would have disclosed the defect which caused the injury, then the company would be negligent in furnishing from its own shops a defective jack for use, even if the defect in the jack was not visible, or even if, after such repairs, a man of ordinary skill, prudence, and diligence would not, by any usual and ordinary inspection, have discovered the defect before the jack broke. *Kansas City & P. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292.

Where a servant was injured by reason of the splitting of the head of a jackscrew which had been given him to use, and the evidence showed that the injury to the plaintiff was due to the break in the jackscrew; that the break had begun before the jackscrew was given to the plaintiff for use; that the defect would have been discovered upon reasonable inspection; and that no such inspection was made,—it was held that from these facts the jury might find negligence on the part of the master; and a judgment in favor of the servant was affirmed. *Kennedy v. Chicago, M. & St. P. R. Co.* 57 Minn. 227, 58 N. W. 878.

In an action to recover for injuries sustained by a workman struck by a maul which slipped from the handle while in use by a fellow workman, the question of the master's negligence in permitting the maul to become loose, and to be used in that condition, is properly submitted to the jury on proof that the maul was wedged by one small wire nail only, which was insufficient, and that wedging was necessary, and that all handles were wedged when placed in the maul. *Deckerd v. Wabash R. Co.* 111 Mo. App. 117, 85 S. W. 982.

An employee injured while turning a jack-

Galveston, H. & S. A. R. Co. (Tex. Civ. App.) 57 S. W. 919.

Plaintiff ought not to be permitted to recover, for the reason that he had equal knowledge with the defendant company of the condition of the lantern globe, and he owed the duty to himself to use ordinary care in his own behalf.

Bonnet v. Galveston, H. & S. A. R. Co. 89 Tex. 72, 33 S. W. 335.

Messrs. Stanford & Watkins, for defendant in error:

Appellant furnished appellee a defective and dangerous appliance.

Texas & N. O. R. Co. v. Black (Tex. Civ. App.) 44 S. W. 673; *Missouri, K. & T. R. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508.

The law places the duty of inspection

screw with a crowbar which broke, whereby he was precipitated from an elevated position, is entitled to recover for the injury sustained, where the crowbar had been injured by fire several days previously, and a reasonable inspection by the master would have disclosed its defective condition. *Miller v. Great Northern R. Co.* 85 Minn. 272, 88 N. W. 758.

An inexperienced employee in the service of a railroad company was directed to line rails on a bridge on its road, and furnished with a chisel bar which was straight without any curve at the end, whereas he should have had a pinch bar, with a curved end, and, by reason of its being an improper instrument, it slipped in doing the work, and he was injured. A judgment for the plaintiff under these circumstances was reversed for another reason; but in the opinion in the case the court said: "If the master knows, or would have known if he had used ordinary care to ascertain the fact, that the tools which he provides for the use of his servant are unsafe, and his servant, without contributory fault, suffers injury thereby, the master is liable therefor." *Smith v. Gulf, W. T. & P. R. Co.* (Tex. Civ. App.) 65 S. W. 83.

In *Reichla v. Gruensfelder*, 52 Mo. App. 43, where it was alleged that the master had furnished the servant unsuitable and defective wrenches with which to do the work required, the court said: If the servant complains of defects in the instrumentalities of the business, he must show that the defects complained of were not obvious, and were unknown to him, and that the master had knowledge thereof, or might have had by ordinary inspection.

A workman on the section force of a railroad was engaged in drawing spikes from railroad ties, to do which he inserted a clawbar under the head of the spike, and, when the spike was driven so tight that it would not take the clawbar, a fellow workman drove it under with a stroke of a highly tempered spike maul, a splinter from which struck the eye of the person holding the

upon the master, and the master cannot shift this duty from himself to the servant by rules, bulletins, etc.

San Antonio & A. P. R. Co. v. Lindsey, 27 Tex. Civ. App. 316, 65 S. W. 668; *Galveston, H. & S. A. R. Co. v. Butchek* (Tex. Civ. App.) 66 S. W. 335; *Dupree v. Alexander*, 29 Tex. Civ. App. 31, 68 S. W. 739; *Bookrum v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 57 S. W. 919.

On petition for rehearing.

The ordinarily prudent man would certainly exercise a greater degree of vigilance in providing and keeping in proper condition a signal lantern designed to be used by his servant in the protection of a railway train than he would in furnishing a lantern to his servant to be used to give light while at work around his premises.

Gulf, C. & S. F. R. Co. v. Smith, 87 Tex. 348, 28 S. W. 521.

How can this court say, as a matter of

clawbar and caused him a serious injury. The court instructed the jury that it was the duty of the master to furnish safe and suitable tools to its workmen, and that, if it failed to do so, and the defect in the spike maul was known to the master, or could have been known by the exercise of ordinary and reasonable care, and the workman did not know of such defect, then they should find for the plaintiff; and this, on appeal, was affirmed. *Louisville & N. R. Co. v. Roberts*, 24 Ky. L. Rep. 1160, 70 S. W. 833.

In an action for an injury caused by a defective tool, an instruction that, if the jury believed that the plaintiff, who was employed by the defendant railroad company as section foreman or boss, was, while in the discharge of his duties as such employee, without carelessness or negligence on his part which contributed directly thereto, struck in his right eye by a piece of steel or iron flying off from a large hammer furnished him to use in the work of cutting iron rails, and that the hammer was unreasonably unsafe and unsound to use for the purpose for which it was furnished, and that the defective and unsafe condition of said hammer was unknown to the employee, and could not have been known to him by ordinary care or caution on his part, but was known to the employer, or might have been known by the exercise of reasonable care and diligence on its part, or its servant or agent who made or repaired it, they must find the issue for the plaintiff,—was upheld. *Johnson v. Missouri P. R. Co.* 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790.

In *Morris v. Eastern R. Co.* 88 Minn. 112, 92 N. W. 535, it was held on demurrer that a cause of action was stated by a complaint alleging that the defendant company carelessly and negligently provided for the use of a minor in its employment a "flogging hammer" so called, to be used by him and a coemployee in connection with a side set (a cold chisel with a handle attached), in cut-

law, that no duty of inspection of such lantern rests upon the railway company?

4 *Thomp. Neg. New ed.* § 3774; *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 165; *International & G. N. R. Co. v. Elkins* (Tex. Civ. App.) 54 S. W. 931; *Galveston, H. & S. A. R. Co. v. Butshek*, 34 Tex. Civ. App. 194, 78 S. W. 740; *Gulf, C. & S. F. R. Co. v. Davis*, 35 Tex. Civ. App. 285, 80 S. W. 253; *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319; *Johnson v. Missouri P. R. Co.* 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343.

Brown, J., delivered the opinion of the court:

Larkin had served as a fireman for about eight months prior to his injury. Upon each locomotive there were two lamps,—one white and the other red; the latter be-

ting off rivets from the tank frame of a locomotive tender, in the shop in which they worked; that this hammer was manufactured by the company itself; that it was defective and dangerous, in that the surface of its head was not smooth, and contained several holes or indentations which made it a dangerous, unsafe, and unfit tool; that these defects were the result of careless and improper manufacture; that, during the process of manufacturing, the defendant could readily have discovered these holes or indentations, in the exercise of ordinary care and diligence; that, had said hammer been properly inspected by experienced men before it was turned over to defendant's employees, these defects could have been discovered readily; and that the injury complained of was caused by the defect stated.

A master is liable to a servant injured by the breaking of the hickory handle of a hammer, which the master had neglected to inspect, where such wood, when cut green and left with the bark on, is liable to become decayed and worm-eaten, and the master could, by a reasonably prudent and careful inspection of the handle of the hammer, have ascertained the fact that it had been cut for so long a time as to render it unsafe for use. *Baltimore & O. S. W. R. Co. v. Amos*, 20 Ind. App. 378, 49 N. E. 854.

It is the duty of the master to inspect tools furnished his employees, and he is liable to one injured by being struck by the head of a maul which flew from its handle when wielded by a fellow workman, if the maul was originally defective, or the master had notice of its defective condition after it became so and allowed it to be used, or, perhaps, left it where it was liable to be used, or if he would have had notice of its defective condition if there had been a proper inspection of the tools, had there been an opportunity for such inspection after it became defective. *Dwyer v. Shaw*, 22 R. I. 648, 50 Atl. 389.

ing intended for use at night in giving signals. Larkin had been running upon this engine for three days, and had used the same lantern during that time, unless it had been changed the night before his injury, while the engine was in the roundhouse at Temple. He had the exclusive possession and control of the lantern, and it was his duty to keep it clean and see that it was in proper condition for use. No other person was authorized to clean it. The lantern was usually left upon the engine when the latter was not in service. There was no evidence that the railroad company caused this lantern to be inspected. While on the engine in the daytime, running from the town of Temple to Cleburne, Larkin undertook to clean the globe of the red lantern; and in doing so the glass globe broke and cut his left wrist, severing the tendons, from which injury his hand became seriously affected, by drawing down and stiffening of

the fingers. Upon a trial in the district court of Bell county, Larkin recovered a judgment against the railroad company, which was affirmed by the court of civil appeals.

The railroad company at the trial asked the court to give to the jury the following charge, which was refused by the court: "The jury is charged that, the plaintiff having failed to show that he was injured by or through any act of negligence on the part of the defendant, you will return a verdict for the defendant."

The only negligence charged against the plaintiff in error is that it failed to have the lantern which was furnished to the plaintiff inspected before furnishing it, or after it had been furnished, and while he was using it. Inspection is only the means by which the master exercises the care required of him for the servant's protection. It is not the duty of a railroad company to inspect

It is the duty of a master to keep and maintain a crucible in which molten metal is carried in a reasonably safe condition for use; and a servant may recover for injuries due to a defect in the crucible, of which the servant had no knowledge, and could not have known by the use of ordinary care, but of which the master had knowledge, or might have known by the exercise of ordinary care. *Ahrens & O. Mfg. Co. v. Rellihan*, 26 Ky. L. Rep. 919, 82 S. W. 993.

But an iron moulder injured by reason of the breaking of the handle of a ladle containing molten iron which he was assisting in carrying, whereby the molten metal was spilled upon him, is not entitled to recover in the absence of evidence that the defect was an obvious one which the master might have discovered by the exercise of ordinary care. *Reilly v. Campbell*, 8 C. C. A. 438, 20 U. S. App. 334, 59 Fed. 990.

In *McGrath v. Delaware, L. & W. R. Co.* 69 N. J. L. 331, 55 Atl. 242, an employee who placed a "sprag" or wedge-shaped piece of oak wood on the track in front of a car to stop it, as was customary, was injured because the sprag, being rotten, broke, allowing the car wheel to run over his hand. It was held that, if the master, for the sole object of a test, had caused the block of which the sprag was made to be sawed in five separate dimensions, i. e., with the grain, across the grain, and obliquely, besides two lateral cuts but 2 inches apart, without disclosing any defect, it could scarcely be said that he had not used ordinary care to acquaint himself with the structure of the material he was using; and, it appearing that this was exactly what was done in the course of the manufacture of the sprag, the judgment of the supreme court rendered in favor of the master was affirmed.

There was a strong dissent in which three of the judges joined, the one writing a short opinion saying that the fact that the sprag

was unsound, as shown by the rottenness of the wood fibers when examined after the accident, was proved and hardly disputed at the trial; that the opinion of the court demonstrates the great probability, if not the certainty, that such unsoundness would be disclosed by the various sections to which the material had been subjected in making the sprag, and that, this being so, two questions remain: First, whether it could reasonably be decided that the maker of the sprag, who was the *alter ego* of the master, and a worker in wood, would have perceived the defect and discarded the material if he had exercised due care in the process of manufacture, and a due regard for the safety of those who were to use the sprag; and, second, whether it could reasonably be decided that the defect might have escaped the observation of the servant, even though he exercised due care in using the sprag. That considering, on the one hand, the ample opportunity for examination afforded to the manufacturer, and the high degree of care required of him, in view of the serious danger incurred by the use of a rotten sprag, and, on the other hand, the right of the user to presume that sound material had been employed, and the slight opportunity for observation afforded to him as he picked up the sprag to stop an advancing car, it was lawful to submit each of these questions to the jury, and that the jury had the legal right to decide both of them in favor of the servant.

In *Clements v. Alabama G. S. R. Co.* 127 Ala. 166, 28 So. 643, the plaintiff, who was employed as a member of the defendant company's bridge crew, was thrown from the trestle or bridge on which he stood and injured while using a steel bar to put the track in alignment. It was alleged that the steel bar which was furnished the plaintiff for use was blunt, dull, and in defective condition, but there was no averment that the defendant knew, or ought to have known,

every implement or tool that it furnishes to its employees, but that duty arises whenever the machinery or implement is of such character that a man of ordinary prudence would, under the same circumstances, inspect the machinery or implement as a precaution against injury to the servant. If an individual, being an ordinarily prudent man, would not have inspected the lantern before furnishing it to the servant, or after it had been furnished and while it was in use, then the railroad company was not required to do so in this case. A master is not required to inspect the common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses. 20 Am. & Eng. Enc. Law, p. 89; *Miller v. Erie R.*

Co. 21 App. Div. 45, 47 N. Y. Supp. 285; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Wachsmuth v. Shaw Electric Crane Co.* 118 Mich. 275, 76 N. W. 497. In *Miller v. Erie R. Co.* a switchman was engaged in aiding to move some cars by means of a push pole, which broke, by which he was injured. In a suit for damages it was alleged that the railroad company failed to have the pole inspected, and was therefore negligent. The supreme court of the New York appellate division said: "There is no duty resting on an employer to inspect, during their use, those common tools and appliances with which everyone is conversant. If a spade, a hoe, or a push stick either wears out or becomes defective, the employer may ordinarily rely on the presump-

that the bar was unsafe and unsuitable for the purpose for which it was furnished to be used, and a demurrer to the complaint was upheld.

See note on "Knowledge as an element of an employer's liability to an injured servant," in 41 L. R. A. 33, subdivisions VII. and VIII. of which treat of the master's duty of, active inspection of instrumentalities when first used and while in use.

But inspection need not be attempted when it would be inefficient or is impracticable.

One of the questions in *Shea v. Wellington*, 163 Mass. 364, 40 N. E. 173, was whether there was evidence of negligence on the part of the master in failing to have certain instruments known as exploders of dynamite cartridges used in blasting rock inspected after he had bought them and before they were used. It was shown that he had procured the best article of its kind, manufactured by a reputable company, and the court directed a verdict for the master on the grounds that it was obvious that an inspection could not be effectively made unless a skilled expert was employed, possessed of the mechanical and chemical knowledge involved in the manufacture of the exploders, and because, upon the admitted facts, the exploders were manufactured with a view of rendering such inspection unnecessary, being composed of dangerous chemicals put up in boxes to be sold in the market, and to be used as they were purchased by quarrymen, who would not be competent to inspect them.

b. When defect is obvious to employee.

If, however, the defect which caused the injury was one apparent upon ordinary inspection by the employee, or one within the power of a reasonably careful employee to discover, his failure so to do is negligence which will preclude him from complaining of the master's failure to inspect.

In *McGrath v. Delaware, L. & W. R. Co.* 68 N. J. L. 425, 53 Atl. 207, it appeared that, on occasions when cars could not be stopped

by the use of a brake, it was the custom of the company and the duty of the employee and other servants to use what was called a "sprag" to bring them to a standstill. This sprag was a wedge-shaped piece of oak wood, and was placed on the track in front of the wheel. On the day of the accident the plaintiff saw a car coming down the dock, in the direction of the chute where it was intended to be stopped, and saw that the brakeman in charge of it was not able to control it, and that it would overrun the chute. In order to prevent this from occurring he took up a sprag, which he had previously selected, from among those furnished by the company to its employees, and placed it upon the track in front of the wheel of the car. The sprag, although new, being rotten, broke, and the wheel ran over his hand crushing it. It was held that, while the master's duty to furnish a proper implement for the purposes intended was undoubted, yet, inasmuch as the employee, by an ordinary inspection, could have seen that the sprag was rotten, he was not entitled to recover for his injury. The court says in its opinion that, although the master is bound to use reasonable care in the selection of the appliances to be used by the servant, and to make proper inspection thereof, yet this does not absolve the latter from all responsibility with relation to their condition. The duty of self-protection requires him to make such inspection of the appliances furnished to him for his work as will disclose to him any obvious defect therein, and to exercise a proper watchfulness to see that, during use, they do not become so defective as to be more dangerous than they otherwise would be. Failure to do this is negligence on his part which will prevent a recovery for an injury received.

It is as much the duty of the employee as of the employer to have a pike pole used in bracing electric-light poles sharpened and repaired when necessary, provided the means are furnished by the master with which the repairing may be done. A reasonably prudent employer performs his duty by furnishing proper pike poles, and a reasonably

tion that those using the article will first detect its defect." [21 App. Div. 46.] In the case of Wachsmuth v. Shaw Electric Crane Co. the injured party was using a ladder which was defective, through which defects he was injured. The supreme court of Michigan said: "In heavy or complicated machinery, and where the person called upon to use the appliance may not possess the skill to detect unfitness, or the opportunities to do so, the law may require diligence upon the part of the master; but where the appliance is a common tool, of which the man who uses it is necessarily well qualified to judge, and, who, when he uses it, has an opportunity to know its condition, a distinction may be made, and the master may rely

upon the servant to inform him of the defect, or not use the tool if it is unsafe."

The undisputed evidence in this case shows that the railroad company purchased its lanterns from reliable manufacturers, and that they were of good and standard make. It was not proved that this particular globe was inspected, but the evidence, which was undisputed, shows that actual inspection was made of a large per cent of the globes which were purchased. But we are of opinion that no ordinarily prudent man who is buying a lantern for use upon his own premises, in the ordinary affairs of life, would think of going into a minute examination of it to detect some latent defect; nor could it be said that such man, after purchasing the lantern and deliv-

prudent employee would not use a pike pole after the point has become dull and blunt. Towne v. United Electric Gas & Power Co. 146 Cal. 766, 70 L. R. A. 214, 81 Pac. 124. The court said: "It is the duty of the employee to use ordinary care and skill, and it certainly is the duty of the employee to know whether the tools with which he is working have become dull or in need of sharpening. Having eyes, he must use them, and, being informed, he must act upon the information."

That the employee may not recover if the defect was an obvious one is also incidentally recognized in the following cases: Reichla v. Gruensfelder, 52 Mo. App. 43; Johnson v. Missouri P. R. Co. 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790,—*supra*, II. a; Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Indiana Natural & Illuminating Gas Co. v. Marshall, 22 Ind. App. 121, 52 N. E. 232; Galveston, H. & N. R. Co. v. Newport, 26 Tex. Civ. App. 583, 65 S. W. 657; Guthrie v. Louisville & N. R. Co. 11 Lea, 372, 47 Am. Rep. 286,—*infra*, III.

c. Ordinary tools in every-day use.

In a few instances the courts have made a distinction in regard to what they call the small and common tools in every-day use, and have held the master relieved from responsibility for their freedom from dangerous defects, on the theory that the employee, being in the habit of using them, is as much or more familiar with their nature and construction than the master himself, and, therefore, that in the employee, in the exercise of reasonable prudence, lies the duty of their inspection.

It has been held that the master's duty of periodical inspection does not extend to the small and common tools in every-day use, of the fitness of which for use the servants who use them may reasonably be supposed to be better judges than the master, or any person that he can employ for the purpose of inspection. Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497.

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So, in Miller v. Erie R. Co. 21 App. Div. 45, 47 N. Y. Supp. 285, where it appeared that the plaintiff, while engaged in the work of shifting cars, used what was known as a push pole, which proved to be defective, a charge by the trial court that "proper inspection for the purpose of discovering defects which may arise from use is part of the duty which the company owed the plaintiff, as well as reasonable inspection to determine its fitness before it was used,"—was held to be improper, as instructing the jury that they might find the defendant negligent in failing subsequently to inspect the pole; and it was held that there was no duty resting on the employer to inspect during their use those common tools and appliances with which everyone is conversant. The court said further: "If a spade, a hoe, or a push stick either wears out or becomes defective, the employer may ordinarily rely on the presumption that those using the article will first detect its defect."

In Garnett v. Phoenix Bridge Co. 98 Fed. 192, it was held that an employee who endeavored to turn a nut with a wrench, and who set the wrench on the nut, which was about 2 feet above his head, and pulled with his right hand on the end of a piece of pipe with which he had enlarged the leverage of the wrench, which opened in the jaw, in consequence of which he fell from the trestle on which he was standing, and was seriously hurt, could not recover of his employer on the ground that the instrument furnished him was an improper tool. The reason given for the decision by the court is as follows: "The knives of a planing machine, the saws of a sawmill, the revolving wheels of a factory, and many other mechanical devices and accessories, are, in their nature, dangerous, and therefore the employer is justly required to adopt proper measures for the protection of those engaged in and about their operation; but the notion that the conductors of the vast industrial enterprises which distinguish our age and country are deficient in ordinary prudence if they do not take care that none of the many to whom they give employment shall be hurt through the breaking

instruction that, if they found the tool inspector furnished the servant the hammer, they should take into account that circumstance, in deciding whether the latter was excused from not discovering or knowing its defects; and further, that, where the master employs an agent or inspector to care for and inspect its tools, and the servant is given a tool by such inspector, the servant has a right to presume it to be in proper condition,—reasonably safe for use,—were upheld.

IV. Right to complain of failure to inspect when safe tools are available.

A servant who uses a defective tool or improper implement when a suitable one is at hand cannot complain that the master has failed to inspect the appliance used.

Thus, in *O'Brien v. Missouri, K. & T. R. Co.* 36 Tex. Civ. App. 528, 82 S. W. 319, where a railroad employee used a worn-out wrench which had been left about the premises, although a tool house containing suitable tools was near at hand, and was injured, the court denied that any duty of inspection rested on the employer.

In *Hefferen v. Northern P. R. Co.* 45 Minn. 471, 48 N. W. 1, 526, it appeared that the plaintiff, who was a minor, had been at work for the defendant company for two years and a half, doing various kinds of work, and on the occasion when the accident occurred, which was the subject of the action, he was directed by the foreman of the defendant to go to work with another workman cutting off the heads of rivets on the tank of a locomotive. For this purpose a tool was used known as a "side set." It was made of steel and had a cutting edge, and the opposite side, which the court designated as the "head," was formed for and intended to receive the blow of a hammer. While the plaintiff was holding the side set and the other man was using the hammer, a thin scale of steel broke from the head of the side set as the hammer fell upon it, and was driven into the plaintiff's eye. The uncontradicted evidence in the case showed that the defendant kept a tool repairer in the shops, whose business it was to repair the tools; and kept a full supply of tools of this kind in the closet and scattered about the shop; that when a workman was to use a tool he would get it for himself, selecting such as he required; and that, when a workman found that a tool needed to be repaired, he would take it to the tool repairer for that purpose, and there was nothing to show that in selecting the tools for use the workman had not the opportunity to act deliberately, and select such as might be fit for use in the work to be done. In view of all these facts, it was held that a judgment for the plaintiff must be reversed.

A servant, who, while engaged with others in making holes through a plate or section of boiler iron, was struck in the eye by a piece of steel which flew from a sledge hammer wielded by one of his fellow workmen, is

not entitled to recover when the improper or dangerous condition of the tool would have been disclosed by inspection, and the use of the particular hammer was not directed or obligatory, but a suitable one was available, and there was a tool repairer in the shop whose special business it was to repair the tools. *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350.

An experienced machinist injured by the slipping of a dull pinch bar which he had selected for the purpose of attempting to move a locomotive in a roundhouse is not entitled to recover. The rule that the master must furnish proper, perfect, and adequate tools and appliances for the proposed work is not applicable where the servant has knowledge equaling that of the master of the machinery or appliances employed in the performance of the work devolving upon him, or when, by reasonable attention, he might have such knowledge. This is especially true when the servant has the selection of the tools and appliances with which his work is to be done. A pinch bar is a simple mechanical tool. By inattention to its condition a servant takes upon himself the risk of there being some defect in it. *Holt v. Chicago, M. & St. P. R. Co.* 94 Wis. 596, 69 N. W. 352. A. W. R.

WISCONSIN SUPREME COURT.

HIRAM L. HART, Appt.

v.

CITY OF NEILLSVILLE, Respt.

(.... Wis.)

1. Drains—defective plan.

A city having, by its governing body, duly adopted a plan for a sewerage system, and executed the same, it is not liable for injuries caused thereby to private property, not involving an unconstitutional taking thereof, produced by defects in such plan.

2. Same.

The basic principle of the rule aforesaid is that the due adoption of the plan re-

Headnotes by MARSHALL, J.

Case Note.—The court in the above case, by placing the liability of the municipality upon the ground that no plans of drainage had in fact been adopted by the municipal authorities, and thereby avoiding the conflict between the decisions absolving the municipality from liability for injuries resulting from a defective plan of drainage and those holding that such nonliability does not exist unless the plan has been adopted by competent authorities, finds a very narrow resting place, and one which could exist only on rare occasions. The adoption of plans is one of the first things to be done in case of any drainage improvement. It is absolutely necessary if the cost is to be placed on the abutting property owners, and it

quires the exercise by the governing body of the city of discretionary authority of a quasi judicial nature.

3. Same—absence of plan.

In case a city constructs a sewerage system, not according to any plan, or according to any plan adopted in the manner aforesaid, the rule stated does not apply.

4. Pleading—construction.

Where a pleading is open to construction, that reasonable meaning which will support it should be adopted, rather than one which will defeat it.

5. Drains—knowledge of defects.

Though a city is not liable for damages to private property caused by mere defects in the plan of its duly adopted and executed sewerage system, if it acquires knowledge of such defects, and that, unless they are remedied, they will produce direct injury to

private rights, it should exercise ordinary care to prevent such a result, and is responsible for damages caused by failure in that regard.

6. Same—connection—injury.

If, by reason of defects in a plan of sewerage contemplating that private property will, as a matter of right, be connected therewith, such property is injured because of water accumulated in a sewer flowing therefrom, through such a connection to such property, the injury is direct within the meaning of the last foregoing rule.

7. Same—effect of connection.

Where, as a matter of right, a private drain is constructed, connecting private property with a main sewer through an opening left by the city therefor, and damages result to such property by accumulated sewage flowing from such sewer to such property,

would probably be necessary in case public funds were to be expended therefor. *Farnham, Waters*, p. 1020.

Therefore, the cases would be rare where no plans had been adopted. The cases seem to agree, however, that, if in any case a municipality can be relieved from liability notwithstanding defective plans, it must have exercised the power given it, and not attempted to delegate the formation of the plans or adopt those devised by others. *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743.

The great weight of authority is in favor of the rule that, if the municipality commits a direct trespass upon the property of a private individual, although it is in consequence of the adoption of a plan, its judicial discretion will not save it from liability therefor. As stated in *Farnham, Waters*, p. 1136, it has no discretion to commit a trespass, and, if the plans adopted by it necessarily result in so doing, it is just as liable as though it deliberately turned the water out of its course onto the abutting land. *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Lehn v. San Francisco*, 66 Cal. 76, 4 Pac. 965; *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484; *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *King v. Kansas City*, 58 Kan. 334, 49 Pac. 88. Even the Wisconsin court seems to have given its assent to this doctrine in *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27, in holding that a municipal corporation is liable for damages caused by the overflowing of property by reason of the insufficiency of the catch basin of a sewer, unless such insufficiency is due to an extraordinary storm such as a person of ordinary prudence would not anticipate and provide against.

Even when a direct trespass is not committed on the abutting property there is a strong tendency on the part of the courts to hold that it is not sufficient that the plan should be adopted by the municipal authorities, unless they were competent to deal with the question, and had such technical

knowledge that their decision would be regarded as an intelligent one.

Farnham, Waters, p. 1140, states that members of a common council, having no expert knowledge of the size of pipe necessary to carry a certain quantity of water, cannot be permitted to determine that water from a certain section shall all be made to flow in one direction, and that a pipe of a certain size shall be provided to carry it away, when such pipe may be entirely inadequate for the purpose.

Upon this point, in addition to the cases cited in the opinion in *HART v. NEILLSVILLE*, see *Harrigan v. Wilmington*, 8 Houst. (Del.) 140, 12 Atl. 779.

Herring v. District of Columbia, 2 Mackey, 87, states that carelessness in the selection of an agent to prepare the plans is as much a ground for liability on the part of the municipality as is negligence in the construction of the work.

The decisions absolving the municipality from liability in case a plan has been selected are mostly founded on the English doctrine, in which the power of Parliament is absolute, and its authorization of the selection of a plan sufficient to absolve the municipality from all liability (*Dixon v. Metropolitan Bd. of Works*, L. R. 7 Q. B. Div. 418); or on the peculiar New England theory that the officers in charge of the work are not the servants of the municipality, so that it is not liable for their acts. Thus, *Boston Belting Co. v. Boston*, 149 Mass. 44, 23 N. E. 320, states that the reason for exempting a municipal corporation from liability for injuries caused by a defect in the plan or system of sewerage built by order of the mayor and aldermen is that the mayor and aldermen, in laying out sewers, act as an independent body of officers, and that the city has no control over, and no responsibility for, the plan or system adopted. This theory is quite general in the New England states, as will be seen by consultation of *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, 19 Atl. 829; *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72.

the mere circumstance that without such drain no such result would have happened will not save the municipality from liability for such damages.

(October 3, 1905.)

A PPEAL by plaintiff from an order of the Circuit Court for Clark County sustaining a demurrer to a complaint filed to recover damages for injuries to plaintiff's property alleged to have been caused by the wrongful construction and maintenance of a sewer. Reversed.

Statement by **Marshall, J.:**

This is an appeal from an order sustaining a demurrer to the complaint for insufficiency. The material facts stated in the pleading for a cause of action are these: For more than twenty years last past plaintiff has owned and occupied as a family home lots 5, 6, 16, 17, 18, and 19, block 8, Hewitt's addition to the city of Neillsville. Under all parts of the dwelling house thereon there is a basement walled up with stone, and a well adjacent thereto upon which the family depend for a water supply. From time to time prior to July 3, 1903, without having adopted any system therefor, said city, by its authorized officers, constructed a sewer system and maintained the same to drain property abutting upon some of its streets. In July, 1902, at the expense of the owners of abutting property said city constructed a sewer along the street in front of plaintiff's lots for the purpose of draining such abutting property, plaintiff paying the cost thereof apportioned to his lots. An opening was left in such sewer to enable him to connect therewith a drain leading from his basement thereto. In October thereafter such connection was made. The sewer system of the city was negligently constructed and maintained in that no plan was adopted therefor by the city; the pipe on the street last mentioned from the outlet thereof was too small to properly dispose of the sewage turned into it; catch basins were so placed as to direct into the sewer surface water much in excess of its capacity, the sewer was not laid at a proper slope to make it efficient, a part of the sewer system was so constructed as to turn surface water flowing down a ravine known as "Goose creek" into it, to such an extent as of itself to fill the pipe so that the added water from catch basins and ordinary drainage necessarily caused sewage to back up into the sewer in front of plaintiff's premises and through the pipe leading to his property into his basement. By reason of such defects, at various times between July 3, 1903, and March 24, 1904, such basement and the well aforesaid were

flooded from the sewer, rendering the well useless and the home for considerable periods of time untenable, and at other times unsuitable for residence purposes, causing the basement wall under the house to settle and to a considerable extent to fall, and the house to settle and crack and otherwise to be injuriously affected, to his damage in the sum of \$1,500. The defendant knew during the time of the construction of the sewer system that it was not proceeding according to any plan having regard to the work that would be required of such system; that the work was being negligently done, and that the system would be inefficient. After the system was constructed the defendant had notice of the insufficiency aforesaid which caused the damage complained of, and that such damages could be prevented by diverting the waters of "Goose creek" from flowing into the sewer pipes, and enlarging the main pipe at the outlet leading into O'Neill creek. When plaintiff connected his basement with the sewer, as aforesaid, he did not know of any of the defects which thereafter caused the damages complained of. He was careful at all times to guard against his property being damaged in the manner in which it was. The damages were caused wholly by the negligence of the defendant, as stated.

Mr. James Wickham, with Messrs. Mars. & Schoengarth, for appellant:

A city is liable for damages caused by its negligence either in its construction or maintenance of a sewer.

Gilluly v. Madison, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27; Harper v. Milwaukee, 30 Wis. 365; Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; Murphy v. Indianapolis, 158 Ind. 238, 63 N. E. 469; Litchfield v. Southworth, 67 Ill. App. 398; Louisville v. Norris, 111 Ky. 903, 98 Am. St. Rep. 437, 64 S. W. 958; Rowe v. Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Chalkley v. Richmond, 88 Va. 402, 29 Am. St. Rep. 730, 14 S. E. 339; 2 Current Law, 1636; Elliott, Roads & Streets, 2d ed. § 471.

A municipal corporation has no more right than a private individual to construct or maintain a sewer in such a way that it becomes a nuisance.

Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668.

A person who lawfully connects his house drain with a public sewer, built at the expense of abutting property, can recover damages for injury caused by the water backing up from the sewer through the house drain and flooding his premises.

Ft. Wayne v. Coombs, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *Leavenworth v. Casey*, 1 Kan. Dassler's ed. 124, appx.; *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826; *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680; *Masterton v. Mt. Vernon*, 58 N. Y. 391; *Wendell v. Troy*, 4 Keyes, 261; *Buchanan v. Duluth*, 40 Minn. 402, 42 N. W. 204; *Evers v. Long Island City*, 78 Hun. 242, 28 N. Y. Supp. 825; *Butler v. Edgewater*, 2 Silv. Sup. Ct. 3, 6 N. Y. Supp. 174; *Tate v. St. Paul*, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158; *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Barton v. Syracuse*, 36 N. Y. 54; *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469; *Tiedeman, Mun. Corp.* p. 736; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Wilson v. Eau Claire*, 89 Wis. 47, 61 N. W. 290.

The corporation is liable when the defect complained of is not a mere error of judgment, but an act of negligence in providing a sewer system that is wholly inadequate to discharge the amount of water intended to be carried therein.

Seaman v. Marshall, 116 Mich. 327, 74 N. W. 484; *Seifert v. Brooklyn*, 101 N. Y. 141, 54 Am. Rep. 664, 4 N. E. 321; *Tate v. St. Paul*, *supra*; *Lehn v. San Francisco*, 66 Cal. 76, 4 Pac. 965; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 24, 9 N. E. 139; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 696; *Seymour v. Cummins*, 119 Ind. 148, 5 L. R. A. 126, 21 N. E. 549; *Leavenworth v. Casey*, *supra*; *Louisville v. Norris*, *supra*; *King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. 1012.

Where a city has constructed a sewer according to plans previously adopted, and has notice of the fact that the sewer is defective, but fails to remedy the defect, the city is liable.

Seaman v. Marshall, *Seifert v. Brooklyn*, and *Tate v. St. Paul*, *supra*; *Betterly v. Scranton*, 208 Pa. 370, 57 Atl. 768; *King v. Granger*, *supra*; *Dill. Mun. Corp.* 4th ed. § 1051, subdiv. 5, § 1051a.

Mr. L. M. Sturdevant, with *Mr. Homer C. Clark*, for respondent:

A municipality is not liable for any defect or want of efficiency in the plan of drainage it adopts, although the carrying of that plan into effect may expose private individuals to incidental inconvenience.

Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680; *Gilluly v. Madison*, 63 Wis. 518, 52 Am. Rep. 299, 24 N. W. 137; *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887; *Hession v. Wilmington (Del.)* 27 Atl. 830; *Darling v. Bangor*, 68 Me. 108; *Mills v. Brooklyn*, 32 N. Y. 489; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; *Dermont v. Detroit*, 4 Mich. 435; *Atchison v. Challiss*, 9 Kan. 612; *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455; *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437, 64 S. W. 958; *Roll v. Indianapolis*, 52 Ind. 547; *Buckley v. New Bedford*, 155 Mass. 64, 29 N. E. 201.

No water was or could be deposited upon plaintiff's property until he made his private connection therewith. This connection was made, not for the public good, but for his own convenience. Such being the case, he is not entitled to recover damages.

Buckley v. New Bedford, *supra*; *Harrington v. Woodbridge Twp.* 70 N. J. L. 28, 56 Atl. 141; *Darling v. Bangor*, 68 Me. 108; *Roll v. Indianapolis*, and *Dermont v. Detroit*, *supra*; *Sheriff v. Oskaloosa*, 120 Iowa, 442, 94 N. W. 904; *Johnston v. District of Columbia* and *Atchison v. Challiss*, *supra*; *Baxter v. Tripp*, 12 R. I. 310; *Fair v. Philadelphia*, and *Child v. Boston*, *supra*; *Manning v. Springfield*, 184 Mass. 245, 68 N. E. 202.

Marshall, J., delivered the opinion of the court:

The learned trial court held the complaint to be fatally defective, supposing, from the facts alleged, that the injuries complained of were produced by defects in the original plan of the sewer; and that, since such defects were rendered injuriously operative as to appellant's property by his voluntary act in connecting his private drain with the main sewer, the result was not referable to any fault of the respondent. The reasoning which resulted in such conclusions is embodied in an elaborate opinion by the judge containing a careful review of numerous authorities supposed to be in point.

While the law is well settled that, in case the governing body of a city, duly authorized thereto by its charter, adopts a plan for a sewerage system and executes the same, it is immune from injuries resulting to private property, not involving an unconstitutional taking thereof, but which are referable to defects in the plan itself (*Gilluly v. Madison*, 63 Wis. 518, 53 Am. Rep. 299, 24 N. W. 137; *Champion v. Crandon*, 84 Wis. 405, 19 L. R. A. 856, 54 N. W. 775; *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; 2 Dill. Mun. Corp. 4th ed. § 1051), the mere circumstance of the construction of a sewerage system by the properly authorized officers of a city does not satisfy that rule. The basic principle thereof is that, discretionary authority being vested in the governing body of a city to adopt a

plan for a system of sewage, defects in a plan so adopted are referable to mere errors in judgment, and, as regards resulting liability for injuries to private rights, are governed by the same rule as mistakes generally in the exercise of quasi judicial authority. It follows necessarily that where such authority is not exercised at all, where, though a system of sewage is constructed by a city without any plan therefor, passed upon and adopted by the governing body of the corporation, the reason for exempting it from liability for defects attributable to faults in the plan does not exist. It is not the mere construction of a sewage system by a city which exempts the corporation from liability for injuries caused by its operation growing out of defects in the plan thereof, but such construction according to a plan stamped with judicial approval, so as to speak, of the proper governing body.

It has been held, as indicated by cases cited by appellant's counsel, that, in order to satisfy the rule stated, the city council must not only adopt a plan, but do so with sufficient care to warrant the belief that legal discretion was exercised in the matter; that action in reckless disregard of consequences, as by adopting a palpably defective plan, or adopting one without the aid of some skilled person, where that in all reason is required, cannot reasonably be attributed to mere error of judgment. *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437, 64 S. W. 958; *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

The sufficiency of the complaint before us does not depend upon our going to the length of the two cases last cited. It states plainly that the system of sewage was not constructed according to any plan adopted by the city; that, on the contrary, the city negligently failed to adopt any plan.

The trial court held contrary to the foregoing upon the theory that the allegation in respect to failure to adopt a plan was intended merely to charge that the city did not employ a skilled engineer and have a plan laid out on paper and filed with the city clerk. We are unable to appreciate how such a meaning can be read out of the pleading. It seems to have been supposed that the allegation that the sewerage system was constructed part at one time and part at another, is so inconsistent with its not having been constructed according to any plan adopted by the city, that the pleader's purpose must have been to charge mere failure to cause a diagram to be made by a skilled person and filed. We cannot so construe the pleading. The more reasonable view seems to be, that the plead-

er, in charging municipal neglect to adopt a plan for the sewerage system, had in mind such a plan as, if it had been adopted, would exempt the city from liability for defects in respect thereto under the familiar rule on the subject. That was the only kind of a plan material to the controversy. If the pleading will reasonably bear the construction which the learned court gave to it, it will also bear the one we have suggested, if indeed it be necessary to resort to construction in order to read that out of the paper. By a familiar rule, the permissible construction which will support a pleading should be adopted rather than one which will defeat it. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869; *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997; *Emerson v. Nash* (Wis.) 70 L. R. A. 326, 102 N. W. 921.

If we were to come to the same conclusion as did the trial court on the point above discussed, it would not affect the final result, since the complaint states that appellant had no knowledge of the insufficiency of the sewerage system prior to the demonstration thereof by the flooding of his property, as alleged, and that the city had such knowledge prior thereto and failed to remedy the defect, or to make any effort in the matter though there was ample opportunity for efficiently doing so. A mistake of judgment in the adoption of a sewerage system is one thing, inexcusable omission to remedy demonstrated defects in one, liable, in view of the manner in which such system is designed to be used, to directly invade and injure private property, is quite another thing. The former involves mere error of judgment, the latter failure to perform a duty which the city owes to the persons whose property is liable to be so injured. It is not only the duty of a city to exercise ordinary care in constructing its sewerage system but also in maintaining it. That is breached by constructing a system known to be so defective as to necessarily cause injury to private rights, or continuing it without making reasonable efforts to remedy known defects therein, which would otherwise naturally and directly cause such injury. *Tate v. St. Paul*, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321. In the last case cited the court said: "We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or

the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper."

That case and the others cited, as also the elementary works on the subject (see 10 Am. & Eng. Enc. Law, 2d ed. p. 243), indicate that only defects in a plan duly adopted for a city sewerage system, which, when put in operation according to the design, result in some direct injury to private rights, is within the rule rendering a city liable for failure to proceed with ordinary care, after notice of the facts, to remedy the matter. However, since, where a sewer is constructed under such circumstances as those stated in the complaint it is designed that the abutting property owners shall connect their property therewith, if the operation of the system with connections thus made, by reason of a defect in the plan of the system, results in water flowing from the sewer to the private property with injurious effects, such injury is direct within the meaning of the cases cited. It was so held, in effect, in *Tate v. St. Paul*, *supra*. Judge Thompson in his work (Neg. vol. 5, § 5376) formulated the rule thus: "But even if it were a good answer to make to the injured property owner, that the city had made a mistake in its plan, yet it would not be so after the city had acquired a knowledge of the inadequacy of the plan and of the injury inflicted thereby upon the property owner; since it would be its duty to abate the evil by changing its plan and rectifying its error."

That seems to accord with familiar principles covering the liability of a municipality for negligence. We adopt it. The allegations of the complaint before us call for its application. In the light thereof the pleading states a good cause of action independently of the first subject discussed, unless the contrary must prevail because the defective character of the sewer was rendered operative to the injury of plaintiff's property through the medium of his private drain.

We are unable to approve the decision that, in a case like this, the injured property owner is remediless because of the existence of his private drain. Plaintiff had a legal right to connect his property with the main sewer, as he did. The sewer was constructed partly at his expense with the expectation and design that such connection would be made. An opening therefor was left by the city, which, in effect, represented to him that the connection could safely be made. No negligence whatever can be im-

puted to plaintiff because of his private drain up to the time he knew a discontinuance thereof was necessary to save his property from being injured. It would be exceedingly unjust to hold, that if a city constructs a sewer in a public street at the expense, in whole or in part, of the owners of abutting property, upon the theory that such property will be specially benefited by the facilities afforded to drain the same by means of a proper connection with the sewer, and the result is that because of defects in the sewer, known to the city to be liable to cause direct injury to such property, such an injury occurs, the corporation can successfully answer the owner's claim for damages by alleging that had such connection not been made such injury would not have happened.

The cases relied upon by the trial court and the respondent's counsel on the subject above discussed we do not find in point. *Baxter v. Tripp*, 12 R. I. 310, seems to be an authority upon which great reliance is placed. There the property owner was permitted to connect his private drain with the main sewer only upon condition of his "executing to said city a release of all damages which may at any time happen to such estate in any way resulting from such connection." The plaintiff complied with that condition, and his claim for damages was defeated solely on that ground. In *Graves v. Olean*, 64 App. Div. 598, 72 N. Y. Supp. 799, the overflow from the main sewer occurred at a time of unusually high water, and the decision was placed mainly on that ground. In *Sheriff v. Oskaloosa*, 120 Iowa, 442, 94 N. W. 904, the recovery was denied because the plaintiff was a mere licensee, and knew when he connected his property with the main sewer that it was insufficient and that by reason thereof injury had resulted from time to time for over a year to property in the vicinity of his premises. In *Dermont v. Detroit*, 4 Mich. 435, the sewer was not constructed at the expense, in whole or in part, of the owners of abutting property. The plaintiff connected his premises with the sewer as a mere licensee. The decision was grounded on those circumstances. In *Roll v. Indianapolis*, 52 Ind. 547, the decision turned on the fact that the property owner, as a condition of making his connection with the main sewer, gave a release as in *Baxter v. Tripp*, *supra*. In all those cases it was inferentially, at least, held that liability would exist under such facts as are alleged in the complaint before us.

When the precise question we are dealing with was presented for decision in *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743, the court said: "We find that the authorities settle this question

against the corporation, for it is held, without diversity of opinion, that the municipality is liable in such cases."

See also, on the same point, *Semple v. Vicksburg*, 62 Miss. 63, 52 Am. Rep. 181; *Murphy v. Indianapolis*, 158 Ind. 238, 63 N. E. 469; *Barton v. Syracuse*, 36 N. Y. 54.

The general result of the foregoing is that a city is not liable for injurious consequences to property abutting on a street resulting from connecting such property with a public sewer constructed by the city in such street according to a plan adopted by its governing body,—such injury being referable to defects in such plan, and not, in effect, an unconstitutional taking of such property. That rule does not apply where a sewerage system is constructed without the judgment of the proper body being exercised in the matter in the adoption of a plan for the work, though the system is in fact constructed according to some plan. If a sewer is constructed by a city in one of its streets according to a properly adopted plan, but, by error of judgment, such a plan is defective, so that, when the sewer is put in operation as contemplated, it causes direct injury to private rights, the municipality is liable if, after notice of the defect, it fails to act with reasonable diligence to remedy the same. When the design of a sewerage system constructed by a city is that abutting property owners will connect their premises therewith, and they are required to pay for special benefits to such property by bearing in whole or in part the expenses of the work, and the operation of the sewer results in a direct invasion of such property through the medium of a private drain, the injury thus caused is direct within the meaning of the rule as to the duty of a municipality to use ordinary care to correct known imperfections in its sewerage system liable to cause injury to property lawfully connected therewith. If a property owner exercises his right to connect his premises by a private drain with a public sewer, he not knowing of a defect therein, which by reason of such connection will produce injury to such property, and such injury is caused before he knows of the danger, or, knowing thereof, has reasonable time to guard against the same, his instrumentality in the matter will not preclude him from recovering compensation for the injury, if it is referable to negligence on the part of the city. Negligence in such a case may consist of failure to adopt a plan for the sewer; failure to exercise ordinary care in constructing the same; or failure to act with reasonable promptness to remedy defects in the plan, causing direct injuries to abutting property, after notice of the existence of such defects. These 1 L.R.A. (N.S.)

principles require us to hold that the complaint states a good cause of action.

The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer and further proceed according to law.

NEW YORK COURT OF APPEALS.

CHARLES H. POND, Resp't.,

v.
NEW ROCHELLE WATER COMPANY,
App't.

(.... N. Y.)

Water company—consumer's right to enforce contract.

A consumer may maintain a suit to compel a water company to furnish water at the rates stipulated in the contract between the company and the municipality, made at the time the right to lay mains in the streets was granted to the company.

(January 9, 1906.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Second Department, affirming an interlocutory judgment of a Special Term for Westchester County sustaining plaintiff's demurrer to affirmative matter set up in the answer in a suit to enjoin defendant from compelling plaintiff to pay rates for water in excess of those fixed by a contract between the water company and the municipal corporation. **Affirmed.**

The facts are stated in the opinion.

Case Note.—The above case is a material contribution to the law governing the relation between a water company operating under contract with the municipality and a private consumer. The general rule, as shown by the cases cited in the appellant's brief, is that, in case a fire results from a breach by the water company of its contract, the private consumer cannot maintain an action upon the contract. The reason for this rule is stated, in *Wainright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987, to be that the cases which have permitted one for whose benefit a contract was made to sue thereon have proceeded upon the ground that he was specially named in the contract, or that the promisor received money or property which he agreed to pay over to the beneficiary, or the promisee was under a legal obligation to the beneficiary which the promisor assumed as his own, and thus connected himself with the transaction. The court of appeals now ignores these limitations, and places the right of the consumer upon the broad ground that the contract was made for his benefit, and it will be interesting to know whether that

Mr. Henry Willis Smith, with Mr. Herbert D. Lent, for appellant:

Plaintiff had no such interest as entitled him to maintain this action.

Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; *Buchanan v. Tilden*, 158 N. Y. 123, 44 L. R. A. 170, 70 Am. St. Rep. 454, 52 N. E. 724; *Wainright v. Queens County Water Co.* 78 Hun, 154, 28 N. Y. Supp. 987.

Municipalities owe no legal duty or obligation to their inhabitants to supply them with water.

Wainright v. Queens County Water Co. 78 Hun, 146, 28 N. Y. Supp. 987; *Smith v. Great South Bay Water Co.* 82 App. Div. 428, 81 N. Y. Supp. 812; *Re Long Island Water Supply Co.* 30 Abb. N. C. 36, 24 N. Y. Supp. 807; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 162, 46 L. R. A. 687, 55 N. E. 562; *Farnham, Waters*, 688.

An inhabitant of a municipality cannot maintain an action for damage to his property by fire, resulting from the failure of a water company to supply water in accordance with the terms of a contract made between the municipality and the water company.

Wainright v. Queens County Water Co., *Smith v. Great South Bay Water Co.*, and *Re Long Island Water Supply Co.*, *supra*; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562; *McEntee v. Kingston Water Co.* 165 N. Y. 30, 58 N. E. 785; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 74, 35 N. Y. Supp. 453, 156 N. Y. 702, 51 N. E. 1089; *Farnham, Waters*, 688; *Linck v. Litchfield*, 31 Ill. App. 118; *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719;

Cooley, Const. Lim. 208; *Van Horn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Fisher v. Boston*, 104 Mass. 93, 6 Am. Rep. 196; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 395; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. E. 126; *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Foster v. Lookout Water Co.* 3 Lea, 42; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1.

Mr. Henry G. K. Heath, for respondent:

Where a contract for a valuable consideration contains covenants intended to benefit a certain class not parties to the agreement, but within the contemplation of the parties at the time, who are expressed as a class; and the promisee has some duty or liability to such class, and interest that the covenant be performed,—any person coming within such class may bring an action in his own name, in equity, to compel performance of the covenant against the promisor.

Lawrence v. Fox, 20 N. Y. 268; *Coster v. Albany*, 43 N. Y. 399; *People v. Holmes*, 5 Wend. 191; *Dutton v. Poole*, 3 Bos. & P. 149, note; *Schemmerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Townsend v. Rackham*, 143 N. Y.

court would permit the private consumer to recover his fire loss for breach of the contract which it permits him to maintain a private action to enforce.

In dealing with the right to recover a fire loss, the court, in *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 326, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720, and *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35, 12 S. W. 557, placed their ruling upon the ground that the consumer is the real party in interest, and that the contract was made by the municipality as his agent, he furnishing the consideration; and that, therefore, he has the right, upon well-settled principles, to enforce the contract. This would seem to be a more satisfactory ground for the ruling than that adopted in *POND v. NEW ROCHELLE WATER COMPANY*, since, in order to adopt the rule of the latter case all the limitations which have hitherto been thrown around the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, must be abandoned.

There would seem to be no ground for denying the right of the consumer to enforce 1 L.R.A. (N.S.)

the contract so far as delivery of water and rates are concerned, although the court, in *Robbins v. Bangor R. & Electric Co.* *post*, 963, seems to place the right of the consumer, in part, at least, upon the theory that the water company, being a public-service corporation, is bound to supply all applicants without discrimination and at reasonable rates. The fact, however, that the consumer may enforce the contract as to supply and rates does not necessarily require a ruling that he can hold the water company liable for fire losses.

Farnham, Waters, p. 846, states that the water company does not undertake to extinguish fires, and that the fire loss cannot be said to be the proximate result of a mere failure to furnish water, and that the rule of damages, which is that they must be such as were within the contemplation of the parties, cannot be held to extend to a liability for the result of a conflagration, although it may be in part due to a breach of the contract to supply water.

516, 38 N. E. 731; Gifford v. Corrigan, 117 N. Y. 257, 6 L. R. A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; Gaedeke v. Staten Island Midland R. Co. 43 App. Div. 514, 60 N. Y. Supp. 598.

Bartlett, J., delivered the opinion of the court:

The appellate division, in allowing this appeal, certified two questions, as follows:

(1) Does the complaint in this action state a cause of action? and (2) Is the affirmative matter set up in the answer sufficient in law, upon the face thereof, to constitute a defense in this action? Neither the special term nor the appellate division handed down an opinion, and we are remitted to the record as is frequently the case in appeals from all the departments, without the views of the supreme court.

The plaintiff, a resident of the village of Pelham Manor, Westchester county, and a customer of the defendant water company furnishing the village with its supply of water, seeks in this action a permanent injunction restraining the company from enforcing collection of a water rate in excess of the amount fixed by the existing contract with the village. In October, 1892, the New York & Westchester Water Company supplied private consumers under a written contract, wherein it agreed with present and prospective private consumers to supply water to them at a rate per annum not to exceed \$22.50 for each private house and \$5 for each private barn. This contract extended to November 1, 1897. On or about October 22, 1894, a franchise was granted to the New York City District Water Supply Company by the village, authorizing the company to lay its mains for the purpose of supplying water; that at the same time a contract under seal was entered into between the village and the company, which contained, among other provisions, a covenant that for and during the term of ten years, from October 22, 1894, and an extension for twenty years thereafter, if voted by the village pursuant to law, it would supply private consumers and corporations in the village with pure and wholesome water at not exceeding the rates then charged by the New York & Westchester Water Company. It further appears that on May 31, 1904, the village voted to extend this contract for thirty years from its original date, October 22, 1894, to October 22, 1924, as permitted by transportation corporations law, § 81 (Birdseye's Rev. Stat. vol. 3, 3d ed. p. 3763), and the contract with the New York City District Water Supply Company was thereby extended for the same period. Some time prior to February 11, 1904, the defendant, New Rochelle Water Company,

became the assignee and successor of the rights of the New York City District Water Supply Company, and subject to all its obligations. On February 11, 1904, the defendant notified this plaintiff in writing that it would furnish water to him after April 1st next only upon written application for water to be taken through a meter. This notice was subsequently withdrawn, but later, on or about April 11, 1904, the defendant again sent to this plaintiff a printed notice to the effect that no water would be supplied by the company except through meters on and after October 22, 1904, and at rates largely in excess of those fixed by the contract, to which reference has already been made. On August 1, 1904, the defendant again sent to the plaintiff a printed notice repeating substantially the last above notice. The foregoing statement of facts contains the substance of the complaint.

The defendant served an answer, which was practically a general denial, and pleaded three affirmative defenses. The first defense was, in substance, that compliance with the alleged contract, as claimed by the plaintiff, would amount to a confiscation of the defendant's property and the rights of certain municipalities it was supplying with water, and would work a forfeiture of its franchise; the fixed rate being too low. The second defense alleged that the contract which the plaintiff seeks to enforce is *ultra vires*. The third defense alleged that the defendant is ready and willing to furnish the inhabitants of the village of Pelham Manor with pure and wholesome water at reasonable rates and cost; that, should the defendant attempt to enforce the alleged contract against the small consumers, it would lead to a multiplicity of suits which it could not successfully defend; that it would be ruinous for the defendant to furnish the large consumers an unlimited supply of water at the rates fixed by the alleged contract, and would amount to a confiscation of its property; that, if the alleged contract is valid and enforceable, it amounts to an exclusive franchise, which the village had no power to grant; that, if the contract was valid, it gave the plaintiff no cause of action.

The plaintiff interposed separate demurrers to each of these affirmative defenses, on the ground that each was insufficient in law upon the face thereof. The appellate division affirmed the interlocutory judgment sustaining the plaintiff's demurrers to the affirmative matter set up in the answer, and sustaining the complaint as stating a cause of action. We agree with the decision of the learned appellate division as above stated, and deem it necessary to discuss only one question of law presented by the pleadings. It is clear that the defendant company rests

under a contract obligation extending to October 22, 1924, to furnish the consumers of water in the village of Pelham Manor at a fixed rate per annum. The defendant not only attacks the validity of this contract, but insists that, even if it is an existing and binding obligation, it cannot be enforced at the suit of an individual private consumer. The plaintiff argues that, "where a contract for a valuable consideration contains covenants intended to benefit a certain class not parties to the agreement, but within the contemplation of the parties at the time, who are expressed as a class, and the promisee has some duty or liability to such class, and interest that the covenant be performed, any person coming within such class may bring an action in his own name in equity to compel performance of the covenant against the promisor." In support of this contention the familiar case of *Lawrence v. Fox*, 20 N. Y. 268, and other authorities are cited.

In *Lawrence v. Fox*, *supra*, there was a money indebtedness due on a day certain from Holly to Lawrence, and, in consideration of the loan from Holly to Fox, the latter agreed to pay his debt to Lawrence. It is obvious that the case cited and other actions at law following it do not present the precise question raised in the case at bar, which is a suit in equity, although a kindred principle is involved. The question may be thus stated: The village of Pelham Manor, in granting privileges to a water company extending over a long period of time, made the same subject to a written contract under seal, having for its object the protection of the present and future private consumers of water. The defendant company, which has been subrogated to all rights and liabilities of the original contracting company, threatened to violate that contract by a printed notice served on a private consumer, the plaintiff, that after a certain day it would no longer abide by the contract rates, but charge a larger amount. The question is, Can the plaintiff, under these circumstances, ask a court of equity to permanently enjoin the defendant from violating the contract and compel it to perform the same? That this action can be maintained is no longer an open question in this state. This court held, in *Coster v. Albany*, 43 N. Y. 399, that if one person contract, whether with or without seal, with another for the benefit of a third person, such third person may maintain an action on the agreement. At page 411, *Folger, J.*, says: "It is settled in this state, that an agreement made on a valid consideration by one with another, to pay money to a third, can be enforced by the third in his own name. *Lawrence v. Fox*, *supra*; *Secor v. Lord*, 3 *Keyes*, 525. And, though a distinction has sometimes been

made in favor of a simple contract (*Hall v. Marston*, 17 *Mass.* 575; *Delaware & H. Canal Co. v. Westchester County Bank*, 4 *Denio*, 97), it is now held that when the agreement is in writing and under seal the same rule prevails. *Van Schaick v. Third Ave. R. Co.* 38 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y. 179. Nor need the third person be privy to the consideration. *Secor v. Lord*, *supra*. Nor need he be named especially as the person to whom the money is to be paid. In that class of cases which holds that a grantee of mortgaged premises, who takes them subject to the lien of the mortgage, which by words in the deed of conveyance to him he assumes to pay, is personally liable to the holder of the mortgage for the amount of the mortgage debt, no question seems to be made but that the action may be maintained in the holder's name, though the agreement be not made immediately for the benefit of the plaintiff, nor he be named in the deed. Thus, in *Burr v. Beers*, 24 N. Y. 178, 80 *Am. Dec.* 327, the clause in the deed described the mortgages as held by John Cramer, which mortgages the grantee thereby assumed to pay. And the case last cited was not an action in equity for the foreclosure of the mortgage in which the mortgagor and his grantee were both parties. See page 179 of 24 N. Y., 80 *Am. Dec.* 327. It was an action to recover a personal judgment against the grantee. The question was distinctly raised that there was no privity of contract between the plaintiff and defendant. And the decision against the defendant was put, in the language of *Denio, J.*, upon the broad principle that, if one person make a promise to another for the benefit of a third person that third person may maintain an action on the promise." Judge *Denio* further said, continuing the above quotation (p. 180 of 24 N. Y., p. 329 of 80 *Am. Dec.*): "Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor Kent laid it down as a point decided, and referred to not less than eight English and American cases as sustaining the principle (*Cumberland v. Codrington*, 3 *Johns. Ch.* 255, 8 *Am. Dec.* 492); and since then it has been frequently affirmed by judges, after an attentive examination of cases, as in *Barker v. Bucklin*, 2 *Denio*, 45, 43 *Am. Dec.* 726, and in the cases therein referred to."

The case of *Vrooman v. Turner*, 69 N. Y. 280, 25 *Am. Rep.* 195, illustrates the general principle here involved. This was an action to foreclose a mortgage and to hold liable a grantee who had received a conveyance subject to the mortgage, and which she assumed and agreed to pay. The mortgage was executed in August, 1873, by one Evans, who then owned the mortgaged premises.

He conveyed the same to one Mitchell, and through various mesne conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the premises to defendant, Harriet B. Turner, by deed, which contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge; the same forming part of the consideration thereof." The referee found that Mrs. Turner, by so assuming payment of the mortgage, became personally liable therefor, and directed judgment against her for any deficiency. The general term affirmed this judgment. This court, in reversing the judgment, held that, as Mrs. Turner's grantor was not personally liable to pay the mortgage, her covenant was made with a stranger and could not be enforced. This court said (p. 283 of 69 N. Y., p. 197 of 25 Am. Rep.): "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise; but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise; the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement." The judgment was reversed in this case because defendant's grantor was not liable to pay the mortgage. If in all the mesne conveyances the grantees had assumed and agreed to pay the mortgage executed by Evans, the mortgagee or his assignee could have enforced the covenant made by the defendant, Mrs. Turner, as it would have been a promise to pay the debt due him, made to one also liable to discharge it.

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The general principle that, if one person contracts for the benefit of a third person, such third person may maintain an action on the agreement, has been applied since early in the seventeenth century in a large number of cases; the facts in each differing to some extent. The leading case in England is *Dutton v. Pool*, 1 Vent. 318, 332, decided in the reign of Charles II. The plaintiff declared in assumpsit that, his wife's father being seised of certain lands now descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised to the father, in consideration that he would forbear to fell the timber, that he would pay the daughter £1,000. After verdict for the plaintiff on nonassumpsit, it was moved in arrest of judgment that the father ought to have brought the action, and not the husband and wife. The court said: "It might be another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." The judgment was affirmed in the exchequer. 2 Lev. 212, T. Raym. 302. Some criticism having been expressed as to the soundness of this decision, Lord Mansfield said of it, one hundred years later, that it would be difficult to conceive how a doubt could have been entertained about the case. *Martyn v. Hind*, 2 Cowp. 443, 1 Dougl. 142. The case has been repeatedly followed in this state.

The principle established by this case has been applied to contracts entered into by a father for the benefit of his daughter and by a husband for the benefit of his wife. As to the latter instance, see *Buchanan v. Tilden*, 158 N. Y. 109, 44 L. R. A. 170, 70 Am. St. Rep. 454, 52 N. E. 724. In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. While there is not presented a domestic relation like that of father and child or husband and wife, yet it cannot be said that this contract was made for the benefit of a stranger. In the case before us the municipality sought to protect its inhabitants, who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of opinion that the complaint states a good cause of action.

The order and interlocutory judgment appealed from should be affirmed, with costs.

and the first question answered in the affirmative and the second in the negative.

Cullen, Ch. J., and Gray, O'Brien, Haight, Vann, and Werner, JJ., concur.

MAINE SUPREME JUDICIAL COURT.

CHESTER W. ROBBINS

v.

BANGOR RAILWAY & ELECTRIC COMPANY.

(.... Me.)

1. Water company—contract for supply.

A water company taking the benefit of a contract between a town and its promoters is bound by the obligations of the contract.

2. Same—service and rates.

One who, for the purpose of securing a hydrant contract with a town for fire purposes, agrees to furnish water to its inhabitants at certain rates after obtaining the benefit of the contract, is bound to fulfil the agreement as to service and rates to individual water takers.

3. Mandamus—duties of water company.

Mandamus lies to compel a water company to supply an individual applicant with water at reasonable rates, as part of its public duties, although the relation between the water company and the town and its inhabitants has been the subject of contract.

4. Water company—rates.

A water company may change from a flat to a meter rate if no contract prevents, and the new rates are reasonable and do not discriminate.

5. Same—waste—meter rates.

For unnecessary waste of water, a consumer may be required to pay reasonable meter rates.

6. Same—basis for fixing rates.

The quantity of water used, and the cost of the individual service, are the principal elements for consideration in fixing the charges for water supply, as between individual takers or classes of takers.

7. Same—rates—establishment—usage.

To make the original classification of a building for purposes of water rates, which

was continued for a long period of time, controlling as to the rate to be applied at a particular time on the ground of usage, the circumstances must appear to have remained the same.

8. Same—family rates—boarding house.

A contract for water supply, at specified rates, to a dwelling house containing a family, does not apply to a building used primarily as a boarding house, although the family of the keeper lives in it.

(November 20, 1905.)

R EPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full bench of a petition for a writ of mandamus to require defendant to furnish water to petitioner. Dismissed.

The facts are stated in the opinion.

Mr. Clarence Scott, for petitioner:

Mandamus is the proper remedy to be employed by an inhabitant against a private corporation engaged in furnishing commodities for public use,—like gas and water.

Spelling, Inj. & Extra. Rem. § 1592; People v. Manhattan Gaslight Co. 45 Barb. 136; Haugen v. Albina Light & Water Co. 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244; Mobile & O. R. Co. v. Wisdom, 5 Heisk. 125.

Mandamus is the appropriate action to compel the supplying of water.

Haugen v. Albina Light & Water Co. *supra*; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 57 L. R. A. 761, 63 N. E. 220; Johnson v. Atlantic City Gas & Water Co. 65 N. J. Eq. 129, 56 Atl. 550; American Waterworks Co. v. State, 48 Neb. 194, 30 L. R. A. 447, 50 Am. St. Rep. 610, 64 N. W. 711.

Water companies are quasi-public, or public, service corporations.

They must serve the public faithfully and impartially, and treat all customers fairly and without unjust discrimination.

Kennebec Water District v. Waterville, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6; Wiemer

Case Note.—The court, in the above case, seems to have avoided some of the difficulty which confronted the court in Pond v. New Rochelle Water Co. *ante*, 958, by holding that, although the water company is bound to fulfil its agreement as to service and rates to individual water takers, the consumer might maintain a mandamus proceeding to enforce the duty of the corporation, as a public-service corporation, to supply water at reasonable rates; implying that the contract rates were the reasonable ones.

Mandamus is the proper remedy, on behalf of the municipality, to compel the water

company to comply with its contract. Farnham, Waters, p. 836. And, in view of the fact that the water company is a public-service corporation, there is no doubt that the private consumer might maintain mandamus to compel it to perform its public duties. Furthermore, as shown by the note to Pond v. New Rochelle Water Co. *ante*, 958, it would seem that the consumer had sufficient interest as principal in the contract to be entitled to maintain an action to enforce the contract itself so far as the duty of furnishing the water and the rates are concerned.

v. Louisville Water Co. 130 Fed. 251; Baily v. Fayette Gas-Fuel Co. 193 Pa. 175, 44 Atl. 251; Miller v. Wilkes-Barre Gas Co. 206 Pa. 254, 55 Atl. 974; Snell v. Clinton Electric Light, Heat, & P. Co. 196 Ill. 626, 58 L. R. A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082; Shepard v. Milwaukee Gaslight Co. 15 Wis. 319, 82 Am. Dec. 679; West Hartford v. Water Comrs. 68 Conn. 323, 36 Atl. 786; State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co. 34 Ohio St. 572; Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 41 L. R. A. 422, 49 N. E. 121; Griffin v. Goldsboro Water Co. 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410; Mobile v. Bienville Water Supply Co. 130 Ala. 379, 30 So. 445; Crosby v. Montgomery, 108 Ala. 498, 18 So. 723; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; Horsky v. Helena Consol. Water Co. 13 Mont. 229, 33 Pac. 689; Haugen v. Albina Light & Water Co. and McCrary v. Beaudry, *supra*; Dittmar v. New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351; Crumley v. Watauga Water Co. 99 Tenn. 420, 41 S. W. 1058; Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 51 L. R. A. 744, 58 N. E. 1049; Indiana Natural & Illuminating Gas Co. v. Anthony, *supra*; State ex rel. Wood v. Consumers' Gas Trust Co. 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674; Westfield Gas & Mill. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 57 L. R. A. 761, 63 N. E. 220; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

They cannot impose arbitrary charges.

State, Culver, Prosecutor, v. Jersey City, 45 N. J. L. 256; San Diego Land & Town Co. v. National City, 74 Fed. 79; Haverhill Aqueduct Co. v. Page, 52 N. H. 472.

They can charge reasonable rates for service, and no more.

Kennebec Water District v. Waterville, Baily v. Fayette Gas-Fuel Co. and Snell v. Clinton Electric Light, Heat, & P. Co. *supra*; Milwaukee Gaslight Co. 6 Wis. 319, 82 Am. Dec. 479; McEntee v. Kingston, 15 N. Y. 27, 58 N. E. 785; State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co. Cincinnati, H. & D. R. Co. v. Bowling Green, *supra*; Capital City Gas-Fuel Co. v. Des Moines, 72 Fed. 829; San Diego Land & Town Co. v. National City, 74 Fed. 79; Haverhill Aqueduct Co. v. Page, 52 N. H. 472; Mobile v. Bienville Water Supply Co., Crosby v. Montgomery, 108 Ala. 498, 18 So. 723; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; Horsky v. Helena Consol. Water Co. 13 Mont. 229, 33 Pac. 689; Haugen v. Albina Light & Water Co. and McCrary v. Beaudry, *supra*; Dittmar v. New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114; Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351; Crumley v. Watauga Water Co. 99 Tenn. 420, 41 S. W. 1058; Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 51 L. R. A. 744, 58 N. E. 1049; Indiana Natural & Illuminating Gas Co. v. Anthony, *supra*; State ex rel. Wood v. Consumers' Gas Trust Co. 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674; Westfield Gas & Mill. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 57 L. R. A. 761, 63 N. E. 220; State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

Co. 132 Cal. 209, 54 L. R. A. 769, 64 Pac. 258; Sheward v. Citizens' Water Co. 90 Cal. 635, 27 Pac. 439; State ex rel. Milsted v. Butte City Water Co. 18 Mont. 199, 32 L. R. A. 697, 56 Am. St. Rep. 574, 44 Pac. 966; Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L. R. A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046.

The public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals.

Kennebec Water District v. Waterville, Baily v. Fayette Gas-Fuel Co., and State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co. *supra*.

The company cannot change the contract made with the city, and force consumers to pay for service by meter.

Birmingham Waterworks Co. v. Truss, 135 Ala. 530, 33 So. 657; Shaw v. San Diego Water Co. (Cal.) 50 Pac. 693; Capital Gas & Electric Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462; Louisville Gas Co. v. Dulaney, 100 Ky. 405, 36 L. R. A. 125, 38 S. W. 703.

Family use is that use ordinarily made by and suitable for the members of a household, whether as individuals or collectively.

12 Am. & Eng. Enc. Law, p. 880, ¶ 3; Spring Valley Waterworks v. San Francisco, 52 Cal. 120.

The proprietor of a private boarding house is a private housekeeper.

4 Am. & Eng. Enc. Law, p. 591, ¶ 1; Com. ex rel. Smith v. Cuncannon, 3 Brewst. (Pa.) 347.

Mr. E. C. Ryder, for defendant:

Plaintiff cannot maintain an action to enforce the contract.

Cleburne Water, Ice, & Lighting Co. v. Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733; Nickerson v. Bridgeport Hydraulic Co. 46 Conn. 24, 33 Am. Rep. 1.

The water company is not liable to the citizen.

Becker v. Keokuk Waterworks Co. 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; Davis v. Clinton Waterworks Co. 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; Vanhorn v. Des Moines, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; Nickerson v. Bridgeport Hydraulic Co. 46 Conn. 24, 33 Am. Rep. 1; Fowler v. Athens City Waterworks Co. 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Weet v. Brockport, 16 N. Y. 161, note; Foster v. Lookout Water Co. 3 Lea, 42; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485; Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Heller v. Sedalia, 53 Mo.

159, 14 Am. Rep. 444; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 21 L. R. A. 653, 40 Am. St. Rep. 510, 56 N. W. 201.

Mandamus will not lie to enforce contractual relations.

2 *Spelling, Inj. & Extr. Rem.* § 1379; *State ex rel. New Orleans v. New Orleans & C. R. Co.* 37 La. Ann. 589; *Sanger v. Kennebec County*, 25 Me. 291; *Mitchell v. Boardman*, 79 Me. 469, 10 Atl. 452; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Knight v. Thomas*, 93 Me. 494, 45 Atl. 499.

There is a distinction between private dwellings and boarding houses.

Gannett v. Albree, 103 Mass. 372; *Rafferty v. New Brunswick F. Ins. Co.* 18 N. J. L. 480, 38 Am. Dec. 525; *Poor v. Hudson Ins. Co.* 2 Fed. 432.

The respondent had the right to make a new schedule of rates, and to make such rules and regulations for its security and convenience as were reasonable and just, and which did not unjustly or unreasonably discriminate.

1 *Morawetz, Priv. Corp.* § 501; 30 Am. & Eng. Enc. Law, 2d ed. p. 419; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; *Parker v. Boston*, 1 Allen, 361.

A company may shut off water from the building of a consumer who wastes it, and compel him to pay the charges before turning the water on.

Shiras v. Ewing, 48 Kan. 170, 29 Pac. 320; *McDaniel v. Springfield Waterworks Co.* 48 Mo. App. 273; *Tacoma Hotel Co. v. Tacoma Light & Water Co.* 3 Wash. 316, 14 L. R. A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; *Wood v. Auburn*, 87 Me. 237, 29 L. R. A. 376, 32 Atl. 906; *American Waterworks Co. v. State*, 46 Neb. 194, 30 L. R. A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; *Krumenaker v. Dougherty*, 74 App. Div. 452, 77 N. Y. Supp. 467; *Treadwell v. Van Schaick*, 30 Barb. 444; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393; *Com. ex rel. Roman Catholic High School Trustees v. Philadelphia*, 132 Pa. 288, 19 Atl. 136; *Harrisburg's Appeal*, 107 Pa. 102; *People ex rel. Kennedy v. Manhattan Gaslight Co.* 45 Barb. 136; *Gaslight Co. v. Colliday*, 25 Md. 1; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; *McEntee v. Kingston Water Co.* 165 N. Y. 27, 58 N. E. 785.

Savage, J., delivered the opinion of the court:

Petition for a writ of mandamus to require the defendant company to furnish water to the petitioner at a house owned by him, and occupied by a tenant, in Old Town. The case was heard upon the peti-

tion and answer, as upon an alternative writ and return, and, at the conclusion of the evidence, the case was reported to this court for its "determination as to whether a peremptory writ of mandamus shall issue, or the petition be dismissed. Some technical questions of procedure and pleading have been argued, but, as the case comes up on report, it is unnecessary to consider them. *Pillsbury v. Brown*, 82 Me. 450, 9 L. R. A. 94, 19 Atl. 858; *Elm City Club v. Howes*, 92 Me. 211, 42 Atl. 392; *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774.

The essential facts are these: On October 16, 1889, Laughton & Clergue were promoters of a water company to be incorporated in Old Town. In fact the organization had been partly perfected at that time, but the approval of the certificate of incorporation by the attorney general was not given until October 24, 1889. October 12, the inhabitants of Old Town, in town meeting assembled, appointed a committee to make a contract with "Laughton & Clergue, or such corporation as Laughton & Clergue may organize, or with any other party or parties, to furnish and supply the town of Old Town with water for proper municipal purposes." October 16th, the committee, acting for the town, entered into a contract with Laughton & Clergue which provided that Laughton & Clergue should organize a corporation, which should accept an assignment of the contract and undertake to carry it out. In the contract the promoters also agreed, among other things, to put in 60 hydrants for the use of the town for fire purposes for a rental named, and to be paid by the town. They also agreed to furnish water for a display fountain, and for certain other public purposes. The fifth paragraph of the contract reads as follows:

"Said first party (the promoters) agrees that the rates for water used in dwelling houses shall not exceed the following: For each dwelling house containing a family of not more than four persons, with one faucet for use within the tenement, \$5 per annum; for each additional person in the family, 50 cents per annum; for the first wash hand basin set, \$2 per annum; for each additional hand basin, \$1 per annum; for one bathing tub, \$3 per annum; for each additional bathing tub, \$1 per annum; for one water-closet, \$3 per annum; for each additional closet, \$1 per annum; for a dwelling house occupied by two or more families, each family to pay three fourths of the above rate per annum."

Thereupon Laughton & Clergue completed the organization of the corporation known as the Penobscot Water & Power Company, to which they assigned the contract. The corporation accepted the assignment and as-

sumed and agreed to perform "all the duties and obligations by said Laughton & Clergue to be performed according to the terms of said contract." Among the corporate purposes of the Penobscot Water & Power Co. was "the construction of waterworks and laying of pipes in any place or places, and buying, selling, or leasing of water." The corporation built a system of waterworks in Old Town, and entered upon the business of supplying water to the town under its contract, and to the inhabitants for power and for domestic purposes. Annual or flat rates were fixed by the corporation payable semi-annually, in advance, for the supply of water to dwelling houses according to the terms of the Laughton & Clergue contract, and to hotels, boarding houses, and other buildings and places at other and varying amounts.

June 1, 1891, the Penobscot Water & Power Company conveyed all its franchises and other property to the Public Works Company, by which they were conveyed, April 7, 1905, to the defendant corporation. The business of supplying water to the town or city of Old Town has been carried on continuously by these corporations in succession to the present time. And the water system referred to has been the only source of public water supply for the city or its inhabitants during all this time.

About the beginning of the year 1903, the Public Works Company, then owning the plant, revised and changed its schedule of rates, and thereafter charged customers according to the new schedule. For water supplied to dwelling houses containing families the rates were left unchanged, being the same annual amounts provided for in the Laughton & Clergue contract. All other services were metered, and were charged for monthly, according to the amount of water supplied. The charge for water used for power was 11 cents for the first 10,000 cubic feet, 8 cents for the second 10,000 feet, and 6 cents per 10,000 feet for all water in excess of 20,000 feet in each month. For all other metered service, including hotels and boarding houses, the charge was 25 cents per 100 feet for the first 2,000 feet, 20 cents per 100 feet for the second 2,000 feet, and 15 cents per 100 feet for all water in excess of 4,000 feet in each month.

The petitioner, an inhabitant of Old Town, owned a house on Main street, which was piped for water, and connected with the water company's mains. The house was occupied from time to time by tenants, who kept boarders. From the outset down to 1904, this house was classed as a dwelling house, and the company charged and the petitioners paid the annual flat rates for dwelling houses, which were named in the Laughton & Clergue contract. In the later 1 L.R.A. (N.S.)

years, the tenant's own family consisted of five persons. The number of boarders varied, but was estimated by the company. The company charged and the petitioner paid for 15 persons in the family, boarders and all, \$5 semiannually. In 1902 or 1903, a water-closet was put into the house for which the petitioner paid at the rate of \$5 per annum. Prior to January, 1904, the company complained to the owner of waste of water, through defects in piping and plumbing. It also claimed that the house should properly be classed as a boarding house and pay according to the meter rates established for boarding houses. About the beginning of 1904 the company notified the petitioner of its intention to put in a meter. A meter was put in April 6, 1904. In May following, a bill was rendered to the petitioner for flat rates from January 1, 1904, to April 1, 1904, and for 3,003 feet of water in April, at meter rates for boarding houses. From that time on the petitioner was charged at meter rates. He declined to pay, and on September 10, 1904, the company shut the water off. There was then due, according to its rates, the sum of \$23.71 for water from January 1, 1904. Both before and after the water was shut off the petitioner tendered the full amount due according to the flat rates for dwelling houses, and now offers to pay the same. He prays that the company be commanded to restore his service.

Upon these facts, concerning which there is little dispute, the defendant contends that the petitioner is not entitled to mandamus against it, as a matter of law. It says that the petitioner's rights, if any, rest in contract, and, so far as alleged in the petition, in the Laughton & Clergue contract, that the contract was made by the town, and that the petitioner was not a party to it, or in any privity with the parties, and that mandamus will not lie to enforce contractual duties in any event. Furthermore, it is argued that the defendant is not bound by the Laughton & Clergue contract. We will consider the last proposition first.

It is not necessary to inquire when and how far and in what manner a corporation is bound by the engagements entered into by its promoters. It is at least settled that, if the corporation adopts such a contract expressly or impliedly, and obtains its benefits, it must take it with its obligations and burdens, *cum onere*. It must do what the promoters agreed to do. 23 Am. & Eng. Enc. Law, p. 241; 10 Cyc. Law & Proc. p. 262; note to *Pittsburg Min. Co. v. Spooner*, 17 Am. St. Rep. 161. In this case, the Penobscot Water & Power Company took an assignment of the Laughton & Clergue contract and its benefits, and expressly assumed its obligations. That contract limited the rates

for water supplied to dwelling houses containing families. The corporation became bound by that limitation. While a town is not an agent of the individual citizens, and authorized to make contracts binding upon them personally, we have no hesitation in saying that, when a person or corporation, as a consideration, or even as a mere inducement, for the making of a hydrant contract with a town for fire purposes, engages to supply water for the inhabitants at rates not exceeding certain specified sums, and so obtains the contract and its benefits, the contractor is under obligations to fulfill the agreement as to service and rates to individual water takers. And the rights of the Penobscot Water & Power Company, with the corresponding duties and obligations, have come to the defendant.

It is true that mandamus is not the proper remedy for the enforcement of mere contractual duties. It does not lie to enforce rights of a private or personal character, or obligations resting entirely upon contract, and not involving any question of trust or official duty, or growing out of public relations. 2 Spelling, Extra. Relief, § 1379. But that is not the situation in this case. The defendant is a public service corporation. By undertaking a public service, namely that of furnishing a supply of water for the public, it comes under obligations to the public, not only to the public as a whole, but to the public as individuals, and that independent of its contract duties. It must serve impartially, or on equal terms and at reasonable rates, all who apply for service. Indeed, from the existence of such a public duty the law will imply a contract, if necessary, with each of the inhabitants served. *McEntee v. Kingston Water Co.* 165 N. Y. 27, 58 N. E. 785. It is the duty of the defendant as a public service corporation to supply water to this petitioner at reasonable rates, fairly, and without discrimination. *Kennebec Water District v. Waterville*, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6. The duty is a public one which does not depend on the Loughton & Clergue contract, although that limits the maximum rate in some instances; but it arises from the character of the service it undertakes to perform. Because a duty of this kind is public, each owner of a building which may be served is entitled to have the water served to him. That is his particular, personal right, and is independent of the rights that others or the general public may have. He does not hold that particular right in common with the public. Mandamus lies to enforce the performance of public duties. It does not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, 1 L.R.A. (N.S.)

but it does lie when his personal and particular rights have been invaded beyond those that he enjoys as a part of the public, and that are common to everyone. *Sanger v. Kennebec County*, 25 Me. 221; *Baker v. Johnson*, 41 Me. 15; *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325; *Knight v. Thomas*, 93 Me. 494, 45 Atl. 499. The petitioner therefore may prosecute the writ.

It is not questioned but that a public-service corporation may adopt reasonable rules and regulations for the conduct of its business, to which the individual water takers must conform, that it may require payment for a reasonable time in advance, or that it may cut off water from a customer who refuses or neglects to pay reasonable rates. *Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906. And we think there can be no question of the right of such a corporation to revise and change its schedule of rates, if no contract prevents, provided that the new rates are reasonable, and do not discriminate. Within these limitations, it may change from an annual or flat rate to a meter rate. In fact, a reasonable meter rate seems the more equitable and just. We have recently discussed what are reasonable rates in *Kennebec Water District v. Waterville*, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6, and *Brunswick & T. Water District v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; and this case calls for no further discussion. Nor do we think there can be any doubt that in case of unnecessary waste, the company may apply a meter, and charge reasonable meter rates. Again, while it may be lawful to classify water takers, not arbitrarily, but upon reasonable grounds,—as, for instance, as between boarding houses and private dwelling houses; and while it may be true in instances that a charge to small customers is not necessarily unreasonable, because in excess of what a large customer would have to pay for the same amount of water,—still, as bearing upon the question of discrimination, it must be true that the quantity of water used and the cost of the individual service are the principal elements for consideration in fixing the charges as between individual water takers or classes of takers. And it has been held that a public-service company cannot make a difference in price according to the use made by the customer; nor is a discrimination proper based on the value of the service to the customer. *Baily v. Fayette Gas-Fuel Co.* 193 Pa. 175, 44 Atl. 251; *Richmond Natural Gas Co. v. Clawson*, 155 Ind. 659, 51 L. R. A. 744, 58 N. E. 1049. And, of course, the water company had the right to establish reasonable rates for service to all customers not provided for in the Loughton & Clergue contract.

An application of these principles will eliminate from further consideration all essential questions except two, and these are questions of fact. The petitioner bases his claim upon the dwelling-house clause in the Laughton & Clergue contract. He says that his house was a "dwelling-house containing a family," within the meaning of that contract, and therefore that the maximum charge for a family of 15, exclusive of the water-closet, was \$10 a year; and further, that the family in the house did not exceed 15 in number. All his tenders and his offer in the petition to pay are limited upon that theory. And if it were otherwise, the record does not disclose sufficient *data* to enable the court to pass upon the reasonableness of the meter rates themselves. The defendant, on the other hand, claims that the building is not a dwelling house within the meaning of the contract, but is a boarding house; and further, that its predecessor was justified in putting in a meter, by reason of the unreasonable waste of water.

The decisive question, and the only one we need to consider, is whether the petitioner's building was a "dwelling house containing a family," as specified in the original contract, or was a boarding house. It is urged in the first place that the company itself has so classified it for quite a long period of years, and that, in consequence, its status is now fixed beyond the power of the company to change. The construction which the parties by their acts place upon a contract frequently is, in cases of doubt, of great value in determining what the contract meant. And when, by long-continued usage, they have given a practical construction to it, it may be beyond the power of one party to change it. *West Hartford v. Water Comrs.* 68 Conn. 323, 36 Atl. 786. But if we were to assume that such a usage should control, it ought to be a usage which has been practically fixed and unvarying. The case shows that all three of the tenants who have occupied the house since the petitioner bought it have kept boarders, but to what extent and under what conditions the two earlier tenants kept them does not appear. And, as we shall hereafter see, the mere fact that boarders are kept in a house is not necessarily inconsistent with the claim that it is a "dwelling house containing a family." Moreover, the house was first classified at a time earlier than the petitioner's ownership, and the record shows nothing in regard to the nature of the occupancy at that time, except that boarders were kept. This ground therefore is not tenable, and we must inquire further.

The building itself seems to have been built originally for family use. But it had been used by tenants for keeping boarders, 1 L.R.A. (N.S.)

and was being so used when the meter was put on. The tenant, his wife, and three sons lived there. The number of boarders was as low as 3 at times, and at others as high as 10, and perhaps more. The boarders were not transients. They stayed more or less permanently. The term "dwelling house" does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, and another under a homestead law, and another under a pauper law, and another under a contract or devise. A boarding house certainly is a dwelling house. So is a hotel; or a jail (*People v. Van Blaricum*, 2 Johns. 105); or a single room (*People v. Horrigan*, 68 Mich. 491, 36 N. W. 236).

But the Laughton & Clergue contract limited the meaning which might be given to the term "dwelling house." The phrase there is "dwelling house containing a family." The word "family" is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. *Dodge v. Boston & P. R. Co.* 154 Mass. 289, 13 L. R. A. 318, 28 N. E. 243. In that sense it has frequently been defined as synonymous with "household." Webster gives the primary meaning as "persons collectively who live together in a house or under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders." This definition is sometimes quoted in the cases, but we have found no cases sustaining the definition as to boarders in which the matter of boarders was in issue or decided, except two, and they were decided on grounds not involved here. *Oystead v. Shedd*, 13 Mass. 520, 7 Am. Dec. 172; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27. To constitute the family relation between persons so living together it must be of a permanent and domestic character, and not of those abiding together temporarily as strangers. *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469. They must be living in one domestic establishment. *Pearson v. Miller*, 71 Miss. 379, 42 Am. St. Rep. 470, 14 So. 731. Family means all whose domicile or home is ordinarily in the same house and under the same management or head. *Cheshire v. Burlington*, 31 Conn. 326. It is all the individuals who live together under the control of another, including the servants. *Poor v. Hudson Ins. Co.* 2 Fed. 432. It embraces a household composed of parents or children, or other relatives, or domestics; in short, every collective body of persons living together within one curtilage, sub-

sisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness. *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553. It may mean the husband and wife, having no children, or it may mean children, or wife and children, or any group constituting a distinct domestic or social body. *Grand Lodge, A. O. U. W. v. McKinsty*, 67 Mo. App. 82. Lord Kenyon said: "In common parlance, the family consists of those who live under the same roof with the *pater familias*; those who form (if I may use the expression) his fireside." *King v. Darlington*, 4 T. R. 800. The relation is one of social status, not of mere contract, and usually is held to include a legal or moral obligation on the head of the family to support the other members, and a corresponding state of dependence on the part of the other members for their support. 3 Words & Phrases, 2673, and cases cited.

If the foregoing definitions gathered from the cases give a correct view of the various phases of a family relationship as applicable to this case, from the judicial point of view, as we think they do, it is clear that boarders do not constitute the family or a part of it. A family living together in a house as a home is none the less a family because incidentally there are boarders in the same house, and perchance eating at the same table. But a boarding house is none the less a boarding house, when used as such, because the boarding-house keeper and his wife and children live in it while the business of keeping a boarding house is being carried on. The Laughton & Clergue contract limited the rates for a "dwelling house containing a family" to annual flat rates for specified amounts. It contemplated, as we think, a dwelling house containing a family living together in domestic and social relations in the house as a home, and not a place of carrying on the business of keeping boarders. The test is whether the petitioner's tenant occupied the house as a home for himself and his wife and children, and incidentally kept boarders also, or whether he occupied it as a place for carrying on the business of keeping boarders, although while prosecuting the business, and as a means of prosecuting the business, he and his wife and children live in the house also. Under this test, neither the size of the house, nor the number of the boarders, is of importance, except as evidence that they may have weight in determining which is the principal use for which the building is occupied.

Applying the test to the evidence in this case, we are satisfied that the petitioner's house should be classed as a boarding house, and that it is not within the limitation for 1 L.R.A. (N.S.)

dwelling houses in the Laughton & Clergue contract. The tenant used the house for carrying on the business of keeping boarders, and his living there was incidental to that. That was his business and his only business of any consequence, as he testified.

Accordingly the petitioner's claim is not sustained, and his petition must be dismissed. But we decide nothing more. The petition is not framed to raise the question whether the rates charged to the petitioner for the house as a boarding house are excessive or not. Neither, as we have already said, is there sufficient evidence upon which to answer such a question. Nor do we say that the rates which the defendant demands are or are not unjust by reason of unlawful discrimination in the classification made by it, and in the charges made to the several classes, nor that the defendant has or has not the right to demand as much of the petitioner as it does, for the unpaid water service. When a customer charges 25 cents a hundred feet to one customer for one use, and only 11 cents for 10,000 feet to another customer for another use, if the water be supplied from the same source, by the same system, in the same pipes, there is an apparent discrimination, but whether it is real or not cannot now be said. See *Baily v. Fayette Gas Fuel Co. and Richmond Natural Gas Co. v. Clawson*, *supra*.

Petition dismissed.

NORTH CAROLINA SUPREME COURT.

H. O. COZAD

v.

KANAWHA HARDWOOD COMPANY,
Appt.

(139 N. C. 283.)

1. Eminent domain—private railway.

The right of eminent domain cannot be conferred to secure a right of way for a private railway to transport timber to market.

2. Same—public use.

The mere development of a locality by the establishment and maintenance of a private

Case Note.—The power to exercise the right of eminent domain to secure a right of way for a logging railroad has been considered in a number of cases and with some variety of opinion.

According to an able commentator on the subject, in its broad signification eminent domain "embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or

enterprise therein is not a public use for which the right of eminent domain may be exercised.

3. Same—limited easement.

The fact that only an easement for a limited time is to be taken for a private railway does not change the rule forbidding the exercise of the right of eminent domain for that purpose.

4. Same—effect of legislative determination.

The legislative determination as to what is a public use for the exercise of the right of eminent domain is not conclusive.

(October 17, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for Cherokee County continuing a temporary injunction to restrain the construction of a railway over plaintiff's property. Affirmed.

Statement by Connor, J.:

Plaintiff alleged: That he was the owner of a tract of land in Cherokee county, upon which he had erected a dwelling and planted a large number of fruit trees and made many other valuable improvements, requiring outlay of many thousand dollars. That the defendants are partners, conducting a general lumber business under the firm name and style of the Kanawha Hardwood Company. That defendants are threatening, and pursuant to such threats proceeded, to

construct a railway over and through his lands for the purpose of hauling timber and timber products from their own lands. That in grading the route for such railway, and erecting trestles over the mountain, great and permanent damage will be done his property, etc. He applied to the resident judge of the district for a restraining order until the hearing, and a permanent injunction, etc. Upon the return day of the order to show cause, his Honor, Judge Ferguson, upon hearing the complaint and answer, supported by affidavits, found the following facts: The defendants, after notice, applied to the highway commission of Valleystown township, in said county, for a right of way to construct and operate a private railroad from the town of Andrews, a railroad station on the Southern Railway, to standing timber owned by the defendants in Graham county, which right of way would pass over the plaintiff's land. The plaintiff filed an answer to the petition. From the order, the highway commission finding that it was necessary, reasonable, and just that the petitioners should have the right of way, and appointing a jury to lay it off, plaintiff appealed to the board of commissioners of Cherokee county. From the order of the said board of commissioners, affirming the proceedings of the highway commission, the plaintiff appealed to the superior court. The appeal is now pending in said court.

private, or by a private citizen. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. . . . Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by the constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power." Lewis, Em. Dom. 2d ed. § 1. And he goes on to say (§ 157) that while only a few of the state Constitutions in terms prohibit the taking of private property for private use, all courts agree in holding that this cannot be done. "Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provision of the Constitution, some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land, others, on the ground that it would be subversive of the fundamental principles of free government, or contrary to the spirit of the Constitution. The conclusion is undoubtedly a correct one, and is too well settled by authority to necessitate any inquiry into the true grounds upon which it rests." See also Wood, Railway Law, p. 636.

Other text writers, and many of the 1 L.R.A. (N.S.)

courts, seem to take the view that the power is essentially limited to taking for a public use. See, *inter alia*, Mills, Em. Dom. § 1; Dill. Mun. Corp. 4th ed. § 584; 15 Cyc. Law & Proc. p. 557; Beach, Railways, § 773; Varick v. Smith, 5 Paige, 159, 28 Am. Dec. 417; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Weir v. St. Paul, S. & T. F. R. Co. 18 Minn. 155, Gil. 139; Giesy v. Cincinnati, W. & Z. R. Co. 4 Ohio St. 308.

Whichever view is taken, it is indisputable that the taking must be for a public purpose, except in states which have adopted constitutional provisions authorizing a taking for private use in cases where the general welfare will thereby be promoted.

The decisions as to the meaning of the words "public use" are numerous and varied; some holding that to constitute a public use the public must use or have a right to use the property taken, while others hold that the words mean public utility, advantage, or what is productive of public benefit. It has been suggested that a possible ground for reconciling decisions apparently inharmonious may be found in the difference in local needs, giving rise to different local policies.

On the question whether a road solely for the transportation of logs or timber is for a

That the defendants are the owners of standing timber from which no public road leads and to which no water is convenient. That the proposed road leads from a railroad station to such standing timber, and that such standing timber cannot be marketed with a profit to the defendants without the construction of a railroad. That the construction of a railroad is necessary for the profitable marketing of such timber, and that the route across the plaintiff's land is a reasonable route. That in taking such route no injustice is done the plaintiff. That there is no reason why his land should not be taken, as well as the land of any others over which the road might be constructed. That five years will not be an unreasonable time in which to remove such standing timber. Defendants have graded a considerable portion of the proposed road, not on the lands of the plaintiff, but other portions of the proposed route. They have bought and contracted for iron rails, locomotives, and other appliances for operating said road. Defendants are not a corporation, and do not propose to become liable as common carriers, but propose to construct and use the road for their sole and exclusive use in removing their timber and timber products from their lands in Graham county to the railroad station at Andrews and to the markets. There are other large boundaries of timber land of like kind contiguous

to the defendants' timber. Defendants do not propose to transport over their proposed railroad such timber for reasonable charges to be fixed by the corporation commission or other authority of the state. Defendants do not claim any other right to enter upon plaintiff's land other than such as they acquired by the order of the highway commission. His Honor, upon the foregoing facts, continued the injunction to the hearing. Defendants appealed.

Messrs. Dillard & Bell, for appellant:

A court of equity will not interfere by way of injunction.

High, Inj. § 388; Clark's Code, § 388, p. 383.

The cartway act gives a right analogous to the right to drain swamp lands, which has been held to be constitutional.

Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 784; Brown v. Keener, 74 N. C. 714; Pool v. Trexler, 76 N. C. 297; Winslow v. Winslow, 95 N. C. 24.

Whether the charge be of public utility is for the legislature to decide.

Brown v. Keener, 74 N. C. 718.

It is contrary to the policy of the law to use the extraordinary powers when the same operate to arrest the development of industrial enterprises.

Walton v. Mills, 86 N. C. 280; Lewis v. John L. Roper Lumber Co. 99 N. C. 11, 5 S.

public use, however, the cases seem in substantial agreement.

In Weidenfeld v. Sugar Run R. Co. 48 Fed. 615, where it appeared that the real purpose for which a railroad was organized was the transportation of bark to the tanneries of the principal stockholder, and no public use or necessity for the railroad or any public traffic that it would obtain when constructed was shown, it was held that such railroad could not exercise the power of eminent domain.

In Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L. R. A. 368, 60 Am. St. Rep. 318, 46 Pac. 790, it was held that a railroad chartered to extend from a certain town past a sawmill, through rough, mountainous, timbered, and sparsely-settled country, to the middle of a certain section on lands of the United States, without ground near any other town, city, or settlement or other railroad, but which had been built only from the sawmill, about 2 miles from the town, for 5½ miles into the timbered region, and has no freight or passenger depots, passenger coaches, or freight cars, except trucks, and has never charged passengers any fare, is a public way for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, and everyone having occasion to use it as a passenger or for the transportation of freight has a right to require the service.

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In Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L. R. A. 513, 52 Pac. 573, 54 Pac. 367, 882, it was held that a skid road, both termini of which were on and entirely surrounded by the property of a lumbering company whose business it was designed to facilitate, to which the public had no access except over private land, and which would not connect with nor be accessible at any point by a public highway, was not for such a use as would authorize the taking of private property without the consent of the owner.

The right to condemn private property for a logging road and water way was also denied in Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681, quoted at length in COZAD v. KANAWHA HARDWOOD CO.

A corporation which does not purpose to engage in the business of transporting logs for the public, but seeks to acquire the right to use a stream for its own private benefit, cannot exercise the right of eminent domain against a lower riparian owner. Matthews v. Belfast Mfg. Co. 35 Wash. 662, 77 Pac. 1046.

Similar considerations govern the decisions in cases involving the exercise of eminent domain in constructing roads to facilitate mining operations, which are discussed in a case note appended to Highland Boy Gold Min. Co. v. Strickley, *post*, 976.

E. 19; Roanoke Nav. Co. v. Emry, 108 N. C. 130, 12 S. E. 900; Wellington & P. R. Co. v. Cashie & C. R. & Lumber Co. 116 N. C. 925, 20 S. E. 964.

The development of the resources of the state is such public benefit as authorized the legislature to grant a right of way, *ex necessitate*, for a period of five years, over plaintiff's land.

Norfleet v. Cromwell, *supra*; Tiedeman, Pol. Power, § 375; 1 Lewis, Em. Dom., § 1, note.

Messrs. Jones & Johnston and Shepherd & Shepherd, for appellee:

Private property is protected from the arbitrary power of transferring it from one person to another.

Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) 451; State v. Glen, 52 N. C. (7 Jones, L.) 321; Staton v. Norfolk & C. R. Co. 111 N. C. 278, 17 L. R. A. 838, 16 S. E. 181; Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; 19 Month. L. Rep. 241; People ex rel. Herrick v. Smith, 21 N. Y. 595; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325.

It is a judicial question whether the taking is of such nature that it may be founded upon a public necessity.

Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437; Taylor v. Porter, 4 Hill. 140, 40 Am. Dec. 274; Sadler v. Langham. 34 Ala. 311.

There is no law of the land by which defendant can be compelled to part with his property for the private use of the petitioners.

Pittsburg, W. & K. R. Co. v. Benwood Iron-Works, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453; Kyle v. Texas & N. O. R. Co. (Tex. App.) 4 L. R. A. 275; 15 Cyc. Law & Proc. p. 578; Cooley, Const. Lim. pp. 530, 531; Mills, Em. Dom. §§ 57, 58; 7 Wait, Act. & Def. p. 567; 2 Cooley, Const. Lim. 4th ed. p. 661, note; Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394; Leigh v. Garysburg Mfg. Co. 132 N. C. 167, 43 S. E. 632; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L. R. A. 826, 99 Am. St. Rep. 964, 74 Pac. 681.

The phrase "public use" is not synonymous with "public benefits."

Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L. R. A. 821, 99 Am. St. Rep. 964, 74 Pac. 681; 15 Cyc. Law & Proc. p. 583; Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L. R. A. 513, 52 Pac. 573, 54 Pac. 367, 882.

Connor, J., delivered the opinion of the court:

The defendants insist that, pending the proceeding instituted before the highway commission, the courts should not interfere by injunction with the construction of their proposed railway. This contention would

be unanswerable, but for the fact that plaintiff insists that in no point of view can the result of that proceeding affect his right to enjoin defendants, for that: (1) No power is conferred upon the highway commission to order a railway of the character or for the purpose contemplated by the defendants to be laid out. (2) That, if the statute undertook to confer such power, it would be invalid, violating the elementary principle that private property can only be taken for a public use, and then with compensation. These contentions render it necessary to examine the provisions of the statute creating the highway commission of Valletown township. Pub. Laws 1905, chap. 210, p. 222.

By the 1st section of the statute provision is made for electing three persons, who shall constitute the highway commission for said township, naming those who shall act until the time appointed for the first election. By the 2d section, the commission is vested with the powers, rights, etc., exercised by the board of supervisors of public roads, etc. "They shall have power and authority to order the laying out of public roads," etc. "They shall also have power and authority to lay out cartways, rights of way for tramroads, church and mill roads, and to discontinue the same in the way and manner provided in §§ 2033, 2056, 2057, 2062, 2063, of the Code or any amendments thereof." It is clear that the highway commission established by the act has no larger or other power in regard to ordering cartways or tramways to be opened than is exercised by the boards having jurisdiction over such matters under the general public laws. It is equally clear that the road proposed to be opened and operated does not come within the definition of cartways provided by §§ 2056, 2057 of the Code. This right is conferred only on persons "settled upon or cultivating any land." The cartway authorized to be opened "shall be kept open for the free passage of all persons on foot or horseback, carts and wagons." Section 2057 provides that persons over whose lands cartways have been opened "may erect gates or bars across the same." The section was amended by chapter 46, p. 97, Laws 1887, by inserting in line 1 the words "or shall own any standing timber," and in lines 6 and 15, between the words "cartway" and "to," the words "tram or railway," and in line 18 striking out the word "way," and inserting the words "cartways established under this act." Section 2057 is amended by inserting in line 1 the words "tram or railways," and by inserting in line 6, between the word "just" and "and," the words "cartways, tramways, or railways for the removal of timber shall continue for a period not long-

er than five years, and, in entering cultivated land, shall protect the same by sufficient stock guards." The effect of these amendments is to confer upon owners of land upon which there is any standing timber the right to have opened tramways or railways, with the exclusive use of them, confining to cartways the right of all persons to pass over them. The right to maintain such tramways or railways is confined to a period of five years, with the duty of erecting stock guards when they pass through cultivated land, thus depriving the owner of the land through which such tram and rail ways pass the right to erect gates or bars across them. It appears that the highway commission ordered the laying out of a private way for a private railway through and over the plaintiff's land, with "such curves and grades as are necessary, according to the survey made, in order to reach the lowest gap on top of the mountain. . . . Said right of way, when it extends through woodland, or said tract, to be of the width of 150 feet, and through cultivated fields or cleared land to be of sufficient width for the roadbed, trestles, and cuts only."

The construction of § 2056 of the Code, being chapter 508, Acts 1798, providing for the opening of cartways, has been frequently before this court. Its constitutionality has never been questioned, and is not involved in this appeal. The validity of similar statutes has been discussed and sustained in other jurisdictions upon the ground that, although established and opened upon the petition of private land-owners, and primarily for their benefit, they are, as provided by our statute, open for the free passage of all persons on horse, foot, in wagons, or carts. This extension of their use impresses upon them a public character. In this way the power to invoke the right of eminent domain, for the purpose of opening and maintaining them, is sustained. It is said: "Roads and streets used by the public, with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is not simply how many persons do actually use them, but how many have a free and unrestricted right in common to use them; for, if the public generally are excluded, the way must be regarded as a private one; if the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. When the way is a private one, the right of eminent domain cannot be successfully invoked. . . . The right itself exists only for the public, and no private interest, however weighty, can call it into exercise. The question, therefore, must always be, not 1 L.R.A. (N.S.)

what private interests will be promoted, but what is the public requirement? The name given the way does not determine its character, for if a road be called a private road or a neighborhood road, but is in fact so laid out and maintained as to give the public a right to freely use it upon terms common to all, the road, notwithstanding its name, is a public one." Elliott, *Roads & Streets*, 2d ed. § 192. The converse of the proposition is stated in § 193, that if the road is so laid out as to give only a limited class of persons the sole right to use it, it is for that reason a private road, without regard to the name by which it is known or called. "If a class, to the exclusion of the citizens generally, acquire a right to use the road, it is no more than a private way." Id. Discussing the same question, it is said: "where the road though laid out on the application of, and paid for and kept in repair by, a particular individual, who is especially accommodated thereby, is in fact a public road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose. for which the land may be condemned. But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private, and the law authorizing the condemnation of property therefor is void." Lewis, *Em. Dom.* 167. Speaking of private cartways over which the public are allowed to pass, the author says: "The roads here provided for are spoken of as quasi public, and have been sustained as a valid exercise of the power of eminent domain. . . . It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified." Id. A statute similar to § 2057, as amended by chap. 46, p. 97, Laws 1887, was enacted by the legislature of Pennsylvania for the benefit of owners of land upon which there were deposits of anthracite coal. In *Waddell's Appeal*, 84 Pa. 90, the validity of the act was discussed and denied, because the way authorized to be opened was not for the use of the public. The supreme court of Indiana, in *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399, said: "Concede that the public exigency requires that a way should be opened to every man's farm, and that the state may and should provide for the establishment of a public road or highway to enable every citizen to discharge his duties and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should

be a highway. If not, then the right of eminent domain cannot be exercised to establish it. It is not the amount of travel—the extent of the use of the highway by the public—that distinguishes it from a private way or road. It is the right to so use or travel upon it, not its exercise.” In a well-considered opinion delivered by Dillon, Ch. J. (*Bankhead v. Brown*, 25 Iowa, 540), it is said: “Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private, if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it.”

The defendants' counsel, in an able and interesting argument before us, conceding the general principle governing the right to take private property or impose burdens thereon, insist that, by reason of the peculiar conditions developed by the affidavits in the record, the use for which the plaintiff's land is sought to be subjected to the easement is public in its character. They call to our attention the large and valuable timber standing upon the mountains of western North Carolina, the removal and marketing of which brings wealth into the state and opens the land to cultivation and homes for the people now there and who are coming into that section of the state. They say that while the logs may be hauled over the mountain roads, but at very large expense, the portions of the trees,—limbs, tops, etc.,—unfit for lumber, which are now wasted, may be made useful and valuable for many purposes, and that it is their purpose to establish tanneries and factories for utilizing these products, etc.; that by these means the revenues of the state will be increased, the development of the natural resources encouraged, immigration brought into that section, and many other benefits accrue to the public. These views, with the facts upon which they were based, were presented with much force by counsel. They have received, as they were entitled to, most careful consideration. They have been made in other cases in other courts. They invite courts to find in the term “public use” a broader and larger meaning. Their persuading and almost compelling force may be seen in the legislation of the states and the decisions of the courts. While they have in some cases stimulated material growth and development, it is manifest that valuable private property rights and stores of natural wealth and resources for feeding, clothing, and making comfortable the rapid-

ly increasing population have been sacrificed to them; that great and dangerous monopolies have been fostered by the liberal construction put upon the term “public use.” It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country, and of the impatient, strenuous promoter and industrial pioneer. It may be that his rights have not received, either in the legislature or the courts, the consideration to which they were entitled. It is conceded that courts and authors have found much difficulty in defining the term. It does not concern us to attempt to do so to any other or further extent than is necessary to a decision of this appeal. Mr. Lewis, after an interesting discussion of the subject, says: “Perhaps no better example of a public use can be given than that of the ordinary highway, where the easement or right of way vests in the public for the common and equal use of all.” *Em. Dom.* § 166. The terms upon which the public may use the highway are, of course, subject to legislative regulation, as on railroads or steamboats, by paying the prescribed fare, going upon and leaving at regular stations, and conforming to those reasonable regulations made by the corporation or other agency for the protection of the public, and on the ordinary country highways by conforming to those statutes or immemorial customs which have become the “law of the road,” etc. In *Pittsburg, W. & K. R. Co. v. Benwood Iron-Works*, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453, the term “public use,” as applied to the right of a railroad company to condemn private property for the purpose of constructing a lateral road to reach a particular customer, is discussed and the authorities reviewed; Johnson, P., concluding his opinion: “As far as the public is concerned, when what they need is for ‘public use,’ they have a right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits, and gains is concerned, they stand as individuals, or as merely private corporations in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.” In reply to the argument of counsel that by such holding a deadly blow was aimed at the industries of the state, the learned judge said: “It seems to us, if railroad corporations were permitted *ad libitum* to do what this defendant in error asks to be done, ‘no deadlier blow could be dealt the private rights of the citizens.’” “The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only permission, and not to whom the tax or toll for support-

ing them is paid." Note in 2 L. R. A. 681; 15 Cyc. Law & Proc. p. 583; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L. R. A. 114, 49 N. W. 894.

The question presented by this appeal, and the argument to sustain the right, was discussed in *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681. A statute similar to ours, as amended, was enacted, enabling owners of timbered lands to condemn a right of way for tramroads and railroads for the purpose of transporting timber to market. The exact question before us was presented; Dunbar, J., saying: "This case presents the important questions, deserving the most serious consideration, involving, as it does, the respective interests of private rights and of property of the state sought to be protected and fostered through the exercise of the high prerogative of sovereignty; the former being guaranteed by the fundamental law and the latter being the subject of universal interest and concern. Eminent domain is the right or power of a sovereign state to appropriate private property. . . . The learned attorneys for appellant have favored the court with an exhaustive and earnest argument in their brief, and a painstaking showing is made of the magnitude of the lumbering business and interest of this state and the effect that it presumably has upon the general prosperity of the commonwealth, and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further the business prosperity of the state, rather than one which would hamper and retard it. But the court cannot invade the province of the lawmaking powers of government and intrude into its decrees its opinion on questions of public policy. Its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction." To the argument that a liberal construction should be given to term "public use," because in the section of the state in which the proposed road is to be built the removal of the standing timber is promotive of the improvement of that section, the answer is that "the Constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such construction would be a virtual removal of any constitutional inhibition on legislative power in this respect." *Ibid.* There is a distinction between public policy or public welfare and public use. "It might be of unquestionable public policy

and for the best interest of the state to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase the revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the Constitution, and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy." *Ibid.* The question is exhaustively discussed in *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313, in which it is said: "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term, 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits which may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat, without any certain principle to guide." Judge Cooley says: "It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established." *Const. Lim.* 652. To the suggestion that only an easement for the period of five years is imposed upon plaintiff's land, and that such period is a reasonable time to remove the timber, we quote the same eminent authority: "And, although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him. It would be sufficient that some interest, the appropriation of which detracted from his right and authority and interfered with his exclusive possession as owner, had been taken against his will; and, if taken for a purely private purpose, it would be unlawful." *Ibid.* Again he says: "The public use implies a possession, occupation, and en-

joyment of the land by the public at large or by public agencies." Ibid. Without pursuing the subject further, we entertain no doubt that the amendment made to §§ 2056, 2057 of the Code by chap. 46, p. 97, Laws 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional and invalid. This conclusion does not affect the right of condemnation of a cartway, as provided by the statute, over which all persons may pass, etc. We see no objection to the extension of this privilege to owners of timber lands under the same limitations and conditions as persons settled upon or cultivating lands. It is manifest that the defendants are not seeking this restricted right. They say that it is their purpose to construct the railway for their exclusive use. This concession deprives them of the benefits of the statute, eliminating the amendment of 1887.

Counsel call to our attention the decisions of this court sustaining the drainage acts. Without discussing these acts, it is sufficient to say that they expressly confer upon all persons having lands adjoining or capable of drainage through the drains or canals authorized to be opened the right to avail themselves of these benefits. This distinguishes those statutes from the one under discussion. It is also contended that it is peculiarly the province of the legislature to say what is a public use, and that its decision may not be reviewed by the courts. While it must be conceded that expressions are to be found in decided cases, several of which are cited by counsel, and in some text-books, which seem to sustain this contention, it will be found that they are subject to the limitation that the question is primarily one for the legislature, but its decision is not conclusive; otherwise, the legislature could nullify the principle protecting private property. The correct view is stated by Judge Cooley: "The question What is a public use? is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive." Const. Lim. 660; Pittsburg, W. & K. R. Co. v. Benwood Iron-Works, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453. "The question whether a particular use is public or not is ultimately a question for the courts. This is necessarily true, in view of the constitutional provisions of the different states that private property can be taken only for a public use, since the interpretation of constitutional provisions is within the province of the judiciary." 10 Am. & Eng. Enc. Law, p. 1066; Call v. 1 L.R.A. (N.S.)

Wilkesboro, 115 N. C. 337, 20 S. E. 468, in which Shepherd, Ch. J., says: "Whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary"—citing Lewis, Em. Dom. 185; Mills, Em. Dom. 10, 11. The distinction is this: whether a use is public is for the ultimate decision of the courts; if the use is public, the expediency or necessity for establishing it is exclusively for the legislature. In the discussion of the question presented, we have assumed that the provisions limiting the power of the legislature to take private property were constitutional. As is well known to the profession, no such provision is found in our state Constitution; but, since the opinion of Ruffin, Ch. J., in Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) 451, the principle has been treated as fundamental, and as existing with the same universal application as if imbedded in the Constitution. Rodman, J., in Johnston v. Rankin, 70 N. C. 555, says: "The principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." Southport, W. & D. R. Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589. While, as found by his Honor, it is reasonable, and even necessary to the successful operation of defendants' enterprise, that they carry their timber and timber products over plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle, upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

The judgment of his Honor, continuing the injunction, must be affirmed.

UTAH SUPREME COURT.

HIGHLAND BOY GOLD MINING COMPANY, Resp't.,

v.

JOHN STRICKLEY et al., Appts.

(28 Utah, 215.)

1. Eminent domain—public use.

A statute granting the right of eminent domain will be upheld against a claim that it is for a private use, unless it clearly ap-

pears that the use is private and in no sense public.

2. Same—in aid of mining industry.

The construction of roads and tramways for the development of the mining industries of a state is a public use for which the right of eminent domain may be exercised.

(October 26, 1904.)

A PPEAL by defendants from a judgment of the District Court for Salt Lake County in favor of plaintiff in a proceeding to condemn a right of way to a mining claim. Affirmed.

Statement by McCarty, J.:

Plaintiff brought this action to condemn a right of way for its aerial tramway over defendants' mining claim. The record discloses the following facts, viz.: That plaintiff is a mining corporation and authorized to acquire, maintain, and operate aerial tramways for the transportation of ores and other materials. Its mines are situated about 2 miles from the upper portion of Bingham, and in altitude about 2,700 feet above the valley. The tramway, which consists of two cables supported on wooden towers, extends from the mines to Bingham.

Case Note.—The right to take private property by eminent domain for a mining road has come under discussion in two classes of cases. In one class, since, as appears by the authorities cited in the case note appended to *Cozad v. Kanawha Hardwood Co.*, ante, 969, the power of eminent domain may be exercised only for a public use, the solution of the question is regarded as depending upon whether the development of the mining industry may be considered a public purpose. In the other class the decisions hinge upon whether such road may possibly be put to some use admittedly of a public character.

The division of opinion as to what constitutes a public use extends through the first class of cases. In harmony with *HIGHLAND BOY GOLD MIN. CO. v. STRICKLEY* is the case of *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, therein cited, in which the constitutionality of an act declaring the mining, milling, and smelting of ores to be for public use, and authorizing the exercise of the right of eminent domain therefor, was sustained, upon the ground that, mining being the paramount interest of the state, "anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people."

In *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537, the condemnation of private property by a mining company for a railroad to transport coal from its mines was held to be for a public use, on the ground that the development of its mineral re-

The towers in some places are 1,000 feet apart, and in others are close together, the space depending upon the contour of the ground. In case of gullies they are far apart; in going over ridges they are close together. The buckets run on wheels on the cables, and are moved by a single endless cable to which they are attached. Loaded buckets are carried down, and the empty buckets brought up. Each bucket holds about 700 pounds of ore, and in them there is carried over 500 tons of ore per day every day of the year. This has been continued since the spring of 1899. The plaintiff has in sight ore sufficient to last for about seven years, and reasonably expects, in the meantime, to develop ore for four or five years longer. All this ore is to be taken from the mines to Bingham, then loaded into railroad cars and shipped to plaintiff's smelter in Salt Lake valley. There is also taken over the tramway from Bingham up to the mines about 5 tons of coal a day; also supplies used in the operation of the mines are taken up in the same way. The placer claim over which the right of way is sought to be condemned is on a hillside, the surface of which is rough and irregular, and four towers are sufficient to cross the claim. A width of 25 feet is required for the towers, and for a

sources would add to the wealth and revenues of the state. It is to be observed, however, that, by the terms of the act authorizing the construction of such railroads, it was made their duty to carry all persons and property at the same rates allowed by law to a certain railroad company, thus making such mining roads common carriers; and, further, that the decision is expressly based on *Hays v. Risher*, 32 Pa. 169, which sustains the exercise of the power of eminent domain in constructing mining roads upon the ground that a similar duty is imposed.

On the other hand, the construction of a tramway from mines to sampling works was said, in *People ex rel. Aspen M. & S. Co. v. District Court*, 11 Colo. 147, 17 Pac. 298, without discussion of the subject, to be for a private use.

In *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199, it was held that land could not be condemned for a tramway from a coal mine to a railroad track, since such use is private. The court says: "The character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or private one. If, from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true, that benefits resulting from a public use, capable of in-

team to pass over the ground when necessary for the purpose of making repairs thereon. About 200 men are employed at plaintiff's mines, and about 200 at its smelter, which reduces only the ores from plaintiff's mines. A jury was impaneled and assessed the damage caused by the erection and operation of the tramway, and the court entered its findings and decree condemning a right of way for the occupation, maintenance, and use of plaintiff for its tramway. The decree, among other things, provides that "said plaintiff is to move said towers to, or rebuild the same on, at any time, different points on said strip hereby condemned, and as often as requested, and at plaintiff's expense, when reasonably required by the owners of said mining claim for using the part of said claim not sought to be condemned, as well as the part sought to be condemned; and such use of the said part of said surface by said plaintiff is entirely consistent with the use by said defendants of all of said claim, except as aforesaid, for

the purpose of mining and working the same and removing the surface again and again; and the said defendants, or the owners of said claim, as the case may be, may work said claim as they see fit and proper, or otherwise use the same; and, whenever the rights herein given to said plaintiff interfere with such use, the said plaintiff is subject to remove said towers, as aforesaid, for the purpose of allowing the owners of such claim full use and enjoyment thereof, except as aforesaid." From that part of the judgment which decrees plaintiff a right of way over defendants' mining claim, defendants have appealed to this court.

Mr. Frank Hoffman for appellants.

Messrs. Sutherland, Van Cott, & Allison, for respondent:

The use of the road of the respondent for its aerial tramway is a public use.

Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371.

Primarily the question what is a public

dividual appropriation, are open to all alike, upon the same terms and conditions."

In *Valley City Salt Co. v. Brown*, 7 W. Va. 191, a salt company, which desired to obtain a supply of coal for its own use and to sell to the people of the vicinity, was not permitted to obtain by condemnation a subterranean right of way from its mine, it appearing that the people could procure coal from other sources, and that the public would not use such right of way.

A coal railroad intended to connect a mine with a railroad, wholly unnecessary for the conveyance of passengers both in the present and the future, the ground adjacent being wholly unfit for manufacturing purposes, is not for a public use, so as to authorize taking land by eminent domain; nor is its nature affected by the possibility that it might be extended so as to open up other coal fields. *Edgewood R. Co.'s Appeal*, 79 Pa. 257.

A right of way for a tunnel for the private use of a mine owner in working his mine cannot be acquired by condemnation. *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 Pac. 74.

The question whether mining may be considered as a public use has also arisen in cases where condemnation of a right of way for a ditch to carry water for mining purposes has been sought. It has been answered affirmatively in *Hand Gold Min. Co. v. Parker*, 59 Ga. 419, and negatively, in *Lorenz v. Jacob*, 63 Cal. 73.

Nor may a right of way for a flume to carry off tailings be acquired by condemnation. *Consolidated Channel Co. v. Central P. R. Co.* 51 Cal. 269.

In the second class of cases, hereinbefore referred to, the right to exercise the power of eminent domain for the construction of a road intended chiefly to facilitate mining operations is upheld on the ground that such

railroads are bound by law to transport the persons and property of the public when occasion arises. See *Dietrich v. Murdock*, 42 Mo. 279; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 523, 31 L. R. A. 304. 50 Am. St. Rep. 508, 41 Pac. 232; *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 161 Mo. 288, 51 L. R. A. 936, 84 Am. St. Rep. 717, 61 S. W. 684.

Of this class are cases arising under the Pennsylvania lateral railroad act of May 25, 1832. *Hays v. Risher*, *supra*.

The right is sustained even where the authorizing statute merely refers to such roads as public ways. *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

An extreme instance is the case of *State, De Camp, Prosecutor, v. Hibernia Underground R. Co.* 47 N. J. L. 43, which holds that a right of way may be condemned for an underground railroad having one terminus in an ore vein and the other at dumps beside a surface railroad. The court says: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public."

The same considerations govern decisions involving the right to construct branches or side track to some one mine or quarry. *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434, 21 S. W. 884; *Ulmer v. Lime Rock R. Co.* 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001.

use is a legislative question rather than a judicial one.

United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Backus v. Fort Street Union Depot Co. 169 U. S. 568, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 399; Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 590; Munn v. Illinois, 94 U. S. 123, 24 L. ed. 83.

The development of the mining industry is a public use.

Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Douglass v. Byrnes, 59 Fed. 29; Butte, A. & P. R. Co. v. Montana Union R. Co. 16 Mont. 526, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Ahern v. Dubuque Lead & Level Min. Co. 48 Iowa, 140.

The states have the right to take private property for any use, unless there is provision to the contrary in the Constitution.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 406, 25 L. ed. 207; 1 Lewis, Em. Dom. § 163; Tuttle v. Moore, *supra*.

A public use is not determined simply by the question whether a physical use is made by the public; but the question is deeper and depends upon whether the use subserves the public good, or tends to that end.

Gibson v. Mason, 5 Nev. 308; Stockton & V. R. Co. v. Stockton, 41 Cal. 172; Jones v. Mahaska County Coal Co. 47 Iowa, 39.

McCarty, J., delivered the opinion of the court:

Plaintiff bases its right to condemn on § 3588, Rev. Stat. 1898, as amended in 1901 (Sess. Laws, chap. 25, p. 19), which provides that "the right of eminent domain may be exercised in behalf of the following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines. . . ." Appellants (defendants below) contend that the foregoing provision of the statute is in conflict with § 22, art. 1, Utah Const., which provides that "private property shall not be taken or damaged for public use without just compensation," for the reason that the use made of the right of way sought to be condemned is not a public use.

There appears to be an irreconcilable conflict in the authorities as to what constitutes a public use. This, no doubt, is largely due to the fact that in many cases what would be a public use in one jurisdiction would not be in another or different jurisdiction. Thus it has been almost uniformly held through-
1 L.R.A. (N.S.)

out the Pacific Coast states that the construction and operation of irrigation ditches is a public use, which doctrine, when applied to the arid region, has been approved by the Supreme Court of the United States, whereas in Ohio, New York, Pennsylvania, and other states where irrigation is not followed and is practically unknown, it would undoubtedly be held not a public use. Therefore what shall be considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the nature and character of the natural resources of such locality, state, or commonwealth. And while it is for the legislature to determine, in the first instance, whether the use is a public use, and to provide the means of condemnation, yet the great weight of authority holds that the declaration of the legislature is not final, and that it is ultimately for the courts to determine whether a particular use is public or not. 1 Lewis, Em. Dom. 2d ed. 158. The text writers on eminent domain, and the adjudicated cases, practically all agree that, when the legislature has declared a use to be public, such declaration will be respected and followed by the courts, unless the act is clearly and palpably unconstitutional, or the necessity for the taking is plainly without reasonable foundation. 2 Dill. Mun. Corp. 4th ed. 600; United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394; Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 585; Mills, Em. Dom. 2d ed. 10; Lewis, Em. Dom. 158; 10 Am. & Eng. Enc. Law, 2d ed. p. 1070. For a further discussion of the general and well-established rule that legislative enactments are presumed to be constitutional unless the contrary clearly appears, see Fletcher v. Peck, 6 Cranch, 128, 3 L. ed. 175; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Stewart v. Polk County, 30 Iowa, 1, 1 Am. Rep. 238; State ex rel. Wells v. Tingey, 24 Utah, 225, 67 Pac. 33, and cases cited; State ex rel. Breedon v. Lewis, 26 Utah, 120, 72 Pac. 388.

The reason for the rule, when applied to the law of eminent domain, is very apparent, as there are some uses for which private property may be condemned, the public character of which is so plain that there is no room for argument; and, on the other hand, there are innumerable uses for which property may be and is used, the private character of which is equally clear and plain. As stated by counsel for respondent, in their brief: "Between these two extremes, however, courts can approach a dividing line which is so shadowy that it leaves room for argument as to whether or not a statute is

constitutional. A short distance on either side of the line the decision is plain, but on the line, and for a short distance on each side, it is doubtful." And, as hereinbefore stated, whenever the court is in doubt, it holds the statute constitutional. Therefore, unless it clearly appears that the use made of the right of way in question is private and in no sense public, the validity of the statute must be upheld. Some general rules by which the question as to what constitutes a public use may be determined were declared by this court in the case of *Nash v. Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371. In that case it was in effect held that when the taking is for a use that will promote the public interest, and which tends to develop the great natural resources of the state, such taking is for a public use.

The mining industry in this state is second in importance only to that of irrigation, and this court held in the case of *Nash v. Clark*, *supra*, that the construction and operation of irrigation ditches is a public use. Counsel for appellants, in his brief, concedes "that irrigation is a public use, and that the condemnation of lands for irrigation ditches is for a public use;" and again he says: "There is no person, I take it, of ordinary intelligence, that would assert or think for a moment that the system of irrigation, as adopted and used throughout this whole western country, is not surely a public benefit and a public use." In *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, the court, after speaking of the interests that New Hampshire had in the improvement and development of her natural water power, says: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivaled opportunities of turning our streams of water to practical account. The present prosperity of the state is largely due to what has already been done towards developing these natural advantages, and there is no assignable limit to our resources in this respect if extended and connected enterprises for the improvement of the water power in the state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether we look to the interpretation which has been given in other jurisdictions to the term 'public use,' in reference to the right of taking private property for such a use; to the legislative practice under the provincial and state

governments before and at the time when the Constitution was adopted; to the language of the Constitution itself; to the early and continued legislative practice under the Constitution; to the decisions of the courts in this state; or to the character of our business and the natural productions and resources of the state,—we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river to be taken without the owner's consent, if suitable provision is made for his compensation; and that the act of 1862 is constitutional and valid."

The same reasons that hold that manufacturing is necessary to the public welfare in New Hampshire and other New England states can be urged in behalf of mining in Utah and other Western states. The mining industry in this state, and in others similarly situated, not only produces a home market for the products of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish, which, without the stimulus thus furnished, would languish. In *Dayton Gold & S. Min. Co. v. Seawell*, *supra*, Mr. Chief Justice Hawley, speaking for the court, aptly portrays some of the conditions and disadvantages under which the mining industry is prosecuted in this inter-mountain region, as well as some of the benefits derived therefrom, as follows: "The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much and sometimes more among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of 'mining, milling, smelting, or other reduction of ores,' it is necessary to erect hoisting works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste, rock, and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are often confined to certain fixed localities." We have in this state, in addition to the extensive deposits of gold, silver, lead, and copper ores, large areas of lands containing coal in almost limitless quantities, and we depend almost exclusively upon the coal mines for the fuel used in our manufacturing establishments and for domestic purposes. Now, it is of vital importance to the people that the coal, as well as the other hidden resources

of the state, be opened up and developed, and that the mining industry in general, which has been the source of so much wealth to the people of this and other Western states, be conducted on the same extensive scale in the future that has characterized its operations in the past. Therefore the public policy of the state, as exemplified by the act of the legislature under consideration, is to encourage the people to open up and exploit the mines with which the state abounds, and thereby not only give to the state the wealth which will enable other industries to be created, but furnish thousands of laborers with remunerative employment.

It being conceded, and this court having held, that the construction and operation of irrigating ditches in this state is a public use (*Nash v. Clark, supra*), it follows that the construction of roads and tramways for the development of the mining industry is a public use, as the same line of reasoning that applies in support of the doctrine in the one case holds good in the other. Otherwise a party owning a few acres of farming land, or only a few square rods for that matter, could invoke the law of eminent domain, and by condemnation proceedings acquire a right of way across his neighbor's land for an irrigation ditch to convey water to his small holdings; whereas the owners of mines and of works for the reduction of ores, the operations of which furnish thousands of men in this state with employment at good wages, and to which the general prosperity of the state is largely due, would be denied the right to invoke this same rule of law in order to acquire, when necessary to the successful operation of their business, rights of way for the transportation of ores from the mines to the mills and smelters, and for the construction of tunnels for drainage and other purposes. And parties holding the title to ground necessary and suitable for these purposes, which, in many cases, except for such purposes, might be entirely worthless, would be clothed with power to demand and compel payment of an unconscionable price for their lands before parting with the title, or they could refuse, absolutely, to grant the easement required on any terms, and thereby in some cases cripple mining enterprises, or destroy them altogether. Such a policy would not only be inconsistent and unreasonable, but would greatly retard the development of one of the greatest natural resources of the state. We are therefore of the opinion, and so hold, that the construction and operation of roads and tramways for the development and working of mines is a public use. The act of the legislature under consideration makes ample provision for the payment of a fair price to the owner for lands sought to be

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condemned, and for all damages that he may suffer because of such taking, and is therefore valid.

There are several other questions of minor importance raised and discussed by appellants in their brief, but as neither the abstract nor brief contains a specification of the points relied upon as grounds for a reversal, as required by rule 6 of this court (49 Pac. xi.), they cannot be considered.

The judgment of the trial court is affirmed, with costs.

Bartch, J., concurs. Baskin, Ch. J., concurs in the affirmation of the judgment.

Affirmed by Supreme Court of United States February 19, 1906.

NORTH CAROLINA SUPREME COURT.

W. D. FESTER, Appt.,

v.

DURHAM TRACTION COMPANY.

(138 N. C. 288.)

Street railway—overhanging curb—rights of abutting owner.

Laying a street railway track under authority of the municipal corporation so near a sidewalk the title to which is in the municipality, at a point where streets intersect at an acute angle, that passing cars will overhang it a few inches, gives no right of action to the abutting owner where his right of ingress to and egress from his property is not impaired.

(May 2, 1905.)

APPEAL by plaintiff from a judgment of the Superior Court for Durham County in favor of defendant in an action brought to recover damages for alleged interference with plaintiff's rights in the highway in front of his property. Affirmed.

The facts are stated in the opinion.

Messrs. Winston & Bryant and Fuller & Fuller, for appellant:

The legislature cannot authorize the taking of sidewalks for street railway purposes. If the abutter is injured by the street railway this would be an additional burden, and subject the company to damages.

Case Note.—Campbell v. Metropolitan Street R. Co. 82 Ga. 320, 9 S. E. 1078, presents features very similar to those of *FESTER v. DURHAM TRACTION CO.*

The complaint in that case showed the construction of defendant's street railway within 13 inches of the curbstone, that the grade of the street in front of plaintiff's property was steep, and that it was frequently necessary, in order to get the cars up the hill, to attach an extra pair of horses.

Merrick v. Intramontaine R. Co. 118 N. C. 1083, 24 S. E. 667.

If the principle were once ingrafted into our law, a street railway could, with the approval of the legislature, sweep away an entire sidewalk, and thereby destroy the value of abutting property, even in the business portion of the city. Commenting upon cases of this kind, the Supreme Court of the United States, in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 181, 17 L. ed. 561, said that this class of decisions has gone to the utmost limit of sound, judicial construction, and in some cases beyond it.

Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428.

As the fee was in the abutter, the railway was an additional servitude.

Craig v. Rochester City & B. R. Co. 39 N. Y. 404; 2 Dill. Mun. Corp. 4th ed. §§ 704, 704a; *Elliott, Roads & Streets*, § 734.

Sidewalks set apart for footmen cannot be lawfully used by vehicles.

Mercer v. Corbin, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. Rep. 76, 20 N. E. 132.

An interurban electric railway, running upon a public highway through a country own, is an additional burden.

Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L. R. A. 575, 67 Am. St. Rep. 844, 74 N. W. 538; *Booth, Street Railways*, § 94, and note; *Cooley, Const. Lim.* 6th ed. 667; 24 Vict. chap. 84.

Projections from buildings, overhanging sidewalks, are nuisances which may be abated by law.

Elliott, Roads & Streets, § 802; 27 Am. & Eng. Enc. Law, 2d ed. pp. 158, 162; 21 Am. & Eng. Enc. Law, 2d ed. pp. 710, 712; 1 Am. & Eng. Enc. Law, 2d ed. p. 66; Code, § 630; *Ridley v. Seaboard & R. R. Co.* 118 N. C. 1000, 32 L. R. A. 708, 24 S. E. 730.

The complaint then alleged that the defendants "often drive their horses and mules under the lash, causing the animals and mules to plunge, rear, pitch, and jump upon the sidewalk along and in front of plaintiff's property and house, greatly to the annoyance and disturbance of plaintiff and his family." A demurrer to the declaration was sustained, the court saying that while, under a constitutional provision for compensation for property "taken or damaged" for public use, an action might be maintained on proof of special damage to property by the construction of the railway, yet in the complaint before it there appeared no allegation of damage to the property of the plaintiff, but merely an allegation of annoyance to the occupants, which did not constitute an element of damage.

"If," says the court, however, "the matters complained of in this amendment damaged the property, the jury might consider them."

Ordinarily the complaint of the abutting 1 L.R.A. (N.S.)

Where sidewalks have been laid off in front of buildings, the city authorities cannot appropriate the portion dedicated to the sidewalk for the purpose of a roadway merely.

Carter v. Chicago, 57 Ill. 283; 2 Dill. Mun. Corp. 4th ed. § 429.

Privileges of this kind, which are granted without any valuable consideration except the convenience to the traveling public, are very strictly construed by the courts.

2 Dill. Mun. Corp. § 716, p. 859; *Baltimore v. Chesapeake & P. Teleph. Co.* 92 Md. 692, 48 Atl. 465; 27 Am. & Eng. Enc. Law, 2d ed. p. 155; *People ex rel. Kunze v. Ft. Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010.

Messrs. Manning & Foushee, for appellee: The land taken for streets in cities and boroughs is in the exclusive possession of the municipality, which may use footways as well as cartways for any urban servitude without further compensation to the lot owners.

Merrick v. Intramontaine R. Co. 118 N. C. 1081, 24 S. E. 667; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 70, 27 L. R. A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; *Elliott, Roads & Streets*, § 558; *Cooley, Const. Lim.* 683; Dill. Mun. Corp. 4th ed. 868; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 534; *Carolina C. R. Co. v. Wilmington Street R. Co.* 120 N. C. 520, 26 S. E. 913; *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 236, 29 S. W. 104; *Booth, Street Railways*, § 83, p. 116; *Joyce, Electric Laws*, §§ 336-

owner in cases of this sort is for an interference with his means of egress and ingress. Upon this subject, see note on "Injury to abutting owner by laying street railway tracks near side of street," in 43 L. R. A. 554. But in the *HESTER CASE* there was no impairment of the means of egress and ingress.

Where the injury complained of is not to the means of access, the right to damages for a given use of the sidewalk most frequently depends upon the question whether such use falls within the purposes for which the highway was dedicated. Thus, it has been held that the right of the public upon the highway is to pass and repass; and, consequently, one who stops upon the sidewalk for the purpose of abusing and vilifying the owner of the premises becomes a trespasser, and is liable as such. *Adams v. Rivers*, 11 Barb. 390. No question of this kind arises, however, in the *HESTER CASE*, as the street railway is undeniably a legitimate aid to travel.

339, 341; 27 Am. & Eng. Enc. Law, 2d ed. pp. 27, 29; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 51 L. R. A. 923, 83 N. W. 701.

The rights, powers, and liabilities of municipalities extend equally to the sidewalks as to the roadway.

Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; Bunch v. Edenton, 90 N. C. 431; Russell v. Monroe, 116 N. C. 726, 47 Am. St. Rep. 823, 21 S. E. 550; Neal v. Marion, 129 N. C. 345, 40 S. E. 116; Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264; 2 Dill. Mun. Corp. note 1, §§ 780, 1008, 1012.

The power of the city of Durham to grant easements to the defendant to use the streets having been clearly shown, upon what principle of law can the power to grant an easement to cross a street, including the sidewalks, be denied?

La Crosse City R. Co. v. Higbee, 107 Wis. 389, 51 L. R. A. 923, 83 N. W. 701.

The right of the abutting owner to a street and sidewalk is subordinate to the superior rights of the public.

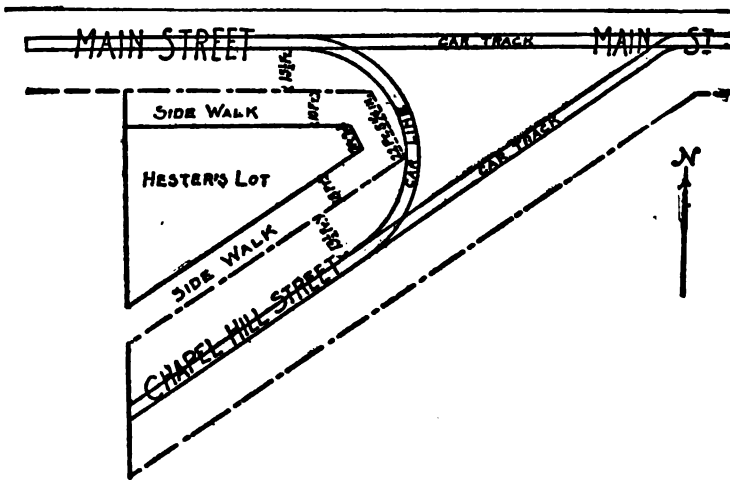
State v. Higgs, 126 N. C. 1014, 48 L. R. A. 446, 35 S. E. 473.

None of the causes requiring compensation to the abutting property are alleged to exist, or proved, in this case.

Booth, Street Railways, note 2, § 91; Rafferty v. Central Traction Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; State, Kennelly, Prosecutor, v. Jersey City, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531; 27 Am. & Eng. Enc. Law, 2d ed. p. 31; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 51 L. R. A. 923, 83 N. W. 701; Joyce, Electric Laws, §§ 296, 297.

Clark, Ch. J., delivered the opinion of the court:

The plaintiff owns the lot which occupies the apex of the acute angle which lies at the junction of Main and Chapel Hill streets in the city of Durham. The defendant, by permission of the board of aldermen of the city, laid a curved track to pass from one street to the other, as per below diagram:



This track was located and laid under the direction of the street commissioner, who made his report to the board of aldermen, the expenses of the work being borne by the defendant. This curved track was used in the summer in the evenings from 6:30 until the cars went to the barn for the night, about 11 or 11:30. The curve was laid for the convenience of the public in going from West Durham to the park and returning. Prior to its being laid, the passengers had to be transferred at that point, known as "Five Points," or else the West Durham car had to go down Main street, and, reversing fenders, seats, and trolley, run back up Chapel Hill street. To avoid this great in-

convenience to the public, the board of aldermen authorized this curve to be put in to run round the sharp angle at the junction of the two streets. Only passenger cars are used,—no freight cars. On Main street the nearest rail of the track is $15\frac{1}{2}$ feet from the outside edge of the sidewalk, and it is $13\frac{1}{2}$ feet on Chapel Hill street from the nearest rail to curb. The curved track in rounding the point does not touch the sidewalk, but at the southeast corner as the curve enters Chapel Hill street, the edge of the car for a few inches of distance is slightly over the edge of the sidewalk. The complaint avers that the rear of the car does this, but this is evidently a mis-

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take, for, as the concave side of the curve is toward the plaintiff's lot, the rear of the car necessarily swings outward, not in. It is also in evidence that at the southeast corner of the sidewalk the cross-ties, extending 18 inches further than the rail, have their extreme ends under the sidewalk. They are not above the surface, but under, and as the cross-ties, thus imbedded out of sight, cannot impede the use of the sidewalk, which is the property of the city, the plaintiff can have no possible ground of action on that account. The sidewalk on Main street is 10 feet wide, and that on Chapel Hill street is 8 feet. The southeast corner, where the passing car overhangs, is diagonally distant about 11 feet from the southeast corner of the plaintiff's lot.

The plaintiff's cause of action depends upon whether he is injured in the use of his property by the slight overhanging of the pavement by the car for an instant of time as it passes the southeast corner where the curve enters or leaves Chapel Hill street. The charter of the city of Durham shows that, as usual, the city has the same right and title to the sidewalks as to the rest of its streets. The defendant's track was laid under authority of its charter, "permission being first had" of the city as required. The construction of a street passenger railway "does not impose any additional servitude upon the property fronting on the street so occupied." *Merrick v. Intramontaine R. Co.* 118 N. C. 1081, 24 S. E. 667, Citing *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 70, 27 L. R. A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; *State, Kennelly, Prosecutor, v. Jersey City*, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531; *Elliott, Roads & Streets*, § 558; *Cooley, Const. Lim.* 683; *Dill. Mun. Corp.* 4th ed. § 723. To the same purport, *Carolina C. R. Co. v. Wilmington Street R. Co.* 120 N. C. 523, 26 S. E. 913; *Smith v. Goldsboro*, 121 N. C. 350, 28 S. E. 479; *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 492, 27 L. R. A. 239, 29 S. W. 104; *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, 51 L. R. A. 923, 83 N. W. 701; *Booth, Street Railways*, § 83; *Joyce, Electric Laws*, §§ 336-339, 341; 27 Am. & Eng. Enc. Law, 2d ed. pp. 27-29.

The authorities, with singular uniformity, concur that it is "now well settled that the use of the streets in cities or villages for a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden or servitude, so as to entitle the abutting property owner, as a matter of right to compensation before such use can be made. . . . This rule 1 L.R.A. (N.S.)

is generally recognized, irrespective of the question whether, in the original laying out of the street, a mere easement was taken, leaving the fee simple in the abutting property." The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street. *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; 2 *Smith, Mun. Corp.* § 1304; *Elliott, Roads & Streets*, § 20. This is recognized by Code, § 3803, and by the courts, which hold towns and cities to the same degree of liability for failure to repair sidewalks as to repair the other part of the street. *Bunch v. Edenton*, 90 N. C. 431; *Russell v. Monroe*, 116 N. C. 726, 47 Am. St. Rep. 823, 21 S. E. 550; *Neal v. Marion*, 129 N. C. 345, 40 S. E. 116; *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264; 2 *Dill. Mun. Corp.* §§ 780, note 1, 1008, 1012. In *Bunch v. Edenton*, 90 N. C. 431, "it was the positive duty of the corporate authorities of the town to keep the streets, including the sidewalks, in proper repair." The charter of Durham gives the same powers over sidewalks, and imposes the same liabilities upon the city for failure to repair the sidewalks, as in regard to the other part of the street. In *La Crosse City R. Co. v. Higbee*, 107 Wis. 402, 51 L. R. A. 929, 83 N. W. 701, it is said: "There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon, and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property."

The complaint avers three grounds of damage:

(1) That 2 inches of the plaintiff's lot is covered by the defendant's track. But the evidence shows that the rail at the nearest point of the curve is 3 inches outside the curbing to the sidewalk, and the pleadings admit that no part of the plaintiff's lot (inside the sidewalk) is overhung by the car in passing.

(2) That vehicles have almost no approach to the lot. But the evidence is that between the outer edge of the sidewalk and the defendant's nearest rail there is 15½ feet on Main street and 13½ feet on Chapel Hill street. It is only at the apex—at the toe of the boot, so to speak—that the track approximates the outer edge of the sidewalk. There is ample evidence that the curve does not interfere with carriages standing on either street in front of the plaintiff's lot. As the toe of the plaintiff's lot is only 7 feet 7 inches, and, being an acute angle, it would be barely 4 feet, perhaps, at the edge of the sidewalk, a car-

riage could not stand there. The toe of the sidewalk (the cross sidewalk) is 22 feet $5\frac{1}{4}$ inches, but over 18 feet of this is "frontage," not of the plaintiff's lot, but caused by continuation of the two sidewalks, for, if the plaintiff's lot were extended to the eastern edge of the sidewalk at that place, it would be narrowed, as already said, to a point with almost no front at all.

(3) That cars frequently run off the track at that point. The only evidence is that they did run off the track three or four times when the curve was first used. There is no evidence of any injury to the plaintiff from this cause.

The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 Am. & Eng. Enc. Law, 2d ed. p. 103; *Ottawa v. Spencer*, 40 Ill. 217; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street, including roadway and sidewalk, shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes. *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 17 Am. St. Rep. 681, 10 S. E. 689; *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330. As said in *State v. Higgs*, 126 N. C. 1014, 48 L. R. A. 446, 35 S. E. 473: "An abutting owner to a street and sidewalk has an easement in his frontage which he may use in subordination to the superior rights of the public." Sidewalks are of modern origin. Anciently they were unknown, as they still are in Eastern countries, and in perhaps a majority of the towns and villages of Europe. In the absence of statutes, a town is not required to construct a sidewalk. *Atty. Gen. v. Boston*, 142 Mass. 200, 7 N. E. 722. It is for the town to prescribe the width of the sidewalk. In the absence of statutory restriction, it may widen, narrow, or even remove, a sidewalk already established. *Ibid.* To widen a sidewalk narrows the roadway. To widen the roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles, respectively, is in the sound discretion of the town authorities. Here they might narrow the sidewalk at the toe of the plaintiff's lot by drawing in its outer edge, or it might make the outer edge curving to correspond with the curve of the car track, and thus prevent the car overhanging the edge of the sidewalk. If so, it may, so far as the plaintiff is concerned, let the car overhang the corner instead of cutting off that corner from the 1 L.R.A. (N.S.)

sidewalk. If the sidewalk were so far narrowed as to impede the circulation of passers-by on foot, so as to hinder the ingress and egress to the plaintiff's building, he would have cause of complaint; but such is not the case here. If the overhanging of the car were to injure anyone walking on the sidewalk, such person might possibly have a cause of action against the city or the defendant, for the establishment and maintenance of the sidewalk are an invitation to pedestrians to walk anywhere thereon, but the plaintiff would not be injured thereby in his property rights to the lot, which is this cause of action. As to pedestrians, the city can protect itself by reducing the width of the sidewalk at that point, or, by condemning a few inches of the plaintiff's lot, it could make a cut-off at the outer corner without reducing the width of the sidewalk; but it should be remembered that that small space, occasionally overhung by a passing car, is at a corner of the street, and therefore the sidewalk, measured diagonally, is wider there than elsewhere, and would still be wider, though the little space overhung were cut off from the sidewalk, or the outer curbing of the sidewalk were drawn in and made curving at that point.

In holding that the acts of the defendant complained of by the plaintiff were not unlawful and did not constitute a cause of action, there was no error.

NORTH CAROLINA SUPREME COURT.

S. W. EVERETT AND WIFE

v.

NORFOLK & SOUTHERN RAILROAD COMPANY et al., Appts.

(138 N. C. 68.)

1. Carrier—loss of goods—presumption.

That loss of goods delivered to a carrier for transportation was due to its negligence will be presumed where the receipt of the

Case Note.—It is now held in nearly every state that the liability of a common carrier for the loss of property transported may be limited, to some extent at least, by a special express contract; but the weight of authority denies the right of the carrier to exempt itself from liability for loss resulting from its own negligence or the negligence of its employees. A contract limiting liability must be reasonable and supported by some consideration. A carrier cannot force such a contract upon the shipper, but must give him the option of having his property transported at a higher carriage rate without limitation upon the carrier's liability.

The weight of authority upholds the validity of a contract limiting a common carrier's liability to an agreed or limited

goods and failure to deliver are shown, and both loss and responsibility are admitted.

2. Same—limited valuation—approval by state commission.

The approval by the state commission of a freight rate based on limited valuation of the property does not, although the carrier is bound to transport at that rate, absolve it from liability for full value of the property if it is lost through its negligence.

(April 11, 1905.)

APPEAL by defendants from a judgment of the Superior Court for Pamlico County in favor of plaintiffs in an action brought to recover the value of property lost while in defendants' possession for transportation. Affirmed.

Statement by Hoke, J.:

The plaintiffs brought action for damages sustained by failure of the defendants to deliver certain packages of freight, delivered to the defendant the Norfolk & Southern Railroad Company at Elizabeth City, North Carolina, on October 22, 1901, to be transported for hire over the lines of the defendant Norfolk & Southern Railroad Company, via Norfolk, Virginia, to Thomasville, North Carolina, on the Southern Railway. The defendants did not deny that certain parcels

or packages of freight delivered to the Norfolk & Southern had not been delivered to the plaintiffs on demand. Both defendants admitted that under the evidence, as it stood, each of them was liable to the plaintiffs for damages, but contended that the amount was only \$30. The following facts also appeared from the record: The goods were shipped on a released bill of lading, wherein they were valued at \$5 per 100 pounds, with a freight rate approved by the corporation commission. The following were the approved rates on household goods, calculated by 100 pounds, to be carried 100 miles: (1) Unlimited in value and unreleased, classified as double first-class, rate 96 cents. (2) Unlimited in value but released, first-class rate 48 cents. (3) Limited in value to \$5 per hundredweight, but unreleased, first-class rate 48 cents. (4) Limited to \$5 in value and released, fourth-class rate 24 cents. The goods were shipped under the last-named classification and rate. The portion of goods lost weighed 600 pounds, which, according to the valuation specified in the bill of lading, would amount to \$30. The jury found that the goods lost were worth \$250. The question presented to the jury on the issue agreed upon was, What was the actual value of the goods lost by the defendants? The question sub-

valuation of the property transported, if such contract is just and reasonable, and a reduction in freight charges is made in consideration for it.

4 Elliott, Railroads, § 1510; Lawson, Contracts of Carriers, pp. 24-57; Hutchinson, Carr. 2d ed. § 250, and Baldwin, Am. Railroad Law, pp. 344-347, lay down substantially the same doctrine.

The leading case on this subject is *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, in which the court sustained the validity of a contract limiting a railroad company's liability to an agreed sum, in consideration of special transportation rates, and denied the right of the shipper to recover the real value of the horses shipped and lost through the negligence of the carrier, although such value was greater than the agreed valuation. The court said that, "where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Some other decisions which also apply this doctrine are the following: *Ballou v. Earle*, 1 L.R.A. (N.S.)

17 R. I. 441, 14 L. R. A. 433, 33 Am. St. Rep. 881, 22 Atl. 1113 (and cases cited in note in 14 L. R. A. 433); *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178, 4 So. 29; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Brown v. Cunard S. S. Co.* 147 Mass. 58, 16 N. E. 717; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314; *Starnes v. Louisville & N. R. Co.* 91 Tenn. 516, 19 S. W. 675; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 150, 56 L. R. A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 6 L. R. A. 849, 10 S. E. 749; *Normile v. Oregon Nav. Co.* 41 Or. 177, 69 Pac. 928; *Zouch v. Chesapeake & O. R. Co.* 36 W. Va. 524, 17 L. R. A. 116, 15 S. E. 185; *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302; *Alair v. Northern P. R. Co.* 53 Minn. 160, 19 L. R. A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; *J. J. Douglas Co. v. Minnesota Transfer R. Co.* 62 Minn. 292, 30 L. R. A. 860, 64 N. W. 899; *Mears v. New York, N. H. & H. R. Co.* 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 193, 52 Atl. 610; *Calderon v. Atlas S. S. Co.* 16 C. C. A. 332, 35 U. S. App. 587, 69 Fed. 574; *Duntley v. Boston & M. R. Co.* 66 N. H. 263, 9 L. R. A. 449, 40 Am. St. Rep. 610, 20 Atl. 327.

But where a stipulation in the bill of lading places a limited valuation on the property carried in case of loss through the default of the carrier, the shipper is not bound when the stipulation is not made in consideration of special shipping rates. Mc-

mitted to the court under the admitted facts of the case and the verdict was, "Shall the plaintiff recover \$250, the value of the articles lost as found by the jury, or \$30, the value of the articles as specified in the bill of lading?" On the verdict, judgment was rendered in favor of the plaintiffs for \$250, and the defendants excepted and appealed.

Messrs. F. H. Busbee & Son, for appellants:

The later cases point out the difference between a contract releasing a carrier from liability arising out of its negligence, on the one hand, and a contract in which, in consideration of a reduced rate of carriage, it is stipulated that the value of articles shipped, in case of loss, shall not exceed a definite amount.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Kidd v. Greenwich Ins. Co. 35 Fed.

353; Calderon v. Atlas S. S. Co. 16 C. C. A. 332, 35 U. S. App. 587, 69 Fed. 577; The Kensington, 88 Fed. 334; Louisville & N. R. Co. v. Sherrod, 84 Ala. 181, 4 So. 30; Western R. Co. v. Harwell, 91 Ala. 348, 8 So. 649; Coupland v. Housatonic R. Co. 61 Conn. 541, 15 L. R. A. 539, 23 Atl. 870; Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 124, 53 Am. Rep. 502, 2 N. E. 344; Pacific Exp. Co. v. Foley, 46 Kan. 462, 12 L. R. A. 802, 26 Am. St. Rep. 107, 26 Pac. 667; Brown v. Wabash, St. L. & P. R. Co. 18 Mo. App. 575; Duntley v. Boston & M. R. Co. 66 N. H. 263, 9 L. R. A. 451, 49 Am. St. Rep. 610, 20 Atl. 327; Fairchild v. Philadelphia, W. & B. R. Co. 148 Pa. 531, 24 Atl. 80; Johnstone v. Richmond & D. R. Co. 39 S. C. 61, 17 S. E. 514; Louisville & N. R. Co. v. Gilbert, 88 Tenn. 433, 7 L. R. A. 173, 12 S. W. 1018; Starnes v. Louisville & N. R. Co. 91 Tenn. 518, 19 S. W. 675; International & G. N. R. Co. v. Caldwell, 3 Tex. App. Civ. Cas. (Willson) 532; St. Louis, A. & T. R. Co. v. Robbins, 4 Tex. App. Civ. Cas. (Willson) 64; Richmond & D. R. Co. v. Payne, 86 Va. 485, 6 L. R. A. 853, 10 S. E. 749; Loeser v. Chicago, M. & St. P. R. Co. 94 Wis. 574, 69 N. W. 373.

A valuation mutually agreed upon as

Fadden v. Missouri P. R. Co. 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689.

Nor will a mere general or arbitrary limitation of value placed upon the goods shipped by the carrier without any actual or bona fide agreement with the shipper with reference to valuation bind the shipper or limit the liability of the carrier to the sum inserted in the bill of lading. Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. 821; Georgia P. R. Co. v. Hughart, 90 Ala. 36, 8 So. 62; Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344; Central R. Co. v. Murphey, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L. R. A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Chicago & N. W. R. Co. v. Chapman, 133 Ill. 96, 8 L. R. A. 508, 23 Am. St. Rep. 587, 24 N. E. 417.

Nor is a carrier's liability limited where its agent inserts a certain amount in the bill of lading without giving the shipper notice of any difference in charges when liability is limited, and without making inquiries as to the value of the property carried. Chicago & N. W. R. Co. v. Chapman, *supra*; Adams Exp. Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. 821.

The shipper is bound by a fair and bona fide valuation of the property carried as a basis for the transportation charges. Louisville & N. R. Co. v. Oden, 80 Ala. 38; Durgin v. American Exp. Co. 66 N. H. 277, 9 L. R. A. 1 L.R.A. (N.S.)

A. 453, 20 Atl. 328; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Hill v. Boston, H. T. & W. R. Co. 144 Mass. 284, 10 N. E. 836; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Boorman v. American Exp. Co. 21 Wis. 154; Central R. Co. v. Murphey, and Ullman v. Chicago & N. W. R. Co. *supra*.

A common carrier is entitled to be fairly informed as to the value of the property confided to his care; and, where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from recovering a higher valuation after the loss occurs, although loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton, or wilful. Zouch v. Chesapeake & O. R. Co. 36 W. Va. 524, 17 L. R. A. 116, 15 S. E. 185.

Where a shipper sends property of a greater value than that made known to the carrier for the purpose of securing a cheaper rate of transportation, he is bound by a general limitation of the amount of liability. Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Brehme v. Dinsmore, 25 Md. 328; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Shacket v. Illinois C. R. Co. 94 Tenn. 658, 28 L. R. A. 176, 30 S. W. 742; Muser v. American Exp. Co. 1 Fed. 383; Georgia S. & F. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; Zouch v. Chesapeake & O. R. Co. 36 W. Va. 524, 17 L. R. A. 116, 15 S. E. 785.

furnishing the basis of the liability assumed and the compensation to be paid is valid.

6 Cyc. Law & Proc. p. 400.

In the present case the rates are not made by the carrier, but are prescribed for it by the administrative body, known as the corporation commission, exercising the legislative power of rate making. The carrier, under heavy penalties, is obliged to carry out these rates. The carrier did not fix the valuation of the articles shipped, but the corporation commission representing the great body of citizens, including the shipper, has prescribed the exact terms of the contract to be made between carrier and shipper. In conforming to these terms the carrier cannot be held chargeable with a determination to evade its common-law or statutory liability.

Where the act was one in which the carrier would be only liable for negligence, or the loss was one within the exceptions provided by special contract of shipment, then "the burden is on the plaintiff to show negligence on the part of the carrier as the approximate cause of the loss; the mere fact of loss or injury creates in itself no presumption of negligence."

5 Am. & Eng. Enc. Law, p. 357; Buck v. Pennsylvania R. Co. 150 Pa. 170, 30 Am. St. Rep. 800, 24 Atl. 678; East Tennessee, V. & G. R. Co. v. Stewart, 13 Lea, 432; Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; E. O. Standard Mill Co. v. White Line Central Transit Co. 122 Mo. 258, 26 S. W. 704; Kirk v. Chicago, St. P. M. & O. R. Co. 59 Minn. 161, 50 Am. St. Rep. 397, 60 N. W. 1084.

The contract which the court is asked to construe is not a contract limiting the liability of the defendants. It is a contract under which the shipper and the carrier have agreed that if a low rate is given, the value of the property is conclusively fixed at a definite amount. The parties are not forbidden to make a reasonable contract limiting the value of the articles shipped, even in case of negligence.

Gardner v. Southern R. Co. 127 N. C. 293, 37 S. E. 328; Hinkle v. Southern R. Co. 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

Mr. A. D. Ward for appellees.

Hoke, J., delivered the opinion of the court:

It is the law of this state that a common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. In Capehart v. Seaboard & R. R. Co. 81 N. C. 438, 31 Am. Rep. 505, 1 L.R.A. (N.S.)

Ashe, J., commenting on several decisions as to the right of a common carrier by contract to restrict its liability, thus sums up the matter: "That a common carrier, being an insurer against all losses and damages except those occurring from the act of God or the public enemy, may, by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer where there is no negligence on his part. (2) That he [a common carrier] cannot, by contract even, limit [his] responsibility for loss or damage resulting from [his] want of due exercise of ordinary care." Elsewhere in the opinion it is held, as stated, that a contract restricting liability as an insurer must be for valuable consideration and reasonable in its terms. The defendants having received the goods for transportation as a common carrier and failed to deliver on demand, and also admitting both loss and responsibility, the law will presume such loss attributable to the defendants' negligence. Mitchell v. Carolina C. R. Co. 124 N. C. 236, 44 L. R. A. 515, 32 S. E. 671; Raleigh Hosiery Co. v. Raleigh & G. R. Co. 131 N. C. 238, 42 S. E. 602; Parker v. Atlantic Coast Line R. Co. 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658. This presumption of the law, arising from the facts proved and admitted, is confirmed by the statement that the goods were shipped "released;" that is, released from liability against which the defendants were permitted to contract, to wit, loss occasioned otherwise than by their negligence.

We have it, then, established that the defendants, by their negligence as common carriers, caused the loss of the plaintiffs' household goods delivered to them for transportation, to the pecuniary value of \$250; that by the valuation specified in the bill of lading the amount of the loss is limited to \$30; and the question presented to the court is, for which sum shall judgment be rendered? It is the law of this state, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. Capehart v. Seaboard & R. R. Co. 81 N. C. 438, 31 Am. Rep. 505; Gardner v. Southern R. Co. 127 N. C. 293, 37 S. E. 328. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the

shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden. *Raleigh Hosiery Co. v. Raleigh & G. R. Co.* 131 N. C. 238, 42 S. E. 602. In *Gardner v. Southern R. Co.* 127 N. C. 293, 37 S. E. 328, it is said: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence;" citing *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, and numerous other decisions. It is further said: "The measure of such liability is necessarily the amount of the loss; and, if the common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost,—that is, for only a small part of the loss,—it is thereby exempted *pro tanto* from the results of its own negligence. Such a course, if permitted, would practically evade the decisions of the courts and nullify the settled policy of the law." In *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 89, 47 Am. Rep. 781, 16 N. W. 497, it is said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for its own negligence, stand, also, in the way of any arbitrary preadjustment of the measure of damages where the carrier is partially relieved from such liability. It would, indeed, be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute and cannot be laid aside, even by the agreement of the parties, but that one half or three fourths of this burden, which the law compels the carrier to bear, may be laid aside by means of a contract limiting the recovery of damages to one half or one fourth of the known value of the property. This would be mere evasion, which would not be tolerated." In *United States Exp. Co. v. Backman*, 28 Ohio St. 156, it is said: "To permit carriers to fix a limitation to the amount of their liabilities for negligence, is, in effect, to permit them to exempt themselves from such liability." In *Hutchinson, Carriers*, § 250, the doctrine is thus stated: "A . . . majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants," and "it is held by the majority of the courts that a contract limiting the liability of the carrier to a certain sum in case of loss,—that is, contracts designed to secure a partial exemption from liability,—while valid and conclusive where the loss is caused by some-

thing other than the carrier's neglect, cannot be allowed to operate where the loss was occasioned by the negligence of himself or his servants; but that in such a case the owner may recover the full value of the goods."

The defendants do not seriously contend that such is not the law of this state; nor do they controvert the position that they would ordinarily be responsible for the amount of the loss established by the verdict of the jury. It is claimed by the defendants, however, that the amount of recovery against them could only be for \$30, because the value to that amount was fixed under the rating established and sanctioned by the corporation commission; that the defendants are compelled to take the goods at that rate, and, as they can only charge the rate, they should only be held to the valuation which is made the basis of the rate. This position is plausible, but not convincing. In the first place, it is fair to conclude that the corporation commission intended that this regulation should be in accordance with law, and that the valuation should only obtain in case of loss not arising from negligence. But, if it were otherwise, the result would be the same. The commission is authorized to make just and reasonable rates of freight, but it has no power to change the law, nor to make a rate based upon any such idea; and, if this regulation has the necessary effect of enabling the common carriers of the state, in shipments of this kind, to evade their responsibility for negligence, the conclusion is not that the law is thereby changed, but that the regulation itself is invalid. We are satisfied that in this instance both the commission and the railroads were prompted by a laudable motive to afford shippers of small means a lower freight rate. But we cannot allow such consideration in a particular case to change the rule of law that we here uphold. It is one in which the entire public is interested as well as the individual shipper, established and adhered to for grave and weighty reasons, and necessary for the protection of the great body of shippers. A principle so vital to the public interest should not be altered or weakened because, in a given instance, the motive is good and the particular result desirable. If this valuation entered as an essential element into the rate here contended for, and the result would enable carriers to evade the law, the rate itself is invalid, and to that extent is not a binding regulation.

There is a class of cases which permits the shipper and carrier to make an agreed valuation of goods delivered for transportation, and which, under certain circumstances in case of loss, will hold the shipper to the

agreed valuation, though this be less than the actual value, and though the loss be occasioned by the carrier's negligence. In some jurisdictions, contracts of this kind are not sanctioned in respect to loss occasioned by negligence. In others, such agreements are upheld where, the carrier being without knowledge or notice as to the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate. In yet others, such agreements would seem to be upheld where the agreed valuation is known to be less than the actual value, provided the same are fairly entered into and made the basis of the shipping rate. But in none of these is the valuation relied upon in this bill of lading sanctioned or justified to the extent here claimed for it. So far as we can discover, all of them condemn an effort to limit liability for negligence by a uniform predetermined valuation arbitrarily fixed, and placed in a printed bill of lading without any reference to the actual value of the property, and without any estimate made or attempted to value the property of the particular shipment, more especially where the difference between the stipulated and actual value is so pronounced that the evident purpose and necessary effect are to practically deny recovery for negligence. The better considered authorities, as far as we recall, forbid and condemn a limitation of liability for negligence under the circumstances here described. See *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 89, 47 Am. Rep. 781, 16 N. W. 497; *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Willock v. Pennsylvania R. Co.* 166 Pa. 184, 27 L. R. A. 228, 45 Am. St. Rep. 674, 30 Atl. 948; *United States Exp. Co. v. Backman*, 28 Ohio St. 156. *Georgia R. & Bkg. Co. v. Keener* was a case very much like the one we are now considering. In that case *Simmons, J.*, in delivering the opinion of the court, said: "Where a shipper enters into an express contract with a common carrier by which he agrees, in consideration of a reduced rate of freight, that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession, the contract will be upheld as to loss not involving negligence on the part of the carrier; but carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence; and this is so as well where the contract provides for partial or limited ex-

emption as where it contemplates total exemption from liability." After stating that under certain circumstances an agreed valuation will be upheld, Judge *Simmons* continues: "But the principle which relieves the carrier from liability for more than the agreed value does not apply where the valuation is merely arbitrary and fixed without reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there is no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of \$5 per 100 pounds for wearing apparel and household goods, indiscriminately, could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier without regard to the actual value of the property; and it follows from what we have said that it was inoperative for that purpose if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence."

It is not claimed here that the carrier was misled or deceived in any way as to the kind or value of these goods. There is neither allegation nor issue, addressed to any such question, and, as we understand it, the defendants did not intend or desire to raise it. Some of the goods lost were perhaps not correctly classified as household goods, but the amount properly described as household goods was more than sufficient to justify the verdict. As a matter of fact, no inquiry was made about the value of the goods, and no statement made concerning them one way or the other. The agent just classified them at the established rate and uniform valuation provided for by the regulation and printed in the bill of lading, and no effort was made to estimate or put any value on the goods of this particular shipment. The defendants rest their defense, and, as we understand, desired to rest it, on the sole ground that they received the goods at a rate and on a valuation established and sanctioned by the corporation commission, and claim that by virtue of such regulation the recovery is limited to \$5 per 100 pounds, amounting in the goods lost to \$30. We declare our opinion to be that the valuation does not restrict the liability of the carriers for losses arising from their negligence, and that the rules of the corporation commission could give it no such effect, even if so intended. The plaintiff is entitled to recover the full amount of his loss as declared by the verdict of the jury. The judgment of the court below is affirmed.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

W. P. HORTON, Appt.

(139 N. C. 588.)

1. Homicide—in commission of unlawful act.

Mere violation of a statute making it a misdemeanor to hunt on another's property without a permit is not such an unlawful act as to render an accidental homicide committed while so doing a criminal offense.

2. Offense *malum in se*.

An offense *malum in se* is one which is naturally evil as adjudged by the sense of a civilized community.

3. Game—property in.

Wild game is the property of the captor, and not of him on whose land it is taken.

4. Statute forbidding hunting—purpose of.

A statute forbidding hunting on another's property without a permit, under a penalty

of not to exceed \$10 fine, cannot be presumed to have been passed for the protection of human life.

(October 24, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for Franklin County, convicting him of manslaughter. Reversed.

Statement by Hoke, J.:

Indictment for manslaughter. The jury rendered a special verdict, and such verdict and proceedings thereon are as follows: "That in the month of November, 1904, to wit, on the — day thereof, the defendant, W. P. Horton, was hunting turkeys on the lands of another; that the following local statute, enacted by the general assembly of 1901, was in force at and in the place in which said defendant was hunting, to wit, chapter 410 of the Laws of 1901; that the said Horton, at the time he was so hunting,

is said the unlawful act must be wilful, and not a mere misadventure. So the fact that, while persons were engaged in a friendly scuffle, a pistol which one of them unlawfully carried in his pocket was discharged and killed the other, did not make a case of homicide caused by the performance of a wrongful act, though carrying the pistol was unlawful.

In *Potter v. State*, 162 Ind. 213, 64 L. R. A. 942, 102 Am. St. Rep. 198, 70 N. E. 129, which was a case of the accidental discharge of a pistol, unlawfully carried, while persons were in a friendly scuffle, the court quoted 1 Bishop, New Crim. Law, § 332, as follows: "It is *malum prohibitum*, not *malum in se*, for an unauthorized person to kill game in England, contrary to the statutes; if, in unlawful shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized." But the court adds: "With equal reason and force it may be asserted, that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act did not, during the scuffle between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful." The court, also, in illustrating its position, said: "If, while engaged in hunting, in violation of the statute, the pistol, through, or by reason of, the culpable negligence of appellant, had been discharged, and killed the deceased, the law, under such circumstances, would not have attributed his death to the unlawful act of hunting, but would have imputed it to such negligence. In fact, under such circumstances, the unlawful act of hunting would not be a factor in or add anything to the case. It would constitute nothing more than a separate and distinct offense."

Case Note.—The opinion in the above case, deciding that an accidental homicide is not a criminal offense merely because it was committed while hunting on another's property without a permit, though that constituted a misdemeanor, since the prohibited hunting was merely *malum prohibitum*, and not *malum in se*, is fully supported by the authorities marshaled at length in the annotation in 63 L. R. A. 353, on the general subject of homicide in the commission of an unlawful act. The author's conclusion is, from the examination of the very great number of authorities, that to render one guilty of involuntary manslaughter for a killing without design while in the commission of an unlawful act, the act must have been *malum in se*, as distinguished from acts *malum prohibitum*, which are merely prohibited by law, but are not otherwise wrong; since such acts do not supply the criminal intent necessary to render one punishable for the killing. The most important cases, however, that are cited in support of that doctrine, are those which the court in the above case has discussed at length in its opinion; and in most of the cases in which accidental homicide has been committed as an unintended result of some unlawful act which is not a felony, the unlawful act has been one which the courts have regarded as criminal in its nature.

Thus, in *People v. Holmes*, 118 Cal. 444, 50 Pac. 675, and similar cases, the court held the homicide manslaughter because the unlawful act, though not a felony, was sufficiently dangerous to come under the condemnation of the law.

And in *People v. Abbott*, 116 Mich. 263, 74 N. W. 529, it is held that the unlawful act from which death results need not be a misdemeanor at common law in order to make the killing manslaughter, if it is a misdemeanor by statute.

And in *Robbins v. State*, 8 Ohio St. 138, it 1 L.R.A. (N.S.)

had not the written consent of the owner of said land or of his lawful agent; that while so engaged in hunting he killed Charlie Hunt, the deceased, but that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting or of handling the firearm with which the killing was done; that hunting at that season was not forbidden under the general game law of the state, but was prohibited only by the special statute referred to; that the shooting from which the killing resulted was not done in such grossly careless or negligent manner as to imply any moral turpitude or to indicate any indifference to the safeguarding of human life; that but for the said statute herein incorporated, the killing of the deceased by defendant does not constitute any violation of the law. If, upon the above findings of fact, the court should be of opinion that the defendant is guilty of manslaughter, we, for our verdict find the defendant guilty of manslaughter; but, if the court should be of opinion that the defendant is not guilty, we, for our verdict, find that the defendant is not guilty." Upon this special finding, the court, being of opinion that the defendant was guilty of manslaughter, so adjudged, and ordered a verdict of guilty of manslaughter to be entered, and gave judgment that the defendant be imprisoned in the county jail of Franklin for a period of four months. Defendant excepted to the ruling of the court, and appealed from the judgment against him.

Messrs. F. S. Spruill and W. H. Ruffin, for appellant:

It is not sufficient that the act or sport engaged in is merely *malum prohibitum*, i. e., unlawful or wrong because forbidden by some police regulation. It must, as an additional and essential element, be such an act or sport as, in itself, is dangerous; or it must be engaged in in a grossly careless and reckless manner.

State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; State v. Turnage, 138 N. C. 566, 49 S. E. 913; State v. Capps, 134 N. C. 622, 46 S. E. 730.

Mr. Robert D. Gilmer, Attorney General, for appellee:

If acts involve any degree of public mischief or private injury they must belong to the class of actions denominated *mala in se*.

Key v. Vattier, 1 Ohio, 132; 1 Sharswood's Bl. Com. p. 58, note.

If the act be unlawful in itself, as shooting at deer in another's park, without leave, 1 L.R.A. (N.S.)

though in sport, and without any felonious intent, whereby a bystander is killed, it will be manslaughter.

1 East, P. C. p. 269; 1 Hale, P. C. p. 38; McClain, Criminal Law, § 23.

The distinction between *malum prohibitum* and *malum in se* (which never had the support of just reason) has disappeared.

Pullman Palace Car Co. v. Central Transp. Co. 65 Fed. 164.

Hoke, J., delivered the opinion of the court:

It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence, and rests the guilt or innocence of the defendant on the fact alone that at the time of the homicide the defendant was hunting on another's land without written permission from the owner. The act, which applies only in the counties of Orange, Franklin, and Scotland, makes the conduct a misdemeanor, and imposes a punishment on conviction of not less than \$5 nor more than \$10. The statement sometimes appears in works of approved excellence to the effect that an unintentional homicide is a criminal offense when occasioned by a person engaged at the time in an unlawful act. In nearly every instance, however, will be found the qualification that if the act in question is free from negligence, and not in itself of dangerous tendency, and the criminality must arise, if at all, entirely from the fact that it is unlawful, in such case, the unlawful act must be one that is *malum in se*, and not merely *malum prohibitum*, and this we hold to be the correct doctrine. In Foster's Crown Law, it is thus stated, at page 258: "In order to bring the case within this description [excusable homicide], the act upon which death ensueth must be lawful. For if the act be unlawful,—I mean if it be *malum in se*,—the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention it will be murder; but if the intent went no farther than to commit a bare trespass, manslaughter." At page 259 the same author puts an instance, with his comments thereon, as follows: "A shooteth at the poultry of B., and by accident killeth a man. If his intention was to steal the poultry, which must be collected from the circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death

ensued was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man; for the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

One of these disqualifying statutes here referred to as an instance of *malum prohibitum* was an act passed (Stat. 13 Rich. II. chap. 13) to prevent certain classes of persons from keeping dogs, nets, or engines to destroy game, etc., and the punishment imposed on conviction was one year's imprisonment. There were others imposing a lesser penalty. Bishop, in his work entitled *New Criminal Law* (vol. 1, §§ 331, 332), treats of the matter as follows: "In these cases of an unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is *malum in se*, and not merely *malum prohibitum*. Thus Archbold [*New Crim. Proc.* 9], says: 'When a man in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished,—in that case, if the act he was doing were lawful, or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance; but, if *malum in se*, it is otherwise.' To illustrate: Since it is *malum prohibitum*, not *malum in se*, for an unauthorized person to kill game in England contrary to the statutes, if, in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized. But to shoot at another's fowls, wantonly or in sport,—an act which is *malum in se*, though a civil trespass,—and thereby accidentally to kill a human being, is manslaughter. If the intent in the shooting were to commit larceny of the fowls, we have seen that it would be murder." To same effect is *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362. An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute. For the reason that acts *malum in se* have, as a rule, become criminal offenses by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal; but this is not at all the test. An act can be, and frequently is, *mal-*

um in se, when it amounts only to a civil trespass, provided it has a malicious element or manifests an evil nature or wrongful disposition to harm or injure another in his person or property. Bishop, *New Crim. Law, supra*; *Com. v. Adams, supra*. The distinction between the two classes of acts is well stated in 19 Am. & Eng. Enc. Law, 2d ed. at page 705: "An offense *malum in se* is one which is naturally evil, as murder, theft, or the like; offenses at common law are generally *malum in se*. An offense *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden."

We do not hesitate to declare that the offense of the defendant in hunting on the land without written permission of the owner was *malum prohibitum*, and, the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide, and the defendant should be declared not guilty. We are referred by the attorney general to East's pleas of the Crown and Hale's pleas of the Crown as authorities against this position. We would be slow indeed to hold that the law differed from what these eminent authors declared it to be in their day and time, nor are we required to do so; for a careful examination of their writings will, we think, confirm the views expressed by the court. My Lord Hale does say in vol. 1, p. 39, that "if a man do *ex intentione* and voluntarily an unlawful act, tending to bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck doth follow thereby within the year and day; or if he strike at one, and, missing him, kills another whom he did not intend, this is felony and homicide, and not casualty or *per infortunium*. So it is, if he be doing an unlawful act, though not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide and not *per infortunium*; for the act was voluntary, though the event not intended; and therefore, the act itself being unlawful, he is criminally guilty of the consequence that follows." But this author says, in treating of the same subject, at pages 475, 476: "So, if A throw a stone at a bird, and the stone striketh and killeth another to whom he intended no harm, it is *per infortunium*; but if he had thrown a stone to kill the poultry or cattle of B and the stone hit and kill a bystander, it is manslaughter, because the act was unlawful; but not murder, because he did it not maliciously or

with an intent to hurt the bystander. By the statute of 33 Hen. VIII., chap. 6, 'no person not having lands, etc., of the yearly value of £100 per annum, may keep or shoot in a gun upon pain of forfeiture of £10.' Suppose, therefore, such a person, not qualified, shoots with a gun at a bird or at crows, and by mischance it kills a bystander by the breaking of the gun or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him; for, though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature." Mr. East, while he gives an instance which apparently supports the view of the state, in treating further on the subject, in vol. 1, p. 255, says: "Homicide in the prosecution of some act or purpose criminal or unlawful in itself, wherein death ensues collaterally to or beside the principal intent. I say collaterally to or beside the principal intent in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another. And, first, it is principally to be observed that, if the act on which death ensue be *malum in se*, it will be murder or manslaughter according to the circumstances; if done in prosecution of a felonious intent, however the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A shoots at the poultry of B, and by accident kills a man; if his intent were to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but, if it were done wantonly and without that intent, it will be barely manslaughter. A whips an horse on which B is riding; whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A and misadventure in B." And again, at page 257: "So, if one be doing an unlawful act, though not intending bodily harm to any person, as throwing a stone, at another's horse, if it hit a person, and kill him, it is manslaughter. Yet in such cases it seems that the guilt would rather depend on one or other of these circumstances; either that the act might probably breed danger, or that it was done with a mischievous intent." So we have it that both Matthew Hale and Mr. East, to whom we were referred as supporting the claim of guilt, declared that the act must be *malum in se* and the instances given by them show that these writers had this qualification in

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mind whenever they state the doctrine in more general terms. Sir William Blackstone also says, in bk. 4, pp. 192, 193: "And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter,"—citing Foster's Criminal Law. We take it that the distinguished commentator must have intended only such civil trespasses as involve an element *malum in se*, as he cites Foster's Criminal Law, and this author, as we have seen, states the qualification suggested.

Again, we are cited by the state to an instance put by East, at page 269: "But, though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger to be reasonably apprehended, if death casually ensue, it is but misadventure. As if persons be shooting at game, or butts, or any other lawful object, and a bystander be killed. And it makes no difference, with respect to game, whether the party be qualified or not. But if the act be unlawful in itself, as shooting at deer in another's park without leave, though in sport and without any felonious intent, whereby a bystander is killed, it will be manslaughter; but if the owner had given leave, or the party had been shooting in his own park, it would only have been misadventure." Lord Hale, at page 475, gives the same instance. And it is urged that this instance is exactly similar to one before us, but not so. According to Sir William Blackstone, in his Commentaries (bk. 2, p. 415): "For some time prior to the Norman Conquest, 'every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the King's forests; as is fully expressed in the laws of Canute and of Edward the Confessor. . . . 'Cuique enim in proprio fundo quamlibet feram quoque modo venari permissum.'" And further on it is said that "if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed; . . . the property arising *ratione soli*." "On the Norman Conquest, a new doctrine took place, and the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, was then held to belong to the King, or to such only as were authorized under him." Again: "But as the King reserved to himself the forests for his own ex-

clusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of chases or parks, or gave them license to make such in their own grounds. . . . And, by the common law, no person is at liberty to take or kill any beasts of chase but such as hath an ancient chase or park." In Encyclopædia Britannica we read that the chases or parks were much the same, except that the parks were inclosed, having a tendency to make the game contained therein more completely and exclusively the property of the owner. Anyone who entered them was a trespasser, and in shooting the game therein his act can be likened to that of the case put by Foster, East, and Lord Hale, where one wantonly shot another's chicken. He was engaged in the effort to destroy another's property, and the act could well be considered *malum in se*. But not so here. We have never transplanted to this country either the Saxon or Norman theory as to the right to take and appropriate game. Here it is considered the property of the captor, except, perhaps, in the case of bees. It is said in Cooley on Torts: "As regards beasts of the chase, the English rule is that, if the hunter starts and captures a beast on the land of another, the property in him is in the owner of the land. Under the civil law, the property passed to the captor, and such is believed to be the recognized rule in America, even when the capture has been effected by means of a trespass on another's land." [*436]. State v. House, 65 N. C. 315, 6 Am. Rep. 744.

The act of the defendant, therefore, was not in the effort to destroy another's property, but was strictly *malum prohibitum*. State v. Vines, 93 N. C. 493, 53 Am. Rep. 466, and State v. Dorsey, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777, are cases apparently opposed to our present decision, but neither is really so. In State v. Vines the sport was eminently dangerous, amounting to recklessness; and in State v. Dorsey the element of criminal negligence was also present, and in this case a state statute governing the construction was given much weight. Neither the one case nor the other required any critical examination of the doctrine, as sometimes stated, that an unintentional homicide, occasioned when in the commission of an unlawful act, is manslaughter. The verdict in the case before us negatives both the elements of guilt (present in these two cases) declaring that the act was not in itself dangerous and that the defendant was not negligent.

Again, it has been called to our attention that courts of the highest authority have declared that the distinction between 1 L.R.A. (N.S.)

malum prohibitum and *malum in se* is unsound, and has now entirely disappeared. Our own court so held in Sharp v. Farmer, 20 N. C. (4 Dev. & B. L.) 255, and decisions to the same effect have been made several times since. Said Ruffin, Ch. J., in Sharp v. Farmer: "The distinction between an act *malum in se* and one merely *malum prohibitum* was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law." It will be noted that this decision was on a case involving the validity of a contract, and the principle there established is undoubtedly correct. The fact, however, that the judge who delivered the opinion uses the words "was never sound," and that other opinions to the same effect use the words "has disappeared," shows that the distinction has existed; and it existed, too, at a time when this feature in the law of homicide was established. And we are well assured that because the courts, in administering the law on the civil side of the docket, have come to the conclusion that a principle once established is unsound and should be rejected, this should not have the effect of changing the character of an act from innocence to guilt, which had its status fixed when the distinction was recognized and enforced.

It was further suggested that the homicide was one of the very results which the statute was designed to prevent, and to excuse the defendant would be contrary to the policy of the act. But this can hardly be seriously maintained. It will be noted that it was not the owner of the land who was killed, but the defendant's comrade in the hunt; and of a certainty if our legislature thought that conduct like that of the defendant was dangerous, and the statute was designed to protect human life, some other penalty would have been imposed than a fine of "not less than \$5 and not more than \$10." It is more reasonable to conclude that the act in its purpose was designed to prevent and suppress petty trespasses and annoyances, such as leaving open gates, throwing down fences, treading over crops, etc.

The special verdict having established that the act of the defendant was entirely accidental, it is a relief that we can declare him innocent in accordance with accepted doctrine, and that in the case at bar the law can be administered in mercy as well as justice. Quoting again from that eminent judge and humane and enlightened man, Sir Michael Foster: "And where the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration."

It is not the part of judges to be perpetually hunting after forfeitures where the heart is free from guilt. They are ministers appointed by the Crown for the ends of public justice; and should have written on their hearts the solemn engagement his Majesty is under to 'cause law and justice in mercy to be executed in all his judgments.'" [P. 264]. We know that in this spirit the judge below dealt with the defendant and his cause; for, though the judgment of his Honor impelled him to the conclusion of guilt, he imposed the lightest punishment permissible for the offense.

There was error in holding the defendant guilty, and, on the facts declared, a verdict of not guilty should be directed and the defendant discharged.

Reversed.

Walker, J., concurs in result only.

CALIFORNIA SUPREME COURT.

RE ESTATE OF JULIUS H. CLARK, Deceased.

L. J. CLARK, Resp't.,
v.

C. P. DuBOIS, Appt.

(.... Cal.)

1. Will—of resident—proof.

Under statutes providing that wills must be proved in the county of which the deceased was a resident at the time of his death, and that foreign wills allowed in other states may be allowed in the county

Case Note.—The courts seem to be unanimous in holding that statutes providing for the allowance or recording of wills admitted to probate in another jurisdiction, upon the production of a duly authenticated copy, do not apply where the testator's domicile at the time of his death was within the state. Two reasons are usually given for such decisions; one being that these statutes are to be construed with reference to others on the same subject, requiring probate at the place of decedent's domicile; and the other, that such statutes are intended to apply only where the court of the other state or country has jurisdiction, which is not the case with reference to realty situated, or personalty belonging to one having a domicile, without the state where the will is offered for probate.

In *Wallace v. Wallace*, 3 N. J. Eq. 616, it was held that such an act, the words of which taken literally embraced not only foreign wills, but those made and executed within the state by residents and proved in another state, should be construed with reference to another act the deficiencies of 1 L.R.A. (N.S.)

in which testator left real estate, the will of a resident cannot be probated elsewhere than in the state, and then brought into the state for secondary or ancillary administration.

2. Statute—effect of title.

Sections under a title of a statute "Probate of Foreign Wills" must be held to refer to such wills, since the title will be read into them.

3. Will—proof in foreign state.

The duty of a state to give full faith and credit to the judgments of other states does not require it to permit the will of one of its residents to be probated first in another state, and then grant ancillary administration within the state on the foreign record.

On Rehearing.

4. Same—will of nonresident—effect of proof.

The probate of the will of a nonresident who dies, leaving property within the state, extends only to its effect upon property within the jurisdiction, and has no effect upon the validity of the will itself.

(Van Dyke, McFarland, and Shaw, JJ., dissent.)

(October 12, 1905.)

APPEAL by proponent from an order of the Superior Court for Yolo County denying probate to the will of Julius H. Clark, deceased, as a foreign will. **Affirmed.**

The facts are stated in the opinions.

Messrs. W. A. Anderson and George Clark, for appellant:

The courts of this state have always interpreted the statute as meaning just what we are contending for.

Re *Warfield*, 22 Cal. 71, 83 Am. Dec. 49;

which it was intended to supplement, which had reference only to wills made in another state or country; and this view was further supported by a consideration of the consequences that would result from a literal construction.

In *Sturdivant v. Neill*, 27 Miss. 157, it was said that the law permitting probate of authenticated copies of wills proved according to the laws of another state or country must be construed with reference to the whole law on the subject of wills; and that since the foreign court had no jurisdiction over the will of one domiciled elsewhere, the courts of the state could take no jurisdiction of the copy of their record.

In *Morris v. Morris*, 27 Miss. 847, and in *Bate v. Incisa*, 59 Miss. 613, it was held, following the foregoing decision, that the statute did not embrace the case of a will whose maker is domiciled in the state, although executed out of the state, and although the testator died in the jurisdiction in which the will was admitted to probate.

In *Manuel v. Manuel*, 13 Ohio St. 458, a statute authorizing the admission to record

Re Richardson, 120 Cal. 344, 52 Pac. 832; Re Engle, 124 Cal. 292, 56 Pac. 1022; Re Brundage, 141 Cal. 538, 75 Pac. 175; Converse v. Starr, 23 Ohio St. 491; Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801; Rogers v. King, 22 Cal. 71; Apple's Estate, 66 Cal. 432, 6 Pac. 7.

Whenever by statute it is provided at the domicile that a will is valid when "executed according to the laws of the place where it was made," original probate may be had outside of the domicile.

Morris v. Morris, 27 Miss. 847; Lyon v. Ogden, 85 Me. 374, 27 Atl. 258.

Full faith and credit shall be given to the judgment of a sister state.

State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 22 L. ed. 599; Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335; Corrigan v. Jones, 14 Colo. 311, 23 Pac. 913; Gaines v. New Orleans, 6 Wall. 703, 18 L. ed. 960; Crippen v. Dexter, 13 Gray, 330; Goodman v. Winter, 64 Ala. 426, 38 Am. Rep. 13; Walton v. Hall, 66 Vt. 455, 29 Atl. 803; Brock v. Frank, 51 Ala. 89; Tompkins v. Tompkins, 1 Story, 552, Fed. Cas. No. 14,091; Vance v. Anderson, 39 Iowa, 426; Townsend v. Downer, 32 Vt. 183; Dickey v. Vann, 81 Ala. 425, 8 So. 195; Moody v. Johnson, 112 N. C. 798, 17 S. E. 578; Pratt v. Hargreaves, 75 Miss. 897, 23 So. 519; Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503, 81 N. W. 1020; Martin v. Stovall, 103 Tenn. 1, 48 L. R. A. 130, 52 S. W. 296; Otto v. Doty, 61 Iowa, 23, 15 N. W. 578; Irwin v. Scriber, 18 Cal. 500; Willetts's Appeal, 50 Conn. 330.

Probate of a will may be granted in any state in which the testator left assets, though

his domicile at the time of his death was in another state, and probate had not been granted by the court of the domicile.

23 Am. & Eng. Enc. Law, 2d ed. p. 142; Apple's Estate, *supra*; Re Clayson, 26 Wash. 253, 66 Pac. 410; Re Gordon, 50 N. J. Eq. 397, 26 Atl. 268; Jaques v. Horton, 76 Ala. 238; Varner v. Bevil, 17 Ala. 286; Still v. Woodville, 38 Miss. 646; Hyman v. Gaskins, 27 N. C. (5 Ired. L.) 267; Rice v. Jones, 4 Call. (Va.) 89; Booth v. Timoney, 3 Dem. 416; Pepper's Estate, 9 Pa. Co. Ct. 507, 148 Pa. 5, 23 Atl. 1039; Brown's Estate, 13 Pa. Co. Ct. 289; Wood v. Matthews, 73 Mo. 477.

On Rehearing.

The court has no power to construe the statute by the use of the caption.

Sutherland, Stat. Constr. § 237; Re Garcelon, 104 Cal. 574, 32 L. R. A. 595, 43 Am. St. Rep. 134, 38 Pac. 414.

Mr. Arthur C. Huston, for respondent:

Proceedings for the administration of an estate are purely statutory, and must be in accordance with the statute, or they are void.

Smith v. Westerfield, 88 Cal. 378, 26 Pac. 206.

The superior court of the county in which the deceased resided at the time of his death alone has jurisdiction to issue letters testamentary or of administration.

Re Harlan, 24 Cal. 182, 85 Am. Dec. 58; Re Wickes, 128 Cal. 274, 49 L. R. A. 138, 60 Pac. 867; Stark v. Parker, 56 N. H. 481; Moultrie v. Hunt, 23 N. Y. 394; Dupuy v. Wurtz, 53 N. Y. 556; Caulfield v. Sullivan, 85 N. Y. 153; Manuel v. Manuel, 13 Ohio St. 458; Converse v. Starr, 23 Ohio St. 498; Bate v. Incisa, 59 Miss. 513; Allaire v.

of authenticated copies of wills executed and proved according to the laws of any state, etc., although sufficiently comprehensive in terms to embrace the case of every will executed by any person, in any place, in such a manner as to conform to the laws of any state, etc., was limited, by construction with reference to statutes *in pari materia*, to wills proved in a court to which the jurisdiction to make original probate in the case properly belongs, under the established rules of the common law.

In New Hampshire, under a statute providing for the filing of copies of a will and its probate in a foreign jurisdiction, if no sufficient objection should be made, it was held that the nonresidence of the testator in such foreign jurisdiction was a sufficient objection, since by the general rule, as well as by a statute declaratory of such rule, a will must be presented for probate where the testator was domiciled. Stark v. Parker, 56 N. H. 481.

In Tarbell v. Walton, 71 Vt. 406, 45 Atl. 748, an intention of the legislature that the statute providing for the allowance of wills

proved and allowed in other states, etc., should not apply to a foreign probate of the will of a domiciled testator, was deduced from other provisions relating to the place of probate of the will of such a testator, and to the disposition, in the case of such allowance on a foreign probate, of property undisposed of by will in the manner provided in cases of nonresident decedents.

The same conclusion as to the effect of a foreign probate of a domestic will, independent of any question of statutory construction, was reached in Scripps v. Wayne Probate Judge, 131 Mich. 265, 100 Am. St. Rep. 614, 90 N. W. 1061, where it was held that the probate court of the domicile of the testator has exclusive jurisdiction to determine the validity of a will; and that where it is admitted to probate by a court without jurisdiction, the decree or order of that court, except as to property located within its jurisdiction, is not conclusive upon the courts of other jurisdictions, under the rule of state comity, or under the United States Constitution.

Allaire, 37 N. J. L. 312; Wallace v. Wallace, 3 N. J. Eq. 618; McNulty v. McClay, 16 Neb. 418, 20 N. W. 286; Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737; Story, Conf. L. § 467; 23 Am. & Eng. Enc. Law, p. 114; Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 56, note; Schoulér, Exrs. & Adms. 15, 57; 2 Redf. Wills, 290, 12-13; 1 Woerner, Am. Law of Administration, § 226, **493, 495, 496; Carpenter v. Denoon, 29 Ohio St. 379; Campbell v. Sheldon, 13 Pick. 8; Ives v. Allyn, 12 Vt. 589; Porter v. Trall, 30 N. J. Eq. 106; Sturdivant v. Neill, 27 Miss. 157; Lindley v. O'Reilly, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; Tarbell v. Walton, 71 Vt. 406, 45 Atl. 748; Re Law, 80 App. Div. 73, 80 N. Y. Supp. 410; 2 Redf. Wills, 18-20.

Mr. Garret W. McEnerney also for respondent.

Mr. S. D. Woods, with Messrs. Campbell, Metson, & Campbell, *amici curiæ*:

Probate of domestic wills can be had only originally.

Manuel v. Manuel, 13 Ohio St. 459; Sturdivant v. Neill, 27 Miss. 157; Stark v. Parker, 56 N. H. 481; Wallace v. Wallace, 3 N. J. Eq. 616.

Mr. Charles S. Wheeler, *amicus curiæ*.

Henshaw, J., delivered the opinion of the court:

Julius H. Clark died in the county of Yolo, in the state of California, on the 14th day of March, 1904, and was a resident of that county at the time of his death. He had resided in the county for more than twenty years continuously prior to his death. On the 13th of July, 1872, while visiting in Keene, New Hampshire, he executed his last will and testament. This will was executed in conformity with the laws of the state of New Hampshire, and also in conformity with the laws of the state of California. It was filed by the executrix named therein in the office of the county clerk of Yolo county, with a petition praying for the probate thereof. In addition to having been a resident of Yolo county at the time of his death, the deceased left estate in that county. Subsequent to the filing of the will and petition, the superior court of Yolo county in probate made an order permitting the original will to be withdrawn and forwarded to Keene, New Hampshire. The will was then probated in New Hampshire, and thereafter appellant herein filed his petition in the superior court of the county of Yolo, asking for probate of the same will upon an exemplified copy from the probate court of the state of New Hampshire. The superior court of Yolo county took evidence and determined that at the time of his death Clark was a resident of Yolo county. This finding is not 1 L.R.A. (N.S.)

in dispute. As a legal consequence, following this finding, the court concluded that Clark's will should be admitted to probate originally in the superior court of the county of Yolo, and was not entitled to admission as a foreign will. It denied the petition, and this appeal is taken.

We are here for the first time upon a direct proceeding, by appeal from an order refusing probate to such a will, called upon to construe our Code provisions governing the question. We say that we are for the first time called upon in direct proceedings, because, as will hereafter be shown, the cases in which the question may be considered to have arisen were either cases of collateral attack or cases where the precise question here presented was not made an issue, and therefore, under well-settled principles, cannot be said to have been decided. As all the provisions of the Code bearing upon a single subject-matter are to be construed together, and harmoniously, if possible, it may be well to set forth the sections touching the probate of wills. Section 1294 of the Code of Civil Procedure declares: "Wills must be proved and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died." Article 3, chap. 2, of the same title (11) containing § 1294, above quoted, is devoted to the probate of foreign wills. The article is itself entitled "Probate of Foreign Wills," and § 1322 provides: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." Section 1323, following, provides that notice of a petition for proving a will shall be given when a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters. Section 1324 provides that if on the hearing it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state. Section 1299 declares: "Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be

in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state." We take it that no jurist, feeling himself unembarrassed by earlier decisions, and at liberty to treat the question as a new one, would hesitate to say: First, that § 1294 fixes the place of jurisdiction for all grants of original probate, while § 1322 does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. Second, that these laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence; and that, so far as the state of California is concerned, it cannot be primarily proved elsewhere, and brought into this state for purposes of secondary and ancillary administration. In construing the language of § 1322, attention would be called to the fact that resort with propriety may be had to the title of an act, and often must be had, to determine its true scope and intent; that the title of § 1322, relating exclusively and in terms to foreign wills, will be read in, and of necessity must be read in, to the language of that section, so that "all wills" means, and should be read to mean, "all foreign wills;" and that "foreign wills," as the phrase is here employed, means all wills other than domestic wills, as plainly appears from the language of the section itself, which describes these wills as all those "duly proved and allowed in any other of the United States, or in any foreign country or state." In illustration, it might be pointed out that if the legislature had passed an act under the title of "An Act for the Government of Boys in Penal and Reformatory Institutions," and the body of the act had begun with the declaration, "All boys shall," etc., it would unhesitatingly be said that the phrase "all boys" had reference exclusively to all boys in penal and reformatory institutions in this state. We think this same unhampered jurist would point out that the matter of recognizing the judgment of a foreign state rested originally wholly in comity, and that, saving as exacted by § 1, art. 4, of the Constitution of the United States, still rests wholly in comity. It would be pointed out that while the states themselves, as has this state, have, by appropriate legislation, provided that full faith and credit should be given to the adjudications of sister states, this never has meant that the state itself has parted with any of its sovereign rights, with any of its rights of primary jurisdiction, nor with any of the rights of its subjects, to have the will of a fellow resident originally proved in the county of his residence, where, presumptively, he is the best known, and where they may the better litigate all questions touching the va-

lidity of the solemn instrument offered for probate.

Recognition would be given to the indisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by § 1294, *supra*, and the rule as to other states is the same. 1 Woerner, *Am. Law of Administration*, *439; *Shields v. Union Cent. L. Ins. Co.* 119 N. C. 380, 25 S. E. 951; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; *Putnam v. Pitney (Washburn's Estate)* 45 Minn. 242, 11 L. R. A. 41, 47 N. W. 790; *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803; *Jaques v. Horton*, 76 Ala. 238. But the limitations of the operation of this principle would also be recognized, namely, that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extra-territorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration. 1 Woerner, *Am. Law of Administration*, *491. And in this connection it would be further pointed out that, if the position contended for by appellant is sound, it involves upon the part of the state a formal surrender of so much of its sovereignty and right of primary jurisdiction, conferring that upon foreign states, and at the same time, to this extent, is subversive and destructive of the rights of its citizens. It would be said with exact truth that the full faith and credit which is accorded to the adjudications of sister states is a full faith and credit, consonant with complete jurisdiction and control of the sovereign state over all its inhabitants, and over all the property within its boundaries. No less would the practical hardships of such an interpretation be pointed out, because, if it were so that all wills, therein including domestic wills of residents of this state, could be primarily proved in a foreign jurisdiction, and by mere exemplification of that proof be entitled to ancillary probate under the laws of this state, it would result in numerous instances that wills of residents of this state would be probated in foreign jurisdictions without the knowledge of those in interest resident in this state, and with-

calf, is too feeble to come to the state of California, to apply for letters testamentary on said will, and it appearing from said petition that the said executrix desires to have said will probated in the county of Cheshire, state of New Hampshire, and that the said Julius H. Clark left estate in said county at the time of his death: Wherefore it is by the court ordered, adjudged, and decreed that the clerk of the said superior court of the county of Yolo be, and he is hereby, ordered and directed to send the will of the said Julius H. Clark, now on file in his said office, to Mrs. Paul Thomson, at West Hartford, Connecticut, by express, or to deliver to W. A. Anderson, the attorney for Mary M. Metcalf, the said will to be so sent. And the clerk is hereby ordered to preserve a certified copy of said will in his said office. E. E. Gaddis, Judge.

Indorsed: Filed April 19, 1904. C. F. Hadsall, Clerk.

Thereafter, on May 18, 1904, the proponent Du Bois, to whom an interest in said estate had been conveyed by said Mary M. Metcalf, devisee and legatee of the said will, filed a petition in the superior court of Yolo county for admission to probate of said will upon a duly authenticated copy thereof and its probate in the state of New Hampshire. Upon notice of said application having been given pursuant to the statute, the contestant, L. J. Clark, son of the testator, and a legatee under the will, filed objections to the admission of the same upon the exemplified copy, upon the grounds, among others, that said Julius H. Clark, at the time of his death and at the date said alleged will was executed, was a resident of the county of Yolo, state of California; that said alleged will was a domestic will, and that the same could not be admitted to probate by virtue of having been previously admitted to probate by the courts of New Hampshire; that the superior court of Yolo county, state of California, had original and exclusive jurisdiction to hear an original petition to admit said will to probate; and that the courts of the state of New Hampshire had no jurisdiction to admit said will to probate, except for the purpose of carrying on an administration ancillary to that had in the state of California. Upon the hearing of the case, the superior court of Yolo county sustained the objection of the contestant upon the grounds stated, and denied the admission of the authenticated copy to probate, and from this order the appeal is taken. From the record it appears that the copy of the will was duly authenticated in conformity with the laws of New Hampshire, and that such will was valid under the laws of said state admitting it to probate; that

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all the proceedings thereon were regular, and that there was nothing upon the face of the record to dispute the jurisdiction of the court of such state admitting the will to probate; and that said will was made and executed in conformity, not only with the laws of said state, but also in conformity with the laws of this state. The question, therefore, presented, is whether, in the case of a testator who, at his death, resided in this state, a will filed for probate in this state upon a duly authenticated copy thereof from the court of a sister state, first having been duly probated therein according to the laws of said state, may be admitted to probate, or must the original will be produced here for that purpose? Section 1322, Code Civ. Proc., copied in the prevailing opinion, is taken from the act of 1850 to regulate the settlement of estates of deceased persons, being § 27 of said act. Stat. 1850, chap. 129, p. 377. The language of the Code sections bearing on the subject under consideration is plain and unambiguous, and cannot be controlled by any headlines of the chapter put there by the Code commissioners. "The mere classifications can scarcely be deemed part of the law." Endlich, Interpretation of Statutes, § 70.

In the case of Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, the plaintiff sued in the character of trustee of the estate of Jonathan Thompson, deceased, under his last will. The testator was a resident of the county of San Luis Obispo, and left estate therein. His last will had been duly proved and allowed in the Queen's probate court of London, on the 28th day of October, 1875. His heirs and devisees were residing in this state and in England. Upon petition filed for the probate of said will from an exemplified copy thereof from said English court, the probate court of San Luis Obispo county, this state, after notice and proceedings as required by the Code, admitted said will to probate in the following order: "It is ordered that the paper heretofore filed purporting to be a copy of the last will and testament of said deceased be admitted to probate as the last will and testament of said deceased; that the said John Thompson and John A. Patchett be and they are hereby appointed executors of said estate; and that letters testamentary issue to the said petitioners upon their taking the oath as required by law." Letters testamentary were accordingly issued to John Thompson and J. A. Patchett, who duly qualified. The will also appointed Thompson, Patchett, and Grierson trustees of the estate, and devised the property to them for the uses and purposes stated in the will. Thereafter, by an order of said superior court, Patchett was removed and plaintiff Goldtree was appoint-

ed in his place. On the trial of the case the defendant objected to the introduction in evidence of the record of the California probate proceedings of San Luis Obispo county, on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject-matter of the probate of the will. Defendant's objections were overruled and judgment went for the plaintiffs which judgment on appeal was affirmed by this court in department. Appellant filed a petition for a rehearing, and made the point that, as Thompson was a resident of California at his death, his will was domestic to the state of California, and that the California court had no jurisdiction to grant ancillary or secondary probate, as was done in that case. A rehearing was granted, and appellant filed additional points and authorities upon the rehearing in bank, in which it is said: "Admittedly Jonathan Thompson was a resident of California at his death. It follows that his will, if any he left, was not a 'foreign' but a domestic will,—domestic to the state of California. . . . The English court had no jurisdiction to grant original probate of a will domestic to this state. The California court alone had such jurisdiction. The California court had no jurisdiction to grant auxiliary or secondary probate of the will in question." And appellant's counsel especially relied upon the point of want of jurisdiction in the probate court of this state in the premises, and this question seems to have been fully presented to this court on the rehearing. In the opinion upon the rehearing by the court in bank it is said: "The judgment appealed from in this case was affirmed January 31, 1890. A rehearing was granted, and the case has been reargued in printed briefs. We have carefully considered the arguments of the learned counsel for appellant on the rehearing, but find nothing in them having the effect to change the former opinion." Pages 96 and 97, 86 Cal., page 801, 24 Pac. This case, which is the latest expression of this court on the question, seems to hold directly that a will of a resident of this state can be admitted to probate in this state on an exemplified copy of its probate in a court outside of the state.

As already shown, the will in question, upon petition, was ordered by the lower court to be withdrawn and transmitted to New Hampshire, where the deceased left property, to be there first admitted to probate. It can hardly be supposed that the court in doing this at the same time entertained the view that said will could only be admitted to probate in the first instance in Solano county. To suppose so would be to suppose that the court set a snare to entrap petitioners, so as to deprive the legatees 1 L.R.A. (N.S.)

and devisees under the will of the principal benefit resulting from the same. Under the provisions of the Code as well as upon the authority of *Goldtree v. McAlister*, *supra*, the court below clearly erred in refusing to admit the will in question to probate under the circumstances, as shown, and the order to that effect should be reversed.

McFarland, J., dissenting:

I dissent, and think that the order appealed from should be reversed. In my opinion the language of § 1322, Code of Civil Procedure, "all wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded," etc., is entirely too clear and explicit to leave any room for the play of construction. The fact that the section is preceded by the subheading "Probate of Foreign Wills" is not sufficient to overcome the unmistakable meaning of the language of the section. Indeed, the word "foreign" does not necessarily mean in law a country other than a sister state of the American Union. In the majority of instances it includes such sister states, and this view of its meaning is so well established as to have gone into the text-books and law dictionaries as settled law. In "Words and Phrases Judicially Defined," vol. 3, p. 2881, it is said: "For all national purposes embraced by the Federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other; their Constitutions and forms of government being (though republican) altogether different, as are their laws and institutions." In *Bouvier's Law Dictionary*, vol. 1, p. 811, it is said: "The several states of the American Union are foreign to each other with respect to their municipal laws." In *Abbott's Dictionary*, vol. 1, p. 514, it is said: "In American usage the several states of the Union are foreign to each other with respect to matters governed by their municipal laws; while the relations of the general government and either state are domestic. This consideration qualifies the usage of several of the phrases mentioned under the present head. It is abundantly well settled that a bill of exchange drawn in one state, payable in another, is a foreign bill. The corporations created by one state are constantly called foreign corporations in any other. In each state the judgments rendered in, and laws enacted by, another state are foreign judgments and laws. A port of another state is a foreign port." Therefore the word "foreign," in the subheading is not at all inconsistent with the language of the

section in question. And, of course, the legislature has full power over the whole subject of wills, descents, distribution of estates, and probate proceedings. There is not a word in the state Constitution limiting its legislative authority in such matters.

Shaw, J., dissenting:

I dissent. So far as the policy of the provisions of § 1322 of the Code of Civil Procedure is concerned, that is a question for the legislature, and not for the courts. There are considerations both for and against the proposition that the will of a person who dies a resident of this state may be first probated in some other state. In cases of persons who have recently become residents of this state it is often very much more convenient and less expensive to pursue this course. A large part of the population of this state has always consisted of persons who have lived here but a short period of time. It may be that the legislature, having these circumstances in view, believed it the best policy to provide that this might be done, and enacted this statute for the express purpose of allowing it to be done. But, in any event, in view of the plain language of the section, the matter of policy is immaterial. "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so; for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. The statute is itself conclusive upon these subjects." *Davis v. Hart*, 123 Cal. 387, 55 Pac. 1060. The section in question must have the same meaning now as it had when it was originally enacted. It first became a part of the statute law of this state in 1850, when it was enacted in § 27 of the probate act (Stat. 1850, chap. 129, 378), in precisely the same language as that contained in § 1322, Code of Civil Procedure, except that the words "superior court" have been substituted for "probate court." In the probate act there was no chapter, heading, or subheading which could have any effect. It is inconceivable that the legislature would have re-enacted the section in the same language, if it had intended to change the meaning by limiting its application to wills of persons who, at the time of their death, resided out of this state. The phrase "all wills" in the section plainly includes wills of every description, domestic and foreign. Where the language of the statute is clear and unambiguous, as in this case, the title of the act, chapter, article, or subheading of the section cannot be resorted to for the

purposes of giving it a different meaning from that which the words import. *Re Boston Min. & Mill. Co.* 51 Cal. 624; *Cohen v. Barrett*, 5 Cal. 209; *People ex rel. Flynn v. Abbott*, 16 Cal. 366; *Hagar v. Yolo County*, 47 Cal. 232. Furthermore, it cannot be said that the decision will not tend to unsettle titles to real property. While it may be true that the determination of the court upon the question of fact that the residence of the deceased at the time of his death was in some other state or country is conclusive on collateral attack, and that this has been settled by the decisions of this court, yet it has never been decided that where, in case of the probate of a so-called foreign will, the petition on its face avers that the deceased died a resident of this state, but that the will had been first probated in some other state, the fact of lack of jurisdiction is not apparent on the face of the record, and may not be raised upon collateral attack. The records of this court show that there have been several cases where wills of this character have been proven as foreign wills, and it is a fair, if not necessary, inference that the actual cases of that character have been quite numerous. Whatever may be now said in the way of a discriminating review of the previous decisions of this court, it must be admitted that the general opinion has been that, under § 1322, the will of a resident of this state, having been first admitted to probate in some other state, may be probated in this state as a foreign will. I think the court below erred in refusing to entertain jurisdiction.

A petition for rehearing having been filed, the following response was made by Beatty, Ch. J.:

In their petition for a rehearing counsel for appellant reiterate the argument that our construction of the Code provisions relating to the proof of foreign wills (Code Civ. Proc. §§ 1322-1324) can only be sustained by reading into the statute a qualification of the words "all wills," which will limit its application to wills "of a certain kind," contrary to the intention of the legislature and the general understanding of the courts of the state and the legal profession. I take leave to doubt this general understanding of the courts and the profession, and gain call the attention of counsel to the fact that it is wholly unnecessary to read anything into the statute in order to limit its application to wills of a certain kind. The qualifying words are plainly written in the statute, and the fault is with counsel in ignoring their existence and their force. The statute does not say "all wills," and stop there. Its language is (§ 1322) "all wills duly proved and allowed" in any other state or foreign

country. Wills that have been duly proved and allowed are wills "of a certain kind," and in order to determine whether a particular will is of that kind we have to give a construction to the words "duly proved and allowed." When, therefore, is a will duly proved and allowed? The proof of a will is a proceeding *in rem*. To the validity of any judgment *in rem*—a judgment which, as to the *res*, binds all the world—there must be adequate public notice of the proceeding, and such notice must emanate from a court which has jurisdiction of the *res*. When the will of a resident of this state is the *res*, is it possible that the courts of every civilized country on the globe have a concurrent jurisdiction, upon published notice, to determine its validity? If we look to our own statute for a test of jurisdiction in such cases, we find that we confine the jurisdiction to the county of which the decedent was a resident at the time of his death, and this, it is safe to say is the ordinary rule. Authority to take proof of wills is confined to courts whose territorial jurisdiction includes the domicile of the decedent. The fact that in this state, as in other states and countries, wills of nonresidents are admitted to probate on original proceedings, for the purpose of administering upon their property within the state, is no impeachment of this proposition. In such cases it is the property within this state and subject to its jurisdiction which constitutes the *res*, and proof of the will is allowed as a mere incident or means of determining the disposition of that property. And the decree which has only that purpose is conclusive only to that extent. It binds that property here and everywhere that the decrees of our courts are accorded full faith and credit, whether by comity or by force of the Federal Constitution. But such a decree is not binding as to the will itself in other jurisdictions where the decedent may have left property, and still less is it binding upon the courts of his domicile. It is not conclusive in other jurisdictions, simply because, as a will and for all purposes, it has not been duly proved and allowed. It has been proved and allowed so far as it affects the disposition of the property within the particular jurisdiction, but no further.

The considerations thus briefly indicated it seems to me, ought to have prevented the hasty construction which we are told has been generally placed upon our statute by the profession and the courts in this state. As to the courts, it is true that in three instances, as shown by our records, the construction contended for by counsel has been accepted by the trial court; but in this court decrees admitting wills of residents of California to probate, on proof of foreign pro-

bate, have never been sustained, except as against collateral attack. My own opinion is clear that no will has been duly proved and allowed, within the meaning of §§ 1322-1324, Code of Civ. Proc., unless the proof has been taken in a court whose territorial jurisdiction includes the domicile of the testator. When a will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicile of the decedent, the decree and proceedings regularly taken under it are, of course, secure against what in *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801, is held to be collateral attack, and this, irrespective of the question whether that decision can be reconciled with a correct construction of the statute. Correct or not, the rule of that case has become a rule of property, and as such must be upheld upon the doctrine of *stare decisis*, for the protection of vested rights.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FRANK H. BALL, Admr., etc., of Henry Holland, Deceased,

v.

FRANK H. HOLLAND et al.

(.... Mass.)

Remainder—vested.

A vested remainder is created by a will giving testator's widow authority, for the maintenance of herself and children, to spend principal and income of the estate, and providing that at her death "then that

Case Note.—In *BALL v. HOLLAND*, where the life tenant was given authority to spend the entire principal, thereby rendering it uncertain whether any of the property would be left for distribution among the remaindermen, the court nevertheless held the remainder to be a vested, and not a contingent, one.

That a vested remainder may be created notwithstanding the life tenant's power to dispose of the property is sustained by the authorities, among which are *Roberts v. Roberts*, ante, 782; and the following cases: *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1038; *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Edwards v. Gibbs*, 39 Miss. 166; *Rhodes v. Shaw*, 43 N. J. Eq. 430, 11 Atl. 116; *Williams v. Peabody*, 8 Hun. 271; *Mitchell v. Knapp*, 54 Hun. 500, 8 N. Y. Supp. 40; *Evans's Estate*, 155 Pa. 646, 26 Atl. 739; *Kenyon's Petition*, 17 R. I. 149, 20 Atl. 294; *Chafee v. Maker*, 17 R. I. 739, 24 Atl. 773; *Willman v. Holmes*, 4 Rich. Eq. 475; *Smith v. Bell*, Peck (Tenn.) 102.

all of my property which she may possess shall be disposed of equally among all of my surviving children," where a preliminary clause of the will gives the property therein provided for "to my sons and daughters, should they be living at the time of my decease, or any of them that may be alive."

(October 19, 1905.)

RESERVATION by the Supreme Judicial Court for Worcester County for the opinion of the full bench of an appeal from a decree of the Probate Court construing the will of Henry Holland, deceased. Affirmed.

The fifth clause of the will, which was the subject of controversy, was as follows: "I also direct that, should my said wife, Hannah Avery Holland, remain unmarried until her death, then that all of my property which she may possess shall be disposed of equally among all of my surviving children, unless in case of any of my minor children may survive their mother, who shall be provided for as stated in No. 3 of this my last will." The third clause gave the rest and residue of the testator's estate to her use and benefit as long as she should remain his widow, provided, nevertheless, that, "should any of my children be in their minority at the time of my decease, they shall be cared for by their mother out of my property until such time as they shall reach their majority."

At the time of testator's death eleven children were living; at the time of the widow's death seven children survived, and several grandchildren, daughters of deceased children, and the question was whether, under the will, the grandchildren took any interest as representatives of their deceased parents.

Further facts appear in the opinion.

Mr. John B. Scott, for Frank H. Holland: The widow might have expended all the property of the testator, and therefore the remainders over were contingent.

Bowen v. Dean, 110 Mass. 438; Taft v. Taft, 130 Mass. 461; Bamforth v. Bamforth, 123 Mass. 280; Johnson v. Battelle, 125 Mass. 453.

The language used is itself apt to create a contingent remainder.

Hulburt v. Emerson, 16 Mass. 241; Denny v. Kettell, 135 Mass. 138; Coveny v. McLaughlin, 148 Mass. 576, 2 L. R. A. 448, 20 N. E. 165; Hale v. Hobson, 167 Mass. 397, 45 N. E. 913; Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708; Whall v. Converse, 146 Mass. 345, 15 N. E. 660; Minot v. Taylor, 129 Mass. 160.

Words of survivorship following a life estate refer to those surviving at the time of distribution, and not at the time of the L.R.A. (N.S.)

testator's decease, unless the contrary intention is plainly manifested in the will.

Brograve v. Winder, 2 Ves. Jr. 634; Newton v. Ayscough, 19 Ves. Jr. 534; Wordsworth v. Wood, 2 Beav. 25; Wordsworth v. Wood, 1 H. L. Cas. 129; Howard v. Collins, L. R. 5 Eq. 349; Selman v. Robertson, 46 S. C. 262, 24 S. E. 187; Sinton v. Boyd, 19 Ohio St. 30, 2 Am. Rep. 369; Nicoll v. Scott, 29 Ill. 529; Den ex dem. Holcomb v. Lake, 24 N. J. L. 686.

Mr. Henry L. Parker, guardian *ad litem*.

Braley, J., delivered the opinion of the court:

The scheme of the will was to make full provisions for the support of the testator's wife, and, during minority, of their minor children living at his death. To accomplish this she was given full authority, so long as she lived or remained unmarried, to spend, not only the income, but the residue, of his entire property, after the payment of nominal pecuniary legacies provided for in the second clause of the will. Until her widowhood was terminated it could not be determined whether any of his property would be left for distribution under the fifth clause. If there was, he directed at her death "then that all of my property which she may possess shall be disposed of equally among all my surviving children." The widow having died unmarried, leaving surviving children and representatives of those that have deceased since the death of her husband, the question is, Among whom is the remainder of his property, not used by her, to be distributed?

The general rule is well settled that a remainder after a life estate is held to have vested at the death of the testator, unless, from the terms of the will, it clearly appears to have been his intention that it should not vest except upon the happening of the event on which the final distribution of any residue remaining is to be made. *Cushman v. Arnold*, 185 Mass. 165, 168, 169, 70 N. E. 43. If he had said, at the death or marriage of his widow, "I give all of my property which she may possess to such of my children as shall then be living," those alive at the time fixed would have taken a contingent remainder. *Thomas v. Ludington*, 104 Mass. 193. If the adverb "then" refers to his wife's death as the period when possession shall be taken, and not to the time when the estate is to vest, this construction does not dispose of the word "surviving;" for, if he had meant that all his children living at his decease should participate, ordinarily this word would seem to be unnecessary. Throughout the will the testator, when he has occasion to refer to them, invariably limits those that are to take to

children living at the end of the period. Thus, in the fourth clause, which provides for a division if his widow again marries, he expresses his purpose by directing it to be among "my surviving children." It is possible to hold from these clauses that he meant such of his children as might be living at the termination of their mother's estate, and so bring the case within a line of decisions where, under language largely, if not exactly, similar, such a construction has been adopted. *Olney v. Hull*, 21 Pick. 311; *Smith v. Rice*, 130 Mass. 441; *Denny v. Kettell*, 135 Mass. 138; *Coveny v. McLaughlin*, 148 Mass. 576, 2 L. R. A. 448, 20 N. E. 165; *Bigelow v. Clap*, 166 Mass. 88, 43 N. E. 1037; *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913; *Harding v. Harding*, 174 Mass. 268, 54 N. E. 549.

But, upon resorting to the second clause, which is preliminary to his principal purpose, the gift by name is "to my sons and daughters, should they be living at the time of my decease, or any of them that may be alive." The will speaks only from his death, when eleven of the twelve children born of the marriage survived, and the more natural construction, in the light of the whole will and of this fact, is that he refers to these children as a class, in the sense that they were to take all of his property, subject to the devise in favor of his wife, although they might die before their mother. *Bosworth v. Stockbridge* (Mass.) 75 N. E. 712. We are of opinion, therefore, that the remainder vested at the death of the testator, and that his children then living, with the representatives of any child since deceased, are entitled to the residue of the estate.

Decree of the Probate Court affirmed

KENTUCKY COURT OF APPEALS.

DAISY CARSON et al., Appts.,

v.

J. A. BELILES.

(....Ky.)

Fraudulent conveyance—cancelation.

A voluntary conveyance of real estate to place it beyond the reach of a judgment in

Subject Note.—Recovery of nonexempt property conveyed to avoid nonexistent or unfounded demand.

I. Scope, 1007.

II. Effect of the intent to avoid liability, 1008.

III. When conveyance was wrongfully induced by grantee.

a. In general, 1010.

b. Imposition or overreaching, 1011.

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an anticipated action will not be canceled as against the heirs of the grantee, although the threatened action had no foundation in law, and the grantee, upon being notified of the conveyance, promised to reconvey on demand.

(October 25, 1905.)

A PPEAL by defendants from a judgment of the Circuit Court for Butler County in favor of plaintiff in an action brought to rescind a conveyance of real estate. Reversed.

The facts are stated in the opinion.

Messrs. Harreld & Willis and Speed Guffy for appellants.

Messrs. N. T. Howard and W. A. Helm for appellee.

Barker, J., delivered the opinion of the court:

The one question involved on this appeal is whether or not J. A. Beliles is entitled to have rescinded a conveyance made by him to his sister, Mrs. M. M. Summerville. In his petition he states the facts as to the conveyance from himself to his sister as follows: "That about the time the deed was made, plaintiff (J. A. Beliles) was threatened with a suit for damages or bastardy proceedings, which plaintiff knew to be wholly unfounded in truth, and false and unwarranted and malicious, and to discharge such a suit plaintiff, after he had brought suit to divide said land, and when the deed was to be made by master commissioner, plaintiff simply ordered the commissioner to make the deed to Margaret Summerville, wife of defendant M. M. Summerville, without consideration from her (Margaret), and without her knowledge or consent, and plaintiff afterwards informed her of what had been done, and she agreed that she would hold the land in her name and would deed it back to plaintiff upon his request to do so." If the foregoing statements are true, do they warrant a judgment of rescission as against appellants, who are the children and heirs at law of Margaret Summerville, now deceased? If so, the judgment must be affirmed; if not, it should be reversed.

In the case of *Tantum v. Miller*, 11 N. J.

III.—continued.

c. False representations.

1. In general, 1012.

2. By one in confidential relations, 1012.

I. Scope.

This note does not include cases where the grantor conveyed property in contemplation of future indebtedness, but only those

Eq. 551, the plaintiff alleged that she, being threatened with prosecution for a larceny, of which she was entirely innocent, in order to discourage it, made a conveyance of her property to Eliza, the wife of Charles Miller, upon the secret trust that she would hold it and reconvey it upon demand. In sustaining a demurrer to the bill, it was said: "If this bill can be maintained, the court must take the broad ground that, if a person charged with a crime conveys away his property for the avowed purpose of protecting it against the consequences of his conviction, if he escapes such conviction, a court of equity will aid him in recovering back his property. It is not alleged, in this case, that any fraud was practised upon the complainant by the defendants or by anyone

else. It is not alleged that the prosecution was a malicious one, and that those concerned in it have been any way benefited by the conveyance, or that, by their advice, or through their contrivance, the complainant was induced to execute the deed. But the complainant was charged with larceny; and, although it is alleged that she was entirely innocent of the charge, it does not appear but that there were good grounds of suspicion, or that her accusers were actuated by any other than a most laudable desire to promote public justice. Under these circumstances, the complainant made the conveyance for the unlawful purpose of placing it beyond the reach of the law, if the threatened prosecution should prove successful. The information alleged to have been given

where he erroneously supposed, at the time of making the conveyance, that a claim existed against him, or believed that an unjust demand was made or about to be made upon him, or where the claim is shown to have been unfounded on the trial of the suit brought thereon against the grantor.

II. Effect of the intent to avoid liability.

There is a conflict in the cases as to whether the mere intent of the grantor to defraud is sufficient to render the conveyance fraudulent, although there are really no valid claims outstanding against him to be defeated by the conveyance.

A person charged with larceny, who conveys her property to her niece for the avowed purpose of preventing the collection, by process of law, of any fine there might be imposed upon her in case of conviction, is not entitled to a reconveyance of the property, although it is alleged that the grantor was entirely innocent of the crime charged, when it does not appear that the prosecution was a malicious one, or that those concerned in it contrived to procure the conveyance, or had been in any way benefited by it. The court observes: She made the deed for the purpose of placing her property beyond the reach of the process of law in case she should be convicted. This was against public policy. The court cannot aid a person under such circumstances. The complainant confided in the honesty of her niece, and there the court must leave her. *Tantum v. Miller*, 11 N. J. Eq. 551.

A conveyance of property by the owner during the pendency of an action, for the purpose of defeating any judgment that might be rendered against him, will not be set aside, at the instance of the grantor or his heirs, after judgment has been rendered in his favor in such action, the conveyance having been made without the practice of any fraud or undue influence by the grantee, and without any promise by him to reconvey the property. The court says: The fact that the suit resulted in favor of the grantor can have but little bearing on the 1 L.R.A. (N.S.)

question of his fraudulent intent in conveying all his property for an expressed nominal consideration, but in reality without any consideration whatever. In many cases, such favorable result might well have been brought about by the conveyance itself, in causing the creditor to abandon his suit rather than enter upon the task of pursuing the property. If the grantor of property, not being certain whether his apprehensions as to the recovery of a judgment against him in a pending suit are well or ill founded, acts as if the judgment would be against him, and by conveyance puts his property in the name of another, under a secret trust, he cannot complain if a court of equity leaves the parties in the position in which it finds them, and declines to set aside the conveyance. The statute contemplates a grant or conveyance with intent to defraud creditors. It recognizes the moral quality of the act as residing in the intention. *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84.

One who conveyed his property, both real and personal, to another under an agreement that the latter would reconvey it on demand, which transfer was made in order to defeat any recovery that might be had in a suit pending against the grantor as security for a third person, is not entitled to recover the property, although, on the trial of the suit, it appeared that the debt for which he was sued had been paid by the principal debtor. The court states that the complainant is not entitled to recover, either under the statute against fraudulent conveyances, or by the principle that no one is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention, and for a fraudulent purpose. *Jackson v. Marshall*, 5 N. C. (1 Murph.) 323, 3 Am. Dec. 695.

An averment in a bill filed to have a deed set aside for fraud and want of consideration, that it was made by the grantor to his brother for the purpose of preventing the satisfaction of any judgment that might be recovered against him in a pending suit for slander, is fatal to the maintenance of the

her by her friends was correct; her property was in jeopardy from the consequences of such a prosecution. If convicted, her property was liable for the costs. The court might, upon such conviction, impose a fine of \$500, which would be a lien upon her property. She made the deed for the purpose of placing her property beyond the reach of the process of the law in case she should be convicted. This was against public policy. This court cannot aid a person under such circumstances. The complainant confided in the honesty of her niece, and there the court must leave her."

In *Cameron v. Romele*, 53 Tex. 238, the vendor conveyed property to the vendee under the belief, manufactured by the vendee, that she (the vendor) was about to be sued,

and that she would, therefore, likely lose her property. In refusing to set aside the conveyance, the court stated the rule as follows: "It may, we think, be well questioned whether the alleged trust upon which this deed was executed is not of a character which the policy of the law forbids the courts to enforce. The purpose of the execution of the deed by appellee was to protect the property from liability for a debt which, through the fraudulent misrepresentations of Maher, she was induced to believe other parties were seeking to hold her liable. If the facts were as she supposed when she made the deed, however fraudulent may have been the conduct of the vendee, the court could give her no relief. But her motive in executing the deed is precisely the

suit, although it is further averred that the action for slander was never brought to trial, but was dismissed by the plaintiff therein. *Fletcher v. Fletcher*, 2 MacArth. 38.

It is intimated in *Cameron v. Romele*, 53 Tex. 238, that a grantor cannot compel a reconveyance of premises even though they were conveyed by reason of the false and fraudulent representations of the grantee as to the grantor's liability for a debt. The court bases its opinion upon the ground that the grantor's motive in executing the deed was precisely the same, whether she acted upon a knowledge of the facts, or upon a mistaken belief in regard to them, induced by the fraudulent representations of the grantee. This case is referred to disapprovingly in *Rivera v. White*, 94 Tex. 538, 63 S. W. 125, *infra*.

One who had been in business which had proved unsuccessful, and had, together with his partner, compromised with their creditors by each giving a deed of trust upon their separate properties, with the understanding that each was to pay one half of the indebtedness, and, upon doing so, was to be released, and who had paid his share, and thereafter directed property purchased by him to be conveyed to his wife, because the courthouse in which the partnership agreement was recorded had been burned, and he was afraid he might unjustly be called upon to pay some of his former partner's debts, cannot rely upon his own wrong to defeat the title of the wife to the lands conveyed to her. He would be asking a court of equity to decree him relief from the consequences of his own fraud. *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007.

A husband who buys lots, pays the purchase money, and requests that the deed be made to his wife, in order that the property may be beyond the reach of legal process if he should be prosecuted upon a certain demand, which he regards as unjust, is not entitled to the reconveyance of the premises. The maxim, *In pari delicto melior est conditio possidentis et defendentis*, applies. *Holliday v. Holliday*, 10 Iowa, 200.

Nor are the heirs of one who conveyed

land to hinder or delay the collection of any judgment that might be rendered against him in a contemplated bastardy proceeding entitled to recover the land conveyed. The court observes: Conceding that the prosecutrix had no valid claim, it does not help the plaintiffs. The fact that no suit is pending at the time of the conveyance cannot vary the application of the principle, that one who conveys property with intent to defeat the satisfaction of such judgment as may be recovered against him in a suit cannot, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey the property to him. The fact of the conveyance having been made may have dissuaded the girl from commencing any suit. *Kihlken v. Kihlken*, 59 Ohio St. 106, 51 N. E. 969.

But another class of cases conflicts with the decisions above shown, and advocates the doctrine that if the claim feared proves unfounded, the grantor may have a reconveyance of his property. These cases go on the theory that the apprehended creditor being in reality not a creditor, no one has been injured by the conveyance except the grantor himself, and it is, therefore, immaterial what motive he had in making the conveyance,—that where there is no creditor to be injured, there is no fraud.

In *Smith v. Bowen*, 3 N. C. (2 Hayw.) 296, it is said: It is not enough to render a conveyance fraudulent, that the parties supposed a third person would recover a judgment against the grantor, and that the conveyance was made to defeat such person's claim. It should appear that he was actually a creditor.

A conveyance of land made by a man of intemperate habits to a friend, "for safe-keeping," because of representations that the grantor's divorced wife intended to demand additional dower, will be set aside, where the grantor had no creditors, unless his divorced wife was such, and it does not appear that she was or had any claim against him or contemplated making any. The grantor's intent in making the conveyance is wholly immaterial, provided no one

same, whether she acted upon her knowledge of the facts, or upon a mistaken belief in regard to them, growing out of the fraudulent representations of her vendee."

In *Harris v. Harris*, 23 Gratt. 737, one, believing himself about to be wrongfully sued for damages, executed bonds in large sums without any consideration therefor, in order to protect himself from wrongful judgments which he anticipated would be recovered against him. In refusing to cancel these bonds the court of appeals of Virginia said: "It is, however, urged with much ingenuity and force that this case does not come within the operation of the statute of frauds, because these bonds were not given to hinder and delay creditors, but only to protect the defendant against the assertion of un-

just demands, which he apprehended might be recovered against him because of the 'unfavorable and unjust constitution of courts and juries at that time;' that there was no fraudulent intent to secure his property against the claims of creditors, but the scheme resorted to was one intended for protection against unjust claimants. Now, it must be conceded that a party claiming damages for the acts of another must be regarded in law as much the creditor of that other as one holding his bonds or other promises to pay. Every person having a legal demand against another is his creditor, whether that demand is one sounding in damages or one that comes under a contract. This is a proposition too plain for argument. And it is to my mind equally plain that the

but himself is injured or has cause to complain. *Day v. Lown*, 51 Iowa, 364, 1 N. W. 786.

One, apprehending that a judgment might be recovered against him in a pending action, conveyed his land to another, who agreed to reconvey it to the grantor if he were successful in the suit, and if not, to convey it to the grantor's children. The litigation terminated in favor of the grantor. It was held that the party who instituted the suit against him was not a creditor, that the conveyance was not fraudulent as to him, and that the grantor was entitled to recover against the grantee upon his assumption. *Brady v. Ellison*, 3 N. C. (2 Hayw.) 348.

In *Gunderman v. Gunnison*, 39 Mich. 313, it is intimated that the assignor of a certificate of purchase of school lands should be allowed to redeem, where the assignment was made because a third person was prosecuting a groundless action against the assignor; that the fact that there was a mental purpose to cheat did not affect the transaction when the purpose could not take effect for the want of a creditor to be injured.

In a suit to cancel a deed of property, or to reach the purchase money received upon its sale by the grantee to an innocent purchaser, and in which the question was raised whether the conveyance was fraudulent, a judgment in favor of the grantor against the purchaser for the purchase money was sustained, where no creditors of the grantor are shown to have existed, and the property, if subject to the claims of creditors, was conveyed because of phantom fears that it might be taken for some illegal debt or unjust claim. *Vandever v. Freeman*, 20 Tex. 334, 70 Am. Dec. 391.

A brother who conveyed property to his sister on a secret trust for his benefit, to defeat any claim for alimony which his wife, who had instituted a suit for divorce, might make against him, is entitled to enforce the trust upon which the conveyance was made, where it does not appear that any claim for alimony was ever set up by his wife, or allowed, or that facts existed

entitling her to such an allowance. The court said: It does not appear that there was any creditor whose rights or interests could be prejudiced by the conveyance, and the question is whether or not the mere motive which impelled the party to make the deed will preclude him from enforcing the trust upon which it was executed. We think that where there is no creditor, there is no fraud, and therefore no policy of the law to prevent the enforcement of the trust. *Rivera v. White*, 94 Tex. 538, 63 S. W. 125.

So, a fraudulent intent in the execution of a conveyance can be imputed only in case the interests of some third party may be injuriously affected by it. *Kervick v. Mitchell*, 68 Iowa, 273, 24 N. W. 151, 26 N. W. 434.

In *Baker v. Gilman*, 52 Barb. 26, a conveyance was upheld as against a subsequent creditor, although made with intent to defeat any recovery that might be obtained against the grantor in pending slander suits, which, however, were terminated in his favor. The court said: The sole object of the statute declaring every conveyance void which is made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, is to protect and prevent the defeat of lawful debts, claims, or demands, and not those which are unlawful or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment or by the assent of the persons against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void.

III. When conveyance was wrongfully induced by grantee.

a. In general.

It is said in *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84, that there are cases in which aid was extended to grantors who were in *delicto*, but not in *pari delicto* with the grantees. Where there are different degrees of guilt as between the parties to the

question whether the demand asserted is a just and legal one, and whether the courts and juries will be likely to enforce an illegal and unjust claim, is not one for the party himself to decide. Nor will another court, passing upon his transactions in transferring his property to another to protect himself against such demands made in regular legal proceedings, inquire whether his apprehensions were justified, or whether the suits pending against him were proper suits. All these must necessarily be questions which another court cannot inquire into, and which certainly the party cannot be allowed to decide for himself."

In the case of *Harper v. Harper*, 85 Ky. 161, 7 Am. St. Rep. 583, 3 S. W. 5, it appeared that the vendor, who was an old and

rather timid and weak-minded lady, conveyed her property to a relative, Charles Harper, who had fraudulently and falsely frightened her into the belief that she was to be sued for libel. In an action to recover the property, this court clearly recognized the rule that, if one undertakes to defeat a claim asserted against him by conveying his property to another, he cannot afterwards recover that which he fraudulently conveyed. In the case cited, however, the deed was rescinded on the ground that the parties were not *in pari delicto*; that the timid, weak-minded vendor was the victim, rather than the accomplice, of the vendee. Judge Holt, who spoke for the court, said: "It is true that in cases of executed contracts, if the parties be *in pari delicto*, they will

fraudulent or illegal transaction, as, when one party acts under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate, the court will grant relief, as an exception to the general rule.

So in *Fletcher v. Fletcher*, 2 MacArth. 38, where the court refused to set aside a deed executed to prevent the satisfaction of any judgment that might be recovered against the grantor in a pending suit for slander, although the action was never brought to trial, but was dismissed by the plaintiff therein, it is said: It may be that a court of equity would assist the grantor in such a case if there were circumstances shown to exist which recognized its interposition on other grounds of settled equity jurisdiction, such as fraud in procuring the deed, imposition by the grantee, a violation of some fiduciary relation, an abuse of confidence, delusion, or the like on the part of the grantor at the time of executing the deed. In such a case the parties would not be *in pari delicto*, and the deed, although made for an improper purpose, yet, having been unfairly procured, through the influence of the grantee, or made under a delusion of the facts, might be set aside.

b. Imposition or overreaching.

An illiterate man, subject to epileptic fits and of weak mind, was induced by another, in whom he had great confidence, to execute to him a chattel mortgage for the purpose of preventing the satisfaction of a judgment regarded by the mortgagor as unjust, and recovered for a debt which he claimed had been paid. The mortgagor was allowed to recover on the ground that where a stronger mind takes advantage of the weaker, and, by persuasion and influence, procures the unlawful act, the principle which denies relief to a party *in pari delicto* is not applicable. *Davidson v. Carter*, 55 Iowa, 117, 7 N. W. 468.

The administrator of one who, to place his property beyond the reach of any judgment
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that might be recovered in a suit instituted against him upon a debt which he claimed to have paid, but which he was unable to procure testimony to prove the payment of, gave a note without consideration, and secured the same by chattel mortgage, is entitled to recover from the mortgagee sums which the intestate was compelled to pay thereon, where the intestate was a man of weak mind, and had been for years subject to epileptic fits, and was so overreached by the mortgagee that it excused his guilt, and rendered him incapable of being or becoming *in pari delicto*. *Wiley v. Carter*, 77 Iowa, 751, 42 N. W. 566.

A court of equity will cancel a conveyance of land to a relative by a timid, credulous woman, who was induced to execute the deed by representations that there was danger that she would suffer loss by reason of her suretyship on a bond given by a third person as guardian of infants. The rule that a court of equity will not aid a grantor in a fraudulent conveyance to escape from the consequences of his own fraud is not applicable where the grantor is the dupe of the grantee, and his weakness has been imposed upon to obtain an undue advantage of him. *Sanford v. Reed*, 27 Ky. L. Rep. 431, 85 S. W. 213.

Equity will decree the cancellation of a deed executed by an old man who could neither read nor write, and was mentally weak, to one who encouraged him to execute it while laboring under excitement, fears, and apprehensions that a third person would seek to establish a false, unauthorized, and unjust claim against him, where the grantor was not indebted to any person whatever, and the grantee took advantage of the confidence reposed in him and of the grantor's weak intellect. *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270.

But in an action to recover property deeded without consideration by a man addicted to habits of intoxication, and who, when in that condition, made improvident bargains, a recovery was denied and the maxim *In pari delicto melior est conditio defendentis* applied, where the conveyance was made by

be left where they have placed themselves. . . . If, however, one party is but an instrument in the hands of the other, then they are not *in pari delicto*."

The refusal of the chancellor to interfere where the vendor, for a fraudulent purpose, has conveyed his property on a secret trust to reconvey, is not alone to protect the creditors, although that consideration has its weight in the problem. The creditors have a remedy of their own by a proceeding to set aside the conveyance that their debts may be paid. Of course, to do this there must be creditors in existence; for, if there are no creditors, there is no injury, and the conveyance stands. But that is not the case here. In this case the appellee, according to his own statement, in order to discourage one who sought, or was contemplating seeking, to enforce a claim against him, con-

veyed his property to his sister, and is now, after the feared prosecution has failed and his sister dead, seeking to recover it. It is contrary to the policy of the law that one should be "discouraged" in the assertion of a legal right by his adversary conveying his property without consideration. The transaction involves moral turpitude in the intention with which it is done. What actually happens may be immaterial. Suppose, for an example, one conveys his property on secret trust for the purpose of defrauding his creditors, and then should afterwards pay all his debts; would the fact that no creditor was actually injured enable him to recover from his vendee? Or suppose one having no creditors should convey his property for the purpose of becoming indebted, and then defrauding his dupes by being insolvent, but should repent before the fraud was com-

the grantor while sober, because of improvident bargains entered into when drunk, and by reason of the grantee's promise to "stand his friend," and that he could and would, by means of the conveyance, protect him from the imposition which had been practised upon him. *Smith v. Elliott*, 1 Patton & H. (Va.) 307.

c. False representations.

1. In general.

One who executes a bill of sale at the instance of the grantee, for the purpose of putting his property beyond the reach of a third person whom the grantee represented was about to institute suit against the grantor, is entitled to recover the value of the property, where such third person had no valid claim against the grantor, but had been settled with in full, and his receipt taken. *Kervick v. Mitchell*, 68 Iowa, 273, 24 N. W. 151, 26 N. W. 434.

But, in *Cameron v. Romele*, 53 Tex. 238, where one was induced to convey real property to another without consideration by reason of his false and fraudulent representations that third persons were seeking to hold the grantor liable for a debt, and that the grantee would hold the deed without record until all danger was past, whereupon he would reconvey the premises, it is intimated that the grantor is not entitled to enforce the trust upon which it is alleged the deed was executed. The court said: If the facts were as the grantor supposed when she made the deed, however fraudulent may have been the conduct of the vendee, the court could give her no relief. Her motive in executing the deed is precisely the same whether she acted upon her knowledge of the facts or upon a mistaken belief in regard
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to them, growing out of the fraudulent representations of her vendee.

2. By one in confidential relations.

A conveyance made by a mother to a daughter in consequence of false representations that her property might otherwise be taken from her to satisfy a claim for alimony arising from a suit for divorce about to be brought against her son by his wife will be canceled. The court said: If the conveyance was made for the purpose of protecting the property from such claim, such representations being untrue, and such apprehensions in fact groundless, then she is entitled to have the deeds set aside. *Kleeman v. Peltzer*, 17 Neb. 381, 22 N. W. 793.

The administrator of one who, during his last sickness, and while generally debilitated in both body and mind, was persuaded to assign property to his brother-in-law, upon a secret trust, for the benefit of the assignor's wife and children, by reason of representations that he was liable as indorser, and that his estate would otherwise be taken to pay the demand, is entitled to recover the property, where the representations were false and the assignor had no creditors. The court says: Although the act of the assignor may appear to be fraudulent, yet he was induced by the false assertions and fraudulent conduct of the assignee to enter into the arrangement. *Prewett v. Coopwood*, 30 Miss. 369.

A deed executed by an aged woman to her son, who led her to believe that a suit for slander was about to be instituted against her, and that all her property would be otherwise lost, will be set aside where no such suit was contemplated, and she had no creditor to be defrauded by the conveyance. Said the court: If one party is but an instrument in the hands of the other,

mitted; could it be maintained that, because he had paid his creditors in the first case, and never had any in the second, he could recover the property so conveyed? We think both these questions should be answered in the negative. The enforcement of a trust is a purely equitable remedy. The chancellor, originally, as a matter of grace,—not legal right,—seized upon the conscience of the trustee, and forced him to do justice because it was immoral that he should defraud one who had confided in his honor. But he would not so aid one whose hardship arose from his own evil intent or moral turpitude. That which was conceived in sin, as to the interest of the wrongdoer, was permitted to be brought forth in iniquity; or, as one of the older opinions has it, "He who doeth fraud may not borrow the hand of the chancellor to draw equity from a fountain his own hath polluted."

then they are not *in pari delicto*. She was not in debt; no creditor was to be defrauded; and under the circumstances the deed must be regarded as the creature of the false alarm of legal consequences in his mind, but of which he was the author, and is, therefore, his act rather than that of his mother. *Harper v. Harper*, 85 Ky. 161, 7 Am. St. Rep. 583, 3 S. W. 5.

A deed executed without consideration by one diseased in body and weak in mind to his brother, in whom he trusted and confided, and who had great influence over him, which conveyance was made because of representations that a certain woman was about to institute a breach of promise suit against the grantor, whereas there was no foundation for such a suit or intent to institute it, will be set aside and canceled. The court remarks: To countenance such an instrument would, in most cases of confidential relations, make the weaker party a victim to the rapacity of the stronger. *Holliday v. Holliday*, 77 Mo. 392.

So a deed will be rescinded which was procured without consideration and by fraudulent representations to the grantor, that she was liable to sustain loss from having signed, with her husband, a note given for a patent right which the grantee assured her was a fraud, and further told her she need not pay it if she would convey her property to him, and that he would reconvey it when the patent difficulty was settled. The court said: A court of equity will not usually aid anyone against a voluntary act in fraud of the law; but neither will it usually allow a person to profit by any instrument which is extorted by exciting false alarms or threats of legal consequences, when there is such a relation of confidence as gives one a special power over the other. This conveyance was not intended to defraud honest creditors. There

Believing it to be contrary to public policy that one should undertake to defeat a claim about to be asserted against him through the machinery of the law by conveying his property upon a secret trust, with a false statement that it was made for a valuable consideration, we think the chancellor should have dismissed the bill which sought to recover the property so conveyed by appellee.

In arriving at the conclusion we have reached in this case, we are not unmindful of the fact that there is high authority opposing it, notably § 441, *Bump on Fraudulent Conveyances*, 4th ed., and the cases cited in the note in support of the text; but we believe that the authorities we have followed are based upon a sounder policy and a more cogent logic. Wherefore the judgment is reversed, for proceedings consistent herewith.

were no creditors to defraud, and there was no debt on which complainant was liable at all. Relief will not be denied to the party least in fault against one who has led her into the act by a violation of confidence. They are not in equal wrong. *Barnes v. Brown*, 32 Mich. 146.

Where a widow who, while greatly disturbed and worried, and under acute apprehension as to a claim made by the heirs of her husband against his estate, but which had little or no foundation, made conveyance of her property to one who had been her adviser, and in whom she had great confidence, the conveyance was set aside, since the parties could not be said to be *in pari delicto*. *Ingersoll v. Weld*, 103 App. Div. 554, 93 N. Y. Supp. 291.

A court of equity will set aside a transfer of property made by a wife to her husband, without consideration, because of his statements, made under misapprehension or mistake, that she was liable for certain debts. In its opinion the court said: Nor is it an answer that the wife consented to the transaction to defraud creditors. The parties do not stand on equal terms, and the husband cannot avail himself of the plea of *particeps criminis* on the part of his wife. *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197.

But in *Renfrew v. McDonald*, 11 Hun, 254, the maxim *in pari delicto melior est conditio possidentis* was applied where one, for a nominal consideration, had conveyed property to an intimate and confidential friend, in reliance upon the latter's false representations that the grantor was liable upon certain notes fraudulently obtained from him by the holder, and the grantor was held not entitled to a reconveyance of the property.

A. W. R.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY et al., Appts.,
v.

LAURA STITH, Admr., etc., of Robert H. Stith, Deceased.

(.... Ky.)

1. Venue—action for negligent injuries.

The residence of the personal representative of one killed by negligence, and not that of deceased, is referred to in a statute permitting an action for negligent injuries by a railroad company to be brought in the county of the plaintiff's residence if the carrier passes into it.

2. Negligence—violation of road rules.

An engineer of a work train does not, as matter of law, cut himself off from recovery for resulting injuries by placing his engine on the main track on the time of a fast train having the right of way, where he places the proper signals to stop the expected train, and, in his judgment, his course of action is necessary to protect the property and interest of his employer.

3. Same—recovery for injuries.

A railroad engineer who places his train on the main track on the time of a fast train having the right of way, after placing the proper signals to stop the train, may recover for injuries caused by a resulting collision if those in charge of the other train

see, or by the exercise of ordinary care could see, the engine in time to avert the collision.

4. Evidence—admissibility of brake tests.

Evidence of professed tests printed in a book of instructions as to the use of a patent brake is not admissible upon the question as to the distance within which a train can be stopped.

(March 25, 1905.)

APPEAL by defendants from a judgment of the Circuit Court for Hardin County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her intestate. Reversed.

The facts are stated in the opinion.

Messrs. J. M. Dickinson and Pirtle, Trabue, Doolan, & Cox, with Messrs. Poston & Moorman, for appellants:

The court erred in refusing peremptorily to instruct the jury to find for the defendants.

Brown v. Louisville & N. R. Co. 97 Ky. 228, 30 S. W. 639; Bowling Green Stone Co. v. Capshaw, 23 Ky. L. Rep. 945, 64 S. W. 507; Kentucky C. R. Co. v. Gastineau, 83 Ky. 119; Thomp. Neg. §§ 237, 428, 432; Eastern Kentucky R. Co. v. Powell, 17 Ky. L. Rep. 1051, 33 S. W. 629; Dilas v. Chesapeake & O. R. Co. 24 Ky. L. Rep. 1347, 71 S. W. 492; Louisville & N. R. Co. v. Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; Clarke v. Louisville & N. R. Co. 101 Ky. 34,

Case Note.—The determination of the question, under what circumstances the venturing with train or hand car upon a track over which another train has the right of way amounts to such contributory negligence as will defeat recovery for injuries received in a collision, does not depend on any arbitrary rule. Such conduct may be justified by duty, or the existence of an emergency; or it may be, as suggested in the case of *ILLINOIS C. R. Co. v. STITH*, the doctrine of last clear chance may render the contributory negligence of the person injured an unavailing defense. In short, each case, like all other negligence cases, must be decided on its own peculiar facts.

While the question as to what emergency will justify the obstruction of a track over which another train has a right of way seems not to have arisen in any other than the *STITH CASE*, there are cases, mostly actions for injuries received in coupling cars, where the emergency was produced by the necessity of doing a piece of work with unusual promptitude, which sustain the doctrine stated in *Labatt, Master & Servant*, vol. 1, § 358, that "the existence of an emergency is sometimes treated as a differentiating or conformatory element, either absolutely precluding a court from declaring the servant negligent as a matter of law, or tending to support the conclusion that he was free from negligence." See *Lawless v. Connecticut River R. Co.* 136 Mass. 1; *St. Louis, I. M. & S. R. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 1 L.R.A. (N.S.)

653; *Horan v. Chicago, St. P. M. & O. R. Co.* 89 Iowa, 329, 56 N. W. 507.

And in *Labatt, Master & Servant*, vol. 1, § 361, it is said: "The courts have sometimes allowed the action to be maintained upon the theory that, when a servant is suddenly confronted by an emergency in which his master's property is threatened with destruction or serious injury, the fact that he attempted to preserve that property, and in doing so exposed himself to greater risks than would have been encountered by a prudent person who was thinking only of his own safety, will not necessarily render him chargeable with contributory negligence. This doctrine, however, does not afford any protection to a servant whose conduct was essentially rash. It does not justify him in going into a place in which he will be exposed to an imminent peril which may at any moment eventuate in disaster. Nor does it serve as an excuse where the damage with which the property was threatened was comparatively slight, when considered with relation to the extremely dangerous nature of the course of action pursued with a view to saving it."

The question whether an employee on one train who obstructs the right of way of another train can recover for injuries received arose in *Georgia R. & Bkg. Co. v. McDade*, 59 Ga. 73, in which such right was denied to an engineer who left the starting point without express authority from the superintendent, fifteen minutes after schedule time,

36 L. R. A. 123, 39 S. W. 840; *Jacobs v. Ohio & B. S. R. Co.* 20 Ky. L. Rep. 189, 45 S. W. 509; *Bush v. Grant*, 22 Ky. L. Rep. 1766, 61 S. W. 363; *Maysville v. Guilfoyle*, 110 Ky. 670, 62 S. W. 493; *Brown v. Louisville, H. & St. L. R. Co.* 23 Ky. L. Rep. 1504, 65 S. W. 588; *Illinois C. R. Co. v. Mercer*, 24 Ky. L. Rep. 908, 70 S. W. 287; *Beach, Contrib. Neg.* §§ 44, 304, 373; *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Williams v. Louisville & N. R. Co.* 103 Ky. 298, 45 S. W. 71; *Louisville & N. R. Co. v. Hiltner*, 21 Ky. L. Rep. 1826, 56 S. W. 654, 22 Ky. L. Rep. 1141, 60 S. W. 2; *Louisville & N. R. Co. v. Scanlon*, 22 Ky. L. Rep. 1400, 60 S. W. 643; *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665, 7 S. W. 83; *Darracott v. Chesapeake & O. R. Co.* 83 Va. 288, 5 Am. St. Rep. 266, 2 S. E. 511; *Elliott, Railroads*, § 1282; *Shearm. & Redf. Neg.* § 207; *Lockwood v. Chicago & N. W. R. Co.* 55 Wis. 54, 12 N. W. 401; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699; *Louisville & N. R. Co. v. Boccock*, 107 Ky. 223, 51 S. W. 580, 53 S. W. 262.

Mr. L. A. Faurest, for appellee:

Stith was not guilty of contributory negligence in going on the main track.

Jaggard, Torts, 1001; Bucklew v. Central

Iowa R. Co. 64 Iowa, 609, 21 N. W. 103; *Rexter v. Starin*, 73 N. Y. 601; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Liming v. Illinois C. R. Co.* 81 Iowa, 254, 47 N. W. 66; *Shearm. & Redf. Neg.* 4th ed. § 207.

Even if Stith was guilty of contributory negligence, or violated a rule, a peremptory instruction should not have been given.

Louisville & N. R. Co. v. McCoy, 81 Ky. 415; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 354, 18 S. W. 2; *Louisville & N. R. Co. v. Coniff*, 16 Ky. L. Rep. 298, 27 S. W. 865; *Louisville & N. R. Co. v. Earl*, 94 Ky. 374, 22 S. W. 607; *Pittsburgh, C. C. & St. L. R. Co. v. Lewis*, 18 Ky. L. Rep. 957, 38 S. W. 482; *Louisville & N. R. Co. v. Adams*, 106 Ky. 859, 51 S. W. 577; *Crowley v. Louisville & N. R. Co.* 21 Ky. L. Rep. 1434, 55 S. W. 434; *Owensboro City R. Co. v. Hill*, 21 Ky. L. Rep. 1638, 56 S. W. 21; *Chesapeake & O. R. Co. v. Keelin*, 22 Ky. L. Rep. 1942, 62 S. W. 261; *Illinois C. R. Co. v. Mahan*, 17 Ky. L. Rep. 1200, 34 S. W. 16; *Louisville & N. R. Co. v. Lowe*, 25 Ky. L. Rep. 2317, 65 L. R. A. 122, 80 S. W. 770; *Thomp. Neg.* 239; *Schlereth v. Missouri P. R. Co.* 115 Mo. 106, 21 S. W. 1110; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Gessley v. Missouri P. R. Co.* 32 Mo. App. 413; *Shoner v. Pennsylvania Co.* 130 Ind. 170,

colliding with a train which was overdue at such point.

But in *Mills v. East Tennessee, V. & G. R. Co.* 87 Ga. 102, 13 S. E. 205, the question whether a brakeman on a train which was delayed on the main track by an accident, who followed the conductor's directions to put torpedoes on the track to warn a later train, and to get some sleep in the caboose, and who was killed by such train, was guilty of contributory negligence, was held to be a question for the jury.

And the engineer of a special train, required by the rules to know the position of regular trains, which had the right of way, is guilty of negligence in colliding with a regular train standing at a station, at which point he was also required to have his train under control. *Merritt v. Great Northern R. Co.* 81 Minn. 496, 84 N. W. 321.

A similar class of cases are those where a train collides with a hand car. In *Campbell v. Chicago, R. I. & P. R. Co.* 45 Iowa, 76, it was held that it is not necessarily negligence to run a hand car on a railroad when a train is past due, for the purpose of making an inspection and repairs.

In *Woodward Iron Co. v. Herndon*, 130 Ala. 364, 30 So. 370, it was held that the question of contributory negligence of employees on a hand car, who knew that a switch engine was liable to be passing at any time, and who were injured by such engine, which was running at an unusual rate of speed, was for the jury.

In *Hawley v. Chicago, B. & Q. R. Co.* 71 1 L.R.A. (N.S.)

Iowa, 717, 29 N. W. 787, an employee who, being told by the engineer that the train would not start for fifteen minutes, went ahead upon a hand car, and was run down in seven minutes, was allowed to recover.

But the right of a repair man on a hand car, who was run into by an extra, to recover damages, was denied in *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, on the ground that it was an assumed risk; and in *Shepard v. Boston & M. R. Co.* 158 Mass. 174, 33 N. E. 508, on the ground that employees had notice that trains might come along without warning.

The right to damages was also denied on the ground of contributory negligence, in *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254, where the plaintiff ran his hand car into a deep cut, when he knew a passenger train was approaching; in *Southern P. Co. v. Ryan* (Tex. Civ. App.) 29 S. W. 527, where the plaintiff's decedent failed to obey an instruction to flag around all curves; in *Burling v. Illinois C. R. Co.* 85 Ill. 18, where an employee left for home on a hand car at a time when he knew that a train, if on time, would meet him on the road; and in *Ream v. Pittsburgh, Ft. W. & C. R. Co.* 49 Ind. 93, where one of a pleasure party on a hand car was killed by a special train.

And in *Pittsburgh, C. & St. L. R. Co. v. Goss*, 13 Ill. App. 619, it was held error to exclude from the consideration of the jury the conduct of the plaintiff in starting with a hand car just ahead of a regular train.

28 N. E. 616; *Kelly v. Union R. & Transit Co.* 95 Mo. 279, 8 S. W. 420; *Howard v. Delaware & H. Canal Co.* 6 L. R. A. 75, 40 Fed. 195; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591.

Nunn, J., delivered the opinion of the court:

The appellee's intestate was an engineer on a work train of appellant, and was killed on December 27, 1902, at Caneyville, Grayson county, Kentucky. The decedent at the time of his death was a resident of Louisville, Jefferson county, Kentucky, where the appellee qualified as the administratrix of his estate. She, as such administratrix, instituted this action in the Hardin circuit court, and, in substance, alleged in the petition that appellants, Illinois Central Railroad Company and one Louis Cofer, an engineer in the employ of the railroad company, by gross negligence ran its engine and train of cars on its railroad, upon which Cofer was acting as engineer, with great force and violence, against the engine in charge of her intestate, and upon which he was at the time, and against the cars attached thereto, and against her intestate, and did thereby kill him, to appellee's damage in the sum of \$20,000. The appellant first filed a plea to the jurisdiction of the Hardin circuit court, stating that the accident occurred in Grayson county, Kentucky; that Stith, at the time he was killed, was a citizen and resident of Jefferson county, Kentucky; that appellee qualified as his administratrix in Jefferson county, Kentucky, and that she resided in Jefferson county at the time of filing this suit, and still resided there; that appellant had its chief officer and offices which it had in Kentucky in Jefferson county at the time of filing this suit and ever since; that its coappellant, Louis Cofer, did not reside in Hardin county at the time of the happening of the things complained of in the petition, and did not then reside in Hardin county. Upon these facts, it asked for a dismissal of the action because the Hardin circuit court did not have jurisdiction. The appellant, by answer and amended answers, traversed all the material allegations of negligence contained in the petition, and set up the separate defense of contributory negligence on the part of Stith, and also set out certain rules of the company for the government of its employees, and averred that Stith's position on the truck at the time he was killed was taken in violation of these rules. It appears that the reply of appellee was lost from the record, and, in order to avoid delay and expense, it was agreed that all pleadings should stand as if all affirmative matter in them had been controverted of record, and 1 L.R.A. (N.S.)

as if all affirmative pleas that could have been made had been made thereto, and the affirmative pleas controverted of record. Thus the issues were fairly made up as to the place of residence of appellee at the institution of the action and down to the time of trial, and as to negligence, contributory negligence, and the violation of rules governing the service of decedent and other employees of the appellant company. Upon these issues there was a trial, and a verdict and judgment for appellee for \$5,000 against both of the appellants. Their motion for a new trial having been overruled, they have appealed.

The first ground urged for a reversal is that the lower court had no jurisdiction of the action. It appears from the record that at the time of Robert Stith's death he was a resident of Jefferson county, Kentucky, and appellee was appointed administratrix of his estate by the county court of that county. The injuries causing his death were inflicted in Grayson county. But at the time of the institution of this action the appellee was a resident of Hardin county, and the action was brought in that county and appellant's line of railroad passed through that county. These facts are virtually conceded by both sides. Appellants contend that the personal residence of the appellee in Hardin county did not confer jurisdiction upon the circuit court of that county to try the action. Section 73 of the Civil Code provides: "An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he reside in a county into which the carrier passes." This section fixes three localities where such an action may be brought, namely, the county of defendant's residence, the county where the injury was done, and the county of the plaintiff's residence, if the carrier passes into that county. Manifestly, the personal representative is the only plaintiff in this action, and the only person who could have brought it, for, by § 6 of the Kentucky Statutes of 1903, it is provided that the action to recover such damages shall be prosecuted by the personal representative of the deceased. Therefore, according to the letter of the statute, the residence of the personal representative is one of the places where the action may be brought. When the general assembly enacted § 73 of the Code, it evidently had the convenience of all parties in mind. Therefore it allowed the plaintiff to sue at the home of the defendant, if he so desired, or go to the county where the injury was inflicted, and where

it would probably best suit the convenience of the witnesses, or to his own home county, provided the carrier passed through such county. The purpose of this last clause was to place the jurisdiction convenient to the plaintiff, and yet not inconvenient to the defendant. The fact that plaintiff resided there would make it convenient for him, and the fact that the defendant passed through the county would insure that it would not be unreasonably inconvenient to it. There is reason in this provision, if the home of the personal representative, in cases of death, is referred to, because he is the one who must look after and prosecute the suit; but it is absurd if the residence of the deceased is referred to, for his convenience can no longer be consulted. He can have no connection with the trial of the action. Therefore we are of the opinion that the spirit as well as the letter of the law requires the construction contended for by appellee to be placed on this section. See the cases of *Turner v. Louisville & N. R. Co.* 110 Ky. 879, 62 S. W. 1025; *Louisville & N. R. Co. v. Gilliam*, 24 Ky. L. Rep. 1536, 71 S. W. 863; and *Sherrill v. Chesapeake, O. & S. W. R. Co.* 89 Ky. 302, 12 S. W. 465.

The substance of the facts as they appear in the record is as follows: Appellee's intestate was employed by the appellant company in the capacity of engineer and was placed in charge of the engine on one of its work trains. This train worked during the day at Rosine tunnel, and laid up at night at the town of Caneyville, where they had no yard master or yard hands. The crew of the work train consisted of the deceased; Eiffier, fireman; McCann, conductor; and Turner, flagman. At night a watchman named Bell was placed at the engine, but, under the rules of the company, he could not move it. The tank of this engine became leaky, and on the morning of December 27, 1902, before the usual time to arise, Stith, Eiffier, McCann, and Turner were all aroused at their boarding house by Bell, who informed them that the water had leaked out of the tank and was low in the engine, and that something had to be done at once. They all dressed and went to the engine. Stith went into the tank to repair the leak, and came out with dry feet. The engine had become hot for lack of water, and was getting hotter all the time. There was no night operator at Caneyville, and it was too early for the day operator. No. 104, a fast passenger train going north, was past due, but had been running from one-half hour to four hours late, and they had no means of knowing when that train would pass. They all considered the question whether they should flag No. 104, and take

the engine out on the main track to a water tank near by, and take water, or whether they should draw the fire from the fire box and let the engine die. They realized that one of these things must be done at once, and concluded to flag No. 104 and take the engine out to the tank. Stith ordered Turner, the flagman, to proceed south and flag No. 104. Turner took his lantern and went to the curve south of Caneyville, 1,120 yards from the water tank, and, after Turner had reached this point, McCann threw the switch, and the engine was taken out on the main track to the water tank. McCann left the switch open, with the red light shining squarely down the track, and very soon thereafter No. 104 crashed into the work engine and killed Stith and Bell. The proof also shows that the distance from the water tank to the switch light, where the engine came upon the main track, was 215 yards, and the switch light was south of the tank, and the track continued straight south for 905 yards to the point where Flagman Turner was. The appellant Cofer testified that 104 was one of four fast trains which had the right of way, under the rules of the company, over all other trains on the road; that he was the engineer on 104 that morning, and was going north; that he did not see Turner at the point named by him, attempting to flag his train, nor did he notice that the switch was turned and the red light was against him until he was about 100 yards from it, nor did he discover decedent's engine and caboose on the main track until the headlight on his engine shone upon the caboose of the decedent's train; that he then immediately applied the emergency brakes, but could not stop his train, and the collision occurred with such force as to throw both engines from the track; that, when he first saw the red light of the switch, the thought occurred to him that the crew of some train leaving there had left it turned; that he could with his train pass over it without injury, as his train was going north, but the switch was so constructed that it would have been dangerous for a southbound train to have attempted to pass it.

The appellants contend, under the facts as proved, that they were entitled to a peremptory instruction, for the reason that Stith took his train from the side track, a place of safety, and placed it at the water tank on the main track, in a place of danger, when he knew that 104 was due, and had not passed, and under the rules of the company it was entitled to the right of way, as against his work train. Appellee contends that her intestate was not guilty of any negligence; that he was confronted with an emergency which required

prompt action to avert injury to the engine in his charge, which by the rules of the company he was required to protect, and also to avert loss of time to the train crew of hands at Rosine tunnel, which would have resulted if he had drawn the fire from the box and permitted the engine to die—and refers to rule 106 of the company which reads, "In all cases of doubt and uncertainty, the safe course must be taken and no risks run," and claims that, being confronted with this emergency, he exercised his best judgment, and it was for the jury to say whether he exercised this judgment properly under all the circumstances. We are of the opinion that appellee's intestate erred in taking his engine upon the track under the circumstances. He knew that 104 was entitled to the right of way, and by his going upon the main track with his engine he would probably impede the progress of this fast passenger train, which had important connections to make for the benefit of passengers, and might endanger the lives of the passengers and the company's employees and its property; which unfortunately did occur by reason of his mistake and violation of the rules. He should not have taken the risk, but should have taken the safe course and remained on the side track. But, this being true, it does not necessarily follow that appellant was entitled to the peremptory instruction. The rules of the company, as shown in the record, required its engineers "to keep a constant and vigilant lookout for signals and the positions of switches while running, and not to pass red signals and red lights on the switches, but must stop and ascertain the cause." It is further provided by the rules that when a train stops or is delayed, or the main track is obstructed, the same must be protected by the flagman when necessary to prevent accident. In the case at bar, the deceased, confronted with the emergency stated, and in an endeavor to protect the property and interest of his employer, obstructed the main track by placing his engine at the water tank. But before doing so he sent out the flagman, with his red light and a torpedo, 1,120 yards in the direction from which 104 was coming, for the purpose of flagging it. The red switch light was also turned against it. The deceased knew that the rules of the company required Cofer, in charge of 104, to stop his train, and not to pass these red signals; and he had the right to assume that he would perform his duty under the rules, and would keep a constant and vigilant lookout for signals and switches, especially in a town; and, if Cofer had done so, decedent would not have been injured or killed. In

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view of the peculiar facts of this case, we are of the opinion that appellee's intestate violated the rules of the company in taking his engine out on the main track, and, if he had done so without sending out the flagman and turning the switch light, thereby giving notice or warning to the engineer of 104, the court should have given a peremptory instruction to find for appellant. But, conceding that he erred in judgment as to his duty, the facts show that it was an honest mistake. His purpose was to protect the property of his master. He took all the necessary steps and precautions provided by the rules to notify and warn Cofer of his situation on the main track. Under these facts and circumstances, we are not willing to say that decedent cut himself off from all right of protection.

Appellants contend that, unless the judgment is reversed, with directions to the lower court to grant them a peremptory instruction, we will, in effect, overrule the opinions in the cases of *Louisville & N. R. Co. v. Hiltner*, 21 Ky. L. Rep. 1828, 56 S. W. 654; *Louisville & N. R. Co. v. Scanlon*, 22 Ky. L. Rep. 1400, 60 S. W. 643; *Louisville & N. R. Co. v. Howard*, 82 Ky. 212; *Newport News & M. Valley R. Co. v. Deuser*, 97 Ky. 92, 29 S. W. 973; *Brown v. Louisville & N. R. Co.* 97 Ky. 229, 30 S. W. 639. After an examination of the cases, we are of the opinion they do not apply to the facts of the case at bar. The last three cases were cases of ordinary trespassers, and at places where they had no right under any circumstances to be, and the company was not required to keep a lookout, and owed them no duty except to save them if discovered in time. The first two cases cited are cases where the engineers were injured by reason of the violation of rules; but they did not give, or attempt to give, the company or its agents in charge of other trains any notice or warning of their perilous positions, as required by the rules, so as to place the company or its agents under the duty of exercising care to avoid injuring them.

We are of the opinion that the principles announced in the following cases, when considered with reference to the particular facts of this case, negative the idea that appellants were entitled to a peremptory instruction: *Louisville & N. R. Co. v. McCoy*, 81 Ky. 415; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607; *Illinois C. R. Co. v. Mahan*, 17 Ky. L. Rep. 1200, 34 S. W. 16; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2; *Louisville & N. R. Co. v. Coniff*, 16 Ky. L. Rep. 298, 27 S. W. 865; *Louisville & N. R. Co. v. Adams*, 106 Ky. 859, 51 S. W. 577; *Louisville & N. R. Co. v. Lowe*, 25 Ky. L. Rep. 2317, 65 L.

R. A. 122, 80 S. W. 770; and *Bowling Green Stone Co. v. Capshaw*, 23 Ky. L. Rep. 945, 64 S. W. 507. In the last case cited, Capshaw was an employee of the stone company. His duties were those of a carpenter in the company's mill. When he was injured he was in front of a truck for the purpose of testing the stone thereon to see if it had been sawed in straight lines, and while attending to this he was injured by the engineer backing the truck over his foot. The company claimed that Capshaw was not in a place or performing labor where his duties required him to be. This court in that case, in discussing an instruction, said: "We are of opinion that this instruction is erroneous and prejudicial to appellant, in the use of the phrase 'or by the exercise of ordinary care might have known.' This placed upon appellant the duty of keeping a lookout for appellee at a place where he voluntarily placed himself, without orders, direction, or duty to be. If appellee, outside of the duties which he was employed to perform, and without direction from Douglas, the superintendent, so to do, went voluntarily into a place of danger,—in front of the truck,—he should have called attention to his position, so that the hookers or engineer would know of his peril, and would then be under the duty of exercising care to avoid injuring him. If appellee, being thus situated, without directions from Douglas, and outside of his duties, failed to give the hookers or engineer notice of his position, he would be guilty of contributory negligence, for which he could not recover." The principles enunciated in this case seem to completely cover the one at bar; i. e., if appellee's intestate, in violation of the rules, went voluntarily into a place of danger, onto the main track, on the time of 104, he should have called attention to his position, so that those in charge of 104 would have known of his peril, and would have then been under the duty of exercising care to avoid injuring him. It appears that the deceased performed this duty, and gave notice of his position in the way and manner prescribed by the rules. The only question that should have been submitted to the jury was whether those in charge of the fast train, No. 104, saw, or by the exercise of ordinary care could have seen, the train in charge of Stith in time to have stopped or checked his train, and saved Stith from injury and death. If so, the appellee should recover; otherwise the finding should be for the appellants.

On the trial, appellee, over the objection of appellants, introduced in evidence some professed tests of the Westinghouse air brakes, appearing in the back of a book of 1 L.R.A. (N.S.)

instructions with reference to the use and operation of such brakes. We are of the opinion that the court erred in permitting this to be introduced as evidence. These professed tests were nothing more than advertisements of the makers for the purpose of inducing purchasers, and they seem not to have been prepared and issued by appellants.

For these reasons, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Petition for modification denied.

KENTUCKY COURT OF APPEALS.

HENRY R. PREWITT, Insurance Commissioner, Appt.,

v.

SECURITY MUTUAL LIFE INSURANCE COMPANY.

TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appt.,

v.

HENRY R. PREWITT, Insurance Commissioner.

(.... Ky.)

Revocation of corporate license for removal of cause to Federal court.

A statute directing the revocation of the license of a foreign insurance company to do business within the state for refusing to perform its agreement not to remove suits against it to the Federal courts is not in conflict with the Federal Constitution.

(Burnam, Ch. J., and Barker, J., dissent.)

(December 15, 1904.)

APPEALS from judgments of the Chancery Branch of the Second Division of the Circuit Court for Jefferson County in actions brought to enjoin the revocation of licenses to do business within the state; the insurance commissioner appealing in the first case from a judgment in plaintiff's favor; and plaintiff appealing in the second case from a judgment in defendant's favor. First case reversed. Second case affirmed.

The facts are stated in the opinion.

Case Note.—In *PREWITT v. SECURITY MUT. L. INS. CO.* an unsuccessful attempt was made to reopen the question apparently settled in *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, where it was held that a state may revoke the license of a foreign insurance company to do business within the state, upon the ground that such corporation refuses to refrain from removing suits against it to the Federal courts, not-

Messrs. N. B. Hays, Attorney General, and H. R. Prewitt, with Messrs. Hazelrigg, Chénault, & Hazelrigg, for the insurance commissioner:

The statute is a valid exercise of the power of the state to exclude foreign corporations for any reason whatever. The state may withdraw a license at pleasure, as it may refuse a license in the first instance.

13 Am. & Eng. Enc. Law, 2d ed. p. 867; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

The state has full power to admit or to refuse to admit foreign corporations within her borders, except where the business is of a Federal nature.

Hooper v. California, 155 U. S. 650, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; State v. Phipps, 50 Kan. 609, 18 L. R. A. 662, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097; Fire Asso. v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; United States v. Des Moines Nav. & R. Co. 142 U. S. 546, 35 L. ed. 1109, 12 Sup. Ct. Rep. 308; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 238, 36 L. ed. 419, 12 Sup. Ct. Rep. 637; New Orleans v. Warner, 175 U. S. 147, 44 L. ed. 109, 20 Sup. Ct. Rep. 44.

Mr. William Marshall Bullitt, for Security Mutual Life Insurance Company:

Ky. Stat. §§ 573, 631, are unconstitutional and void, because repugnant to the Constitution and laws of the United States.

Com. v. East Tennessee Coal Co. 97 Ky. 238, 30 S. W. 618; Com. v. Jellico Coal Co. 97 Ky. 246, 30 S. W. 611; Norton v. Shelby County, 118 U. S. 442, 30 L. ed. 186, 6 Sup. Ct. Rep. 1121; Hildreth v. McIntire, 1 J. J. Marsh. 206, 19 Am. Dec. 61; Cooley, Const. Lim. 188.

A state cannot make the right to continue within its limits dependent upon the surrender or abandonment of, or absention

from, the right of removal to the Federal courts.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Com. v. East Tennessee Coal Co. *supra*; Metropolitan L. Ins. Co. v. McNall, 81 Fed. 888; Moon, Removal of Causes, pp. 29, 31.

Mr. F. W. Jenkins also for Security Mutual Life Insurance Company.

Mr. William Bro. Smith, with Messrs. Pirtle, Trabue, Doolan, & Cox, for Travelers' Insurance Company:

An injunction against a state officer threatening action under an unconstitutional statute is maintainable where complainant's safety and immunity from the hazard of enormous penalties make it remediable only in equity, and render its remedy at law inadequate.

Bank of Kentucky v. Stone, 88 Fed. 383; Metropolitan L. Ins. Co. v. McNall, 81 Fed. 888; Mutual L. Ins. Co. v. Boyle, 82 Fed. 705.

A state statute, however contrived, seeking to prevent removal or resort to the Federal courts, is unconstitutional and void.

Com. v. East Tennessee Coal Co. 97 Ky. 238, 30 S. W. 618; Com. v. Jellico Coal Co. 97 Ky. 246, 30 S. W. 611; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S.

withstanding the fact that agreements to refrain from moving such suits, entered into by a foreign company, are void and of no effect, as decided in Home Ins. Co. v. Morse. 20 Wall. 445, 22 L. ed. 365. This attempt was based upon the ground that the Supreme Court had in effect overruled the decision in the Doyle Case by its decision in Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, where it was held that a state statute requiring every foreign corporation to have a license before engaging in business in the state was void, where it also contained a provision providing that a license should not issue except upon a stipulation by the corporation that the permit should be void if the corporation removed suits against it to 1 L.R.A. (N.S.)

the Federal courts; and that the statute requiring a license being void, the defendant was not subject to arrest for doing business for a foreign corporation which had not complied with the statute.

After the decision in the TRAVELERS' INSURANCE COMPANY CASE, adverse to the contention of the insurance company, a writ of error issued from the Supreme Court of the United States to review the judgment, but this writ of error was dismissed upon the ground that the license involved, having been issued for a limited period, and having expired after the issuance of the writ of error, the question involved was a moot one and would not be passed upon. TRAVELERS' INS. Co. v. PREWITT, Adv. S. U. S. 1906, p. 316, 26 Sup. Ct. Rep. 316.

684, 38 L. ed. 315, 14 Sup. Ct. Rep. 533; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 25, 46 L. ed. 61, 64, 22 Sup. Ct. Rep. 5; Bigelow v. Nickerson, 30 L. R. A. 336, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 121; Metropolitan L. Ins. Co. v. McNall and Mutual L. Ins. Co. v. Boyle, *supra*.

Hobson, J., delivered the opinion of the court:

In the first of the above cases the Security Mutual Life Insurance Company filed its petition in equity, alleging that in the year 1900 it began business in Kentucky, having complied with the requirements of the statutes of the state applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of the state of New York; that the commissioner then granted it permission to transact the business of life insurance in this state, and it employed a large number of agents, established a large number of agencies throughout the state, expended large sums of money in advertising its business, and acquired a large and profitable business in the state; that in June, 1904, it removed to the circuit court of the United States for the eastern district of Kentucky, without the consent of the other party, a suit brought against it in one of the circuit courts of the state; and that on September 29, 1904, the defendant, Prewitt, as insurance commissioner, revoked its authority to do business in the state for the sole reason that it had removed the suit referred to to the circuit court of the United States, and refused and still refuses to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the state. The defendant demurred to the petition, his demurrer was overruled, and, he declining to plead further, a judgment was entered as prayed in the petition.

In the other case the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and, unless enjoined by the court, will revoke it, to the plaintiff's irreparable injury; it being a foreign corporation created under the laws of the state of Connecticut. The defendant demurred to the petition, his demurrer was sustained, and, the plaintiff declining to plead further, its petition was dismissed. Both the appeals raise the same question and will be considered together.

1 L.R.A. (N.S.)

By § 633, Ky. Stat. 1903, license to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor and fined not less than \$50 nor more than \$100 for each offense. By § 634 every foreign insurance company, before transacting any business in this state, must return to the commissioner a copy of its charter or organic law, and the commissioner, upon being satisfied that the company has complied with the laws of the state and is possessed with the legal reserve, shall furnish to such agents as the company directs a license to transact business as agents for the company, under the seal of the insurance department. By § 657 foreign life insurance companies, in addition, must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, etc. By § 694 insurance companies other than life, not incorporated under the laws of this state, upon complying with the provisions of the statute, may be authorized by the commissioner to transact business in the state. By § 761 the fees to be charged by the commissioner are regulated.

Section 631, Ky. Stat. 1903, is in these words: "Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted that it is in conflict with the Constitution of the United States. Three decisions of the United States Supreme Court are relied on.

In *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, the statute of the state required the foreign insurance company to sign an agreement not to remove any of its cases to the Federal courts. The company signed the agreement and afterwards filed a petition seeking the removal of a suit brought against it to the Federal court. The state court refused to remove the case, but on appeal to the United States Supreme Court the judgment of the state court was reversed, and it was held that the agreement in advance not to exercise a right guaranteed by the Constitution did not prevent the defendant from removing the case to the Federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next case relied on is *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; the opinion being also written by Judge Hunt. In that case there was a state statute corresponding to § 631 above quoted, and the state officer under it was about to cancel the license of the insurance company. The plaintiff made in substance the same allegations as are made in the case before us, and prayed an injunction as in these cases. The Supreme Court, reversing the court below, dismissed the bill. After distinguishing the case from the *Morse* Case, the court said: "The cases of *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972, *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field [Curtis] in the case last named. The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable. *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *People ex rel. Cunningham v. Roper*, 35 N. Y. 629; *People ex rel. Davies v. Tax & A. Comrs.* 47 N. Y. 501. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204. License to a foreign corporation to enter a state does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and 1 L.R.A. (N.S.)

control over its territories, its citizens, and its business belongs to the state. If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked for the reason that it removed the case of *Drake* from the state to the Federal courts. If the act of an individual is within the terms of the law, whatever may be the reason which governs him or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. The state of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign state, possessing all the powers of the most absolute government in the world. The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the state is legal,—is not in violation of the Constitution or laws of the United States,—it is quite out of the power of any court to inquire what was the intention of those who enacted the law. In all cases where the legislation of a state has been declared void, such legislation has been based upon an act or a fact which was itself illegal." After discussing certain previous decisions, the court added: "It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the state may compel the foreign company to abstain from the Federal courts or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. That state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes.

There is nothing, therefore, that will justify the interference of this court."

It is conceded by counsel that, if this case is still authority, these actions must fail. But it is insisted that in *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, this case was, in effect, overruled. In *Barron v. Burnside* there was a state statute requiring every foreign corporation to have a license before engaging in business in the state. The license, by the terms of the statute, was not to be issued except upon the application of the company by a resolution of the board of directors or stockholders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the Federal courts. *Barron* was arrested under the statute for doing business for a foreign corporation without complying with the statute, and obtained a writ of habeas corpus, which was sustained by the United States Supreme Court. The court, after quoting the statute and discussing it at some length, said: "This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable." Then, after some further discussion of the statute, the court concludes with these words: "In view of these considerations, the case falls directly within the decision of this court in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365." It then proceeds, after showing what was decided in the *Morse* Case, to discuss the *Doyle* Case in these words: "The case of *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in *Home Ins. Co. v. Morse* and was satisfied with it. In referring to the second conclusion in *Home Ins. Co. v. Morse*, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in *Doyle v. Continental Ins. Co.* that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the same statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license to do business in the 1 L.R.A. (N.S.)

state. Afterwards it removed into the Federal court a suit brought against it in a state court of Wisconsin. The state authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been that, as the state had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Home Ins. Co. v. Morse*, *supra*, must be regarded as not in judgment."

We do not understand this to overrule the *Doyle* Case; for certainly, if the state cannot withdraw the license it has once granted, any court of competent jurisdiction may so decide. If the state statute withdrawing the license was unconstitutional and void, the Supreme Court of the United States had the same power to declare the statute in that case unconstitutional as it had to declare the statute unconstitutional in *Barron v. Burnside*. Our statute is not liable to the objections made to the statute in either the *Morse* Case or the *Barron* Case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the state, for the protection of its citizens against unsafe insurance companies, should require them, before doing business in the state, to obtain a license from the insurance commissioner, and to furnish him such evidences of their solvency as will protect insurers in this state before he is authorized to grant them a license. The license which the state grants is purely a matter of grace, and, like any other license, may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for, when he takes it he takes it subject to revocation. He cannot question the reason of the licensor for revoking the license, as the state may exclude foreign corporations from doing business in the state with or without reason. If I have license to cross my neighbor's lot, and he revokes it because I brought a suit against his son, I cannot enjoin him from revoking the license

on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me; for he had an absolute right to revoke the license, and the fact that he did it out of spite, or for a bad reason, is immaterial. The state, by her statutes above referred to, in effect, says to the foreign insurance companies: "I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If, after you come, you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the Federal courts, but the practical denial of justice that results, in a sparsely settled state like ours, if the case must be tried 100 or 200 miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the vicinage. The state simply says to the foreign insurance companies: "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the state, on the day before these suits were filed, by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States circuit court, could these plaintiffs have complained? If not, how are they affected by the fact that the state acts by an executive officer, and not by a special statute? Certainly they cannot complain that the license of certain other companies was not revoked.

The case of *Com. v. East Tennessee Coal Co.* 97 Ky. 238, 30 S. W. 608, did not involve the revocation of a license granted by the state, but was in effect similar to *Barron v. Burnside*, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the state courts. The naked question presented here is, May the state, without cause, revoke a license it has once granted? for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound, unless the whole doctrine that the state may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a state may at will prohibit foreign corporations from doing business in the state (*Hooper v. California*, 155 U. S. 650, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207), and yet that it may not at will withdraw a license which it has once granted to such corporations. It seems to us that the *Doyle* Case rests on sound principles, and that 1 L.R.A. (N.S.)

the *Barron* Case in no wise conflicts with it; for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the *Morse* Case. 6 Thomp. Corp. §§ 7466, 7467; 13 Am. & Eng. Enc. Law, p. 867; *People ex rel. Payson v. Pavey*, 151 Ill. 101, 37 N. E. 691.

The judgment in the first case is therefore reversed, for further proceedings consistent herewith.

The judgment in the second case is affirmed.

Burnam, Ch. J., and Barker, J., dissent.

Appeal dismissed by Supreme Court of United States February 19, 1906.

TEXAS COURT OF CRIMINAL APPEALS.

JOHN TONES, Appt.,
v.
STATE OF TEXAS.

(... Tex. Crim. App.)

1. Robbery—consent—affording facilities.

Consent to a robbery, so as to absolve the robber from criminal liability, is not shown by merely providing one's self with money which may be taken, and going where the deed may be done in anticipation of the commission of the crime, for the purpose of apprehending the criminal.

2. Same—by officers.

Officers are guilty of robbery who, after having arrested a person, forcibly search him, and take from him valuables with the intention of keeping them.

3. Evidence—memorandum.

The admission in evidence of a memorandum of bills furnished a person for the detection of robbers, upon the trial of persons

Case Note.—If there had been nothing but the arrest to support the allegation of force in *TONES v. STATE*, it would have been difficult, under the authorities, to have upheld the conviction.

Long v. State, 12 Ga. 293, and *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, discussed in the opinion in the *TONES* CASE, were cited in *Jackson v. State*, 118 Ga. 125, 44 S. E. 833, as authority for its decision that, there being no violence beyond that of an arrest and a threat to prosecute by the defendant, who falsely pretended to be a detective, there was no robbery; and those cases were also cited in *Simmons v. State*, 41 Fla. 316, 25 So. 881, as authority for its decision that a case of "putting in fear," within the meaning of the statute defining robbery, was not shown by an information alleging, in effect, that the defendants falsely represented and pretended to the prosecutrix that one of them was an officer and authorized to take

apprehended for that offense, is not reversible error where the identity of the bills found in possession of the accused with those taken from the person robbed is abundantly proved.

(June 7, 1905.)

APPEAL by defendant from a judgment of the District Court for Grayson County convicting him of robbery. Affirmed.

The facts are stated in the opinion.

Messrs. E. J. Smith, F. N. Roberts, and R. H. Thompson for appellant.

Messrs. Galloway & Vowell, for the State:

If the claim of right is a mere pretext covering an intent to steal, and property is taken from a person by force or violence, it is robbery.

2 Bishop, Crim. Law, 8th ed. § 1162; 2 Russell, Crimes, 101, 114; Long v. State, 12 Ga. 293; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628.

Exposing property, or neglecting to watch it, under the expectation that a thief will take it; or furnishing any other facilities or temptations,—is not consent in law.

1 Bishop, Crim. Law, 5th ed. § 262; 1 McClain, Crim. Law, § 118; Alexander v. State, 12 Tex. 540; Speiden v. State, 3 Tex. App. 156, 30 Am. Rep. 126; State v. McAfee, 148 Mo. 370, 50 S. W. 82; Robinson v. State, 34 Tex. Crim. Rep. 71, 53 Am. St. Rep. 701, 29 S. W. 40; Allison v. State, 14 Tex. App. 122; Conner v. State, 24 Tex. App. 245, 6 S. W. 138.

Mr. Howard Martin also for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of robbery, and his punishment fixed at confinement in the penitentiary for a term of nine years; hence this appeal.

The state's case, briefly stated, is as follows: H. S. Rich was constable of precinct No. 1, at Sherman, and Marion Nicholas was

also a resident of Grayson county. Nicholas suspected that some robberies and violations of the local-option law were being committed in the city of Denison. He conferred with Rich about the matter, and, as a result of their conference, Rich agreed to get a man to see if he could not catch up with the parties committing said offenses. He selected prosecutor Joe Richards, a painter and a resident of Sherman. On the day preceding the night of the alleged offense, these three parties met in Sherman and gave Richards \$40, \$38 of which was furnished by Nicholas, and consisted of one \$10 bill, and five \$5, and three \$1 bills of United States currency. The numbers of all these bills were taken on a slip of paper by the parties at the time. Besides, they were marked, and from some of the bills small portions were torn off. The remaining \$2 in silver was furnished by Rich, constable. It was understood that Richards was to go to Denison that night, buy all the whisky he could with the silver money, but was not to spend the currency. These bills were placed with him to be used to detect any parties who might rob prosecutor Richards, should he be robbed. In pursuance of this agreement, Richard and Nicholas went that evening or night to Denison. After getting there, Nicholas separated from prosecutor Richards. Richards immediately proceeded to the execution of the plan, went to several joints, drank some beer and a drink of whisky, and bought two pint bottles of whisky at two different joints. Subsequently he was seen on the street by appellant, who was a policeman of Denison, and by Finley, also a policeman. He was at the time either drunk, or acting in a manner to suggest he was drunk. They accosted him and charged him with being intoxicated. He seems to have denied it, stating he could take care of himself, and had money to pay his way, and that he was from the territory. They

her furniture, and threatened to arrest her if she resisted them in taking the same. In neither the Jackson nor the Simmons Case did it appear that there was any force or violence used beyond the arrest and threat; and this distinguishes them from the actual decisions in the earlier Georgia cases referred to, and also from TONES v. STATE.

In Williams v. State, 51 Neb. 711, 71 N. W. 729, cited in the opinion in TONES v. STATE, it was held that a conviction for robbery by putting in fear was sustained by evidence that the defendants conspired unlawfully to extort money from the prosecuting witness, and that one of them, falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of him by the collar, whereupon the latter delivered over to his assailants a sum 1 L.R.A. (N.S.)

of money, being at the time so frightened that he did not realize what he was doing. Here, also, actual violence was employed. The case is thus distinguishable from the Jackson Case and the Simmons Case.

Those cases are also distinguishable from Sweat v. State, 90 Ga. 315, 17 S. E. 273, where it was held that a verdict of robbery by intimidation was supported by evidence that the prosecutor was arrested without a warrant by the defendants, who pretended to believe that he was a fugitive from justice, and, by threatening to carry him to prison and hinting at mob violence, they induced him to give up money in his possession. The distinguishing feature in the last case was the implied threat of mob violence, and so the distinguishing feature in the TONES CASE was the actual violence employed in addition to the arrest.

arrested him, however, and marched him to the jail, one on either side of him. When they got there, they took him inside, stood him against the wall, held his arms up, and searched him. They took from him the roll of currency bills before mentioned, 55 cents in silver, a pocketbook, and the two pint bottles of whisky. They deposited with the jailer the two pints of whisky, the purse, and 55 cents. The balance of the money they did not deposit. The next morning, on complaint of Richards, appellant and his codefendant, Finley, were arrested and searched. On appellant's person was found four \$5 bills and one \$1 bill, and on Finley was found a \$10 bill and a \$5 bill and one \$1 bill. All of these bills were thoroughly identified by witness Rich as the same currency bills that he and Nicholas had given to prosecutor Richards on the evening before. All of said currency that had been given said Richards was found, except two \$1 bills not accounted for. Appellant denied that he got any money off of Richards on the night before, except the 55 cents, and claimed the money found on his person as his own property, which he had borrowed on the day before from one Carver. Finley also denied that they had taken any money from Richards, except the 55 cents, and accounted for and claimed the money on his person as his own. It was also shown on the part of appellant that when they arrested prosecutor he claimed to have been robbed of his watch and some money in a house of prostitution in Denison. This is a sufficient statement of the case to discuss the legal questions presented.

We understand appellant's defense to embrace two propositions: First, that prosecutor was willing to be robbed, prepared himself for that purpose, made no resistance; and, conceding that the money was taken from him under the circumstances by the officers, that it was with his consent, and so there could be no robbery. Second, that appellant and his companion, Finley, were police officers of the town of Denison; that they were authorized by ordinance to arrest persons found drunk in any public place in said city; that appellant was found in such condition by them, and they took him into custody and carried him to jail; that they had a right to search him; that they used no violence in said search; and that in the absence of any violence used in procuring the money, conceding that they did procure it, this would not constitute robbery. Furthermore, if it be admitted that sufficient violence was shown in taking the money, still no intent was shown to appropriate it, and, if subsequently they

formed the intent and did appropriate said money, it would not constitute robbery.

On the first proposition, appellant has cited a number of authorities, from which he deduces a principle of law as follows: Where money is placed upon a person with the purpose of being taken from him, in order to detect a criminal, the owner of the money and the person from whom the money is taken consenting thereto, robbery is not committed. The authorities cited in support of this proposition are *Speiden v. State*, 3 Tex. App. 162, 30 Am. Rep. 126; *Connor v. People*, 18 Colo. 373, 25 L. R. A. 341, 36 Am. St. Rep. 295, 33 Pac. 150; *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514; *McGee v. State* (Tex. Crim. App.) 66 S. W. 564; note to *Allen v. State*, 91 Am. Dec. 477; note to *State v. Hull*, 72 Am. St. Rep. 705. Of course, if it be conceded that the evidence shows that the prosecutor was consenting to the robbery, then the application of the authorities cited may be granted. However, we gather from the authorities cited by appellant, and others, that as to the offense of burglary, larceny, robbery, and other crimes of like character, if the owner of the burglarized premises or property invites a crime or induces parties to commit an offense in order that they may be apprehended, he cannot afterwards be heard to say that he did not consent to what was done. It was so held in *Allen's Case*. The principle is further extended by some of the cases that, where the owner of the premises sought to be burglarized authorized his servant to act with the accused, and under the owner's direction unlocked the door of the premises said to be burglarized, and entered the premises with the accused, this was held not to be burglary, because of his consent. In *Speiden's Case*, which was the alleged burglary of a bank in Dallas, it appears that the owners set on foot the design to have the bank burglarized, and had detectives go in with the burglars. In that case it was held there was consent. But we do not believe it is held by any well-considered authority that where a person has learned of plans to burglarize his premises, and does not at all enter into the designs of the burglar, but does not try to prevent the burglary, on the contrary, lays plans to entrap the burglar, and does apprehend him in the act, there is no consent to the burglary, and the burglar is amenable to punishment. *Robinson v. State*, 34 Tex. Crim. Rep. 71, 53 Am. St. Rep. 701, 29 S. W. 40; *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *State v. Sneff*, 22 Neb. 481, 35 N. W. 219. And we understand the same principle is announced in *Alexander v. State*, 12 Tex. 540; *Pigg v. State*, 43 Tex. 108; *Johnson v. State*,

3 Tex. App. 590; 1 Bishop, Crim. Law, § 262. In *Alexander's Case*, Judge Wheeler cites with approval the principle laid down in 3 Chitty, Crim. Law, p. 952, as follows: "If the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and lead them on until the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed." In *Russell on Crimes*, vol. 2, p. 113, citing *M'Daniel's Case*, 1 Fost. C. L. p. 129, he refers to a case very much in point, and illustrative of the principle of law here involved. We quote as follows: "One Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavors to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post chaise, until the highwayman came up to the company in the coach, and to him presenting a weapon, demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with the pistol in his hand, and, with the assistance of some others, took the highwayman. This was holden to be a robbery of Norden." It occurs to us that the facts of this case come within the principle of the above case. Here there was no agreement between prosecutor Richards and appellant that he would submit to a robbery, as was the case in *M'Daniel's Case*, 1 Fost. C. L. 121, 128. Nor was there any invitation on his part, much less was there any device to lead appellant to the commission of the offense. While he anticipated, like Norden, that he might be robbed, he made no agreement with the robbers in that regard. Apprehending that he might be robbed, he had a perfect right to prepare himself beforehand, in order that he might detect the persons guilty of the robbery, and this we understand to be all that he did. Under the authorities, this is not consent to the robbery in such measure as to absolve appellant from criminality.

The next question is, Was the violence used such as to constitute the offense? The indictment charges that appellant committed the robbery by an assault and by violence, and by putting the said Richards in fear of life and bodily injury, etc. If either of these allegations is proved, the offense is complete. It may be conceded here that appellant was not in fact put in actual fear of life or serious bodily injury; but the authorities hold it is not necessary that actual fear should be strictly and precisely proved, as the law in *odium spoliatoris* will presume fear where 1 L.R.A. (N.S.)

there appears to be a just ground for it. *Long v. State*, 12 Ga. 293; *Williams v. State*, 51 Neb. 711, 71 N. W. 729. We take it that the state's case depends on violence. If there be not a sufficient degree of violence proved, then the state has no case. We understand it is contended that whatever violence was used was authorized by law in making the arrest. This may be conceded, so far as the arrest is concerned. But we do not understand it to be the law that officers can make a rightful arrest, and if they subsequently use violence and commit a robbery they will be exonerated on account of the legality of the alleged arrest. The books do not cite many cases of robbery where the offense was committed by officers after the arrest of the prisoner, yet there are some which recognize the principle as above stated. *Russell on Crimes*, vol. 2, p. 11, cites *King v. Gascoigne*, 1 Leach, C. L. 280, which is illustrative of this question. There a woman was arrested upon the charge of having committed an assault upon another woman who lodged in her house. She appears to have been committed to the custody of an officer, who took her in charge, threatened to put her in jail, handcuffed her, and succeeded, by alarming her, in getting from her several shillings. Justice Nares, who tried the prisoner, said: "That in order to commit the crime of robbery it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head or a dagger to the breast, and that a violence, though used under a colorable and specious pretense of law or of doing justice, was sufficient, if the real intention was to rob. And he left the case to the jury with a direction that, if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colorable means of putting his felonious intention into execution. And, upon the case being referred to the twelve judges, they were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretense of law, for the purpose of obtaining it, the offense was clearly a robbery." *Long v. State*, 12 Ga. 293, is another case somewhat in point. There the court laid

down the criterion which distinguishes robbery from larceny, as the violence, actual or constructive, which precedes the taking. There can be no robbery without violence, and no larceny with it. It is further held: "If one, against whom a crime has been committed, with or without a warrant arrest the offender, and receive money or property without violence, actual or constructive, under an agreement not to prosecute, that is not robbery. . . . Actual force in . . . robbery implies personal violence. If there is any injury done to the person, or if there is a struggle to retain possession of the property before it is taken," this is a sufficient criterion of force. It is further held: "If, however, such threats or accusations are accompanied with force, actual or constructive, and the property or money is given up in consequence of this force, the transaction is robbery. Nor is the guilt of the party accused any defense to an act of robbery. If property is extorted by violence, upon a charge of larceny or any other crime, the offense is neither justified nor mitigated by his guilt, nor aggravated by his innocence. The law will not permit property or money to be violently taken from a citizen because he happens to be a guilty man. He is liable to the law if guilty, and under the protection of the law whether innocent or guilty." It is further held that there must be some degree of force used, and "the taking must be against the will of the person robbed; yet it may seem to be with his consent when it is really delivered from fear. If it is apparently voluntary, yet from the facts and circumstances it is from fear, it is still robbery." The facts and circumstances, however, in that case as to the violence used, were stronger than in the case at bar; still the principles of law there laid down are applicable.

In *Com. v. Snelling*, 4 Binn. 379, there, as here, it was contended that the offense does not amount to robbery, because the watch was taken without his being in any fear of being robbed. The court lays down this rule: To constitute a robbery, there must be a felonious taking of property from another by force. This force may be either actual or constructive. Actual force is applied to the body; constructive is by threatening words or gestures, and operates on the mind. It is impossible in advance to comprehend all cases which may arise. As the different cases are presented, the question will be whether they fall substantially within the principles of the definition. The verdict of the jury did not expressly find whether the watch was taken against Harrod's consent or not, but it did find that he did not know of its being taken. It was therefore held that it was without his con-

sent. It was also found that he was in fear, not of being robbed, but of being beaten. The court held on this point that fear is not an essential ingredient of robbery, force being sufficient. It was expressly found that the prisoner made use of force to obtain the watch; that is, he seized Harrod by the cravat with his left hand, and pressing him against the wall at the same time, taking his watch from his fob. The court further says: "It is clear that the prisoner's violence was the cause of Harrod's losing his watch. The fear of being beaten diverted his attention from his property, and this fear was produced by force, so that, in truth, the property was taken by force. The law is not to be evaded by fraudulent contrivances. . . . If it was the prisoner's intent to obtain the watch under cover of this violence, without the knowledge of the owner, it is to be construed a taking by violence." And, for other authorities on this subject, see note to *State v. McCune*, 70 Am. Dec. 182, 183. In *Bussey v. State*, 71 Ga. 100, 51 Am. Rep. 256, defendant pretended to be town marshal, and seized prosecutor, to whom another was showing a trick at cards, shoved him against the wall, and threatened to take him to jail unless he paid him money. Whereupon prosecutor paid him money, as he said, to keep him from going to jail and being bothered. (In Georgia, threats to accuse prosecutor of a crime do not afford the basis of a prosecution for robbery, except in one instance; that is, a charge of the crime against nature.) In that case the quotation above given from *Long's Case* is cited with approval. The court further says: "These principles will be found in 2 East, P. C., 714-736, and 2 Russell on Crimes, pp. 117 et seq. The presumption is that the court below gave them to the jury, and that the jury found that the money was extorted from the prosecutor by violence on a charge of gambling, and not by the mere fear of a criminal prosecution for that offense. If the jury so found, and there is evidence of violence sufficient to support the finding, then, under the decision in *Long v. State*, the verdict is not contrary to law and evidence. What violence is proved? The prosecutor was seized, shoved and held against the wall, and threatened to be taken to jail, and thus the money was extorted from him. True, he did say that he paid it to keep from going to jail, and he did not want to be bothered, but the jury might well have concluded that, whilst the fear of the jail did enter into the reason of his delivery of the money, the violence of the defendant, the seizure by the collar, and pressing him against the wall contributed largely to it, and made a considerable part of that 'bother' in which the poor country

darky was involved when in the clutches of these town sharks. Whilst the mere arrest of him with the threat to take him to jail . . . would not suffice alone to make a case of robbery, yet, accompanied with this ill usage and violence of seizure, pushing, and holding, it does, according to Long v. State, make such a case." And see Williams v. State, 51 Neb. 711, 71 N. W. 729.

Now, what are the facts of this case as bearing on the question of violence? It will be taken for granted that the appellant and Finley had a right to arrest prosecutor for drunkenness on the streets of Denison, and they had a right to take him to jail. And it may be conceded they had a right to search him for weapons or instruments he might use in accomplishing an escape. It may be doubtful, however, if the prisoner objects, or without consent, an officer has any right to take from a prisoner valuables which are not weapons or may not be used in accomplishing an escape. Still, conceding that they had this right to take from the prosecutor his money for the purpose of keeping it in safe custody against the time when he might be enlarged, if they had the intent at the time they found any money or valuables on him to take it, and they used force to make the search, then we understand they cannot avail themselves of the right to search in order to defeat the prosecution. They took the prisoner in hand after they got him in jail. They did not ask him to consent to be searched. According to the testimony, they rudely backed him up against the wall and held his hands up, while one of them thrust his hand into his pocket and extracted his money. Was this sufficient force? We hold, under the authorities above cited, that it was. No consent was given to the search. In order to make the search effective, they forced him against the wall, used violence in holding his hands above his head against the wall, and then took his money. Did they have the present intent to appropriate it to their own use when they took it? The evidence shows that almost immediately they deposited the whisky and 55 cents in coin which they got from the prosecutor with the jailer, but they kept the \$38 in currency. If there was violence in a case of this character, the law will not closely scrutinize the degree. Here two guardians of the public welfare, peace officers, take a prisoner in charge. He is powerless, and he knows it. The least effort to foil them, he is aware, will call for the use of greater force and violence, and undoubtedly his apparent acquiescence under the circumstances was superinduced by his surroundings. As was said in *Bussey's Case*, *supra*: "Whilst this court will rule the law as it understands it, 1 L.R.A. (N.S.)

it will not strain it one jot or tittle to shield the perpetrator of such an outrage."

Appellant assigns as error the action of the court in its charge to the jury, and in refusing to give a number of special requested instructions. We have examined the charge of the court, and it is in accordance with the principles hereinbefore discussed; and, in so far as the special charges asked announce the same principles, they were not called for. Special charges which contravened the principles contained in the charge, and which have been heretofore discussed in this opinion, were not the law, and the court did not err in refusing to give them.

Appellant excepted to the court receiving in evidence a written memorandum preserved by Reh at the time he gave the currency bills to prosecutor, of the numbers and denominations of said bills. The witness used this memorandum. He stated he took it at the time, and that it was correct. We do not believe there was any error in the admission of this memorandum, under the circumstances in which it was done. However, aside from this, the bills were abundantly identified as those taken from the prosecutor. The admission of the paper, if erroneous, would not constitute reversible error.

There being no errors in the record, the judgment is affirmed.

Petition for rehearing overruled June 23, 1905.

TENNESSEE SUPREME COURT.

J. H. HARDWICK, Appt.,
v.
AMERICAN CAN COMPANY et al.

(.... Tenn.)

1. Bill of review—new matter pending action.

A supplemental bill in the nature of a bill of review is the proper proceeding to bring before the court new matter discovered by

Case Note.—The opinion of the court in *HARDWICK v. AMERICAN CAN Co.* so thoroughly presents the authorities and opinions of the text writers upon the question involved as to leave but little to be added. An examination of the authorities fails to reveal anything in conflict with the court's holding that a supplemental bill in the nature of a bill of review is an appropriate remedy for reviewing interlocutory decrees, while the propriety of such remedy was sustained in *Putnam v. Lewis*, 1 Fla. 455, and *Hyman v. Smith*, 10 W. Va. 298, in addition to the authorities cited by the court. See also 16 Cyc. Law & Proc. p. 518, to the same effect.

defendant after answer, and after the passing of a decree referring the case to a master, and while such decree is in process of execution.

2. Inconsistent defenses.

A supplemental bill in the nature of a bill of review cannot be filed to bring to the attention of the court, in an action for breach of contract to purchase a certain quantity of manufactured articles in which the defense had been the unmerchantable character of the articles and consequent loss and injury to business credit and reputation, in attempting to dispose of them, matter showing a breach of the contract by the seller in selling the articles to other merchants within the territory which the contract awarded exclusively to the buyer.

(November 18, 1905.)

A PPEAL by plaintiff from a decree of the Court of Chancery Appeals which reversed a decree of the Chancery Court for Hamilton County denying the right to file a supplemental bill in the nature of a bill of review to bring a newly discovered defense to the attention of the court. Reversed.

The facts are stated in the opinion.

Messrs. Brown & Spurlock and Pritchard & Sizer for appellant.

Messrs. White & Martin, for appellees:

Matter discovered after a decree has been made, although not capable of being used as evidence of anything which was previously in issue, in the case, but constituting an entirely new issue, may yet be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review.

Gibson, Suits in Equity, § 1071; Frazer v. Sybert, 5 Sneed, 100; Heiskell, Dig. 596; Story, Eq. Pl. § 416.

Whatever new fact would entitle a party to review a decree if final will entitle him to a rehearing upon an interlocutory decree.

He may file a supplemental bill, setting up the newly discovered fact, and asking for a rehearing of the interlocutory decree.

Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786; Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; Dan. Ch. Pl. & Pr. 5th ed. 1537; Long v. Granberry, 2 Tenn. Ch. 85; Gibson, Suits in Equity, §§ 1074, 1080; Maddox v. Apperson, 14 Lea, 599; Deitch v. Staub, 53 C. C. A. 137, 115 Fed. 310; Gillette v. Bate Refrigerating Co. 12 Fed. 108.

There is nothing antagonistic in the two defenses. They could certainly both be true, and there can be no antagonistic truths.

Messrs. Wheeler & Trimble also for appellees.

Neil, J., delivered the opinion of the court: This case was before us at the last term. 1 L.R.A. (N.S.)

The opinion then delivered appears in 113 Tenn. 657, 88 S. W. 797. At the former hearing the case was remanded to the chancery court for an account and for other purposes. It is now before us again on appeal from the action of the court of chancery appeals in respect of the disposition which it made of the report of the master, and of the decree of the chancellor thereon and in respect of an application made in the chancery court for the filing of a supplemental bill in the nature of a bill of review, and for the disposition of questions related thereto.

We shall not take up these questions in the order just stated, but in what seems to us the most convenient sequence.

1. The defendant filed in the court below a supplemental bill in the nature of a bill of review, for the purpose of putting in issue new matter discovered after the filing of the answer, and after the passing of the decree of reference, and while the latter decree was in process of execution before the master. This bill shows that due diligence was exercised on the part of the defendant, and that the matter could not reasonably have been ascertained prior to the time at which it was discovered. Assuming the evidence to have been material and determinative, the question arises as to the proper practice in such cases. We are not aware that this precise question has ever before been determined in this state. The cases are numerous wherein final decisions have been reviewed under bills of review, but we know of no case in our reports where the question has arisen in respect of an interlocutory decree.

The following authorities indicate the true conclusion:

In Laidley v. Merrifield, 7 Leigh, 346, it is said: "A bill of review, strictly speaking, is a proceeding to correct a final decree in the same court, for error apparent on the face of the decree or on account of new evidence discovered since the final decree. The decree being final, the bill of review is not regarded as a part of the cause in which the decree was rendered, but as a new suit, having for its object the correction of the decree in the former suit. But where a decree is only interlocutory, but liable to the same objections, the party injured must seek his redress, not by a bill of review, as such, but by petition or supplemental bill in the nature of a bill of review. Such petition or supplemental bill is regarded as a part of the very cause, the decree in which is sought to be corrected, and any order or decree of the court on the petition or bill is only interlocutory." Story, Eq. Pl. § 425; Dan. Ch. Pl. & Pr. 5th ed. 1537.

The new matter must be brought to the

attention of the court as soon as discovered. If, after discovering such matter, the party allow the case to go to a final decree, he cannot use the new matter. Story, Eq. Pl. § 423. In *Baker v. Whiting* it is said: "To compel the petitioner to wait until a final decree, and then to apply for a bill of review, or a bill in the nature of a bill of review, would not only occasion great delay, but also great expense to the parties, which ought, if practicable, to be avoided. 1 Story, 218, Fed. Cas. No. 786. See also *Jenkins v. Eldredge*, 3 Story, 299, Fed. Cas. No. 7,267. In the last-cited case Judge Story used this language: "The real question, therefore, for the consideration of the court is whether leave should be granted to file a supplemental bill to bring forward the new evidence. In substance, there is no difference between this case and the case of leave to file a bill of review, or a bill in the nature of a bill of review, except that the latter is solely applicable to cases where there has been a final decree, whereas applications like the present may be before or after an interlocutory decree."

In his work on Equity Pleadings, Judge Story says: "It has been established that matter discovered after a decree has been made, although not capable of being used as evidence of anything which was previously in issue in the cause, but constituting an entirely new issue, may yet be the subject of a bill of review." Story, Eq. Pl. § 416.

Such a supplemental bill may be filed, not only by a complainant, but also by a defendant. In the work just referred to, it is said: "Hitherto we have chiefly considered supplemental bills on the part of the plaintiff; but they may also be brought on behalf of the defendant in the suit. Where the matter is newly discovered evidence on the part of the defendant after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental bill, obtain relief." Id. § 337c.

The subject was recently gone over in an opinion by Judge Lurton in the case of *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 310-316. In that case it appeared that Staub, as receiver of the Knoxville Building & Loan Association, brought suit against Deitch in the Federal court for money loaned. Deitch, the defendant, raised the question of usury. On an interlocutory decree, Judge Clark, with much doubt and uncertainty expressed in his conclusions, decided that there was no usury, and referred the case to the master to report on the indebtedness. While the matter was pending before the master new evidence was discovered and offered, showing usury. The master declined to consider the new proof; and 1 L.R.A. (N.S.)

there was an exception for this reason. On appeal, it was held in the circuit court of appeals that the master could not consider the newly discovered evidence because of the interlocutory decree, and that the proper practice was for the defendant to bring a supplemental bill setting up the newly discovered evidence and seeking to rehear the interlocutory decree.

Such a bill, "if maintainable at all, should properly in its prayer be for leave to file a supplemental bill to bring forward the new evidence, and for rehearing of the cause at the time when the supplemental bill should also be ready for a hearing." *Jenkins v. Eldredge*, *supra*.

In *Daniel*, Ch. Pl. & Pr. it is said: "A bill of this description cannot be filed without leave of the court having been first granted. In order to obtain permission for this purpose, a petition must be presented supported by an affidavit to show that the new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made." Id. 5th ed. 1537. But a bill may be drawn so as to serve the purpose of both a bill and petition, and so presented to the court for leave to file. *Long v. Granberry*, 2 Tenn. Ch. 85; *Gibson*, Suits in Equity, §§ 1074, 1080.

2. From what has just been said, it is apparent that, nothing else appearing, the chancellor should have allowed the filing of the supplemental bill offered by the defendant; and likewise that the court of chancery appeals, but for a fact to be presently stated, acted correctly in granting the permission.

In order to properly understand the fact on which the question turns, it should be stated that the complainant and the defendant had mutually entered into a written contract, wherein the defendant agreed to purchase from the complainant, 5,000 stoves, and the complainant, among other things, agreed not to sell any stoves during the running of the contract in the state of Georgia. It was alleged in the supplemental bill filed by the defendant that, after the decree of reference had been awarded and the term had adjourned at which that decree was rendered, the defendant had, by the exercise of great diligence, discovered a secret arrangement between the complainant and the firm of Bondurant & Company of Athens, Georgia, whereby the complainant had sold to this firm a large number of stoves. It was alleged in the supplemental bill that the defendant had been greatly injured by this secret transaction between Hardwick and Bondurant & Company. It is insisted on the part of the complainant that this new defense ought not to be permitted, be-

cause in direct conflict with a leading defense set up in the original answer.

In the original answer, one of the defenses set up by the can company was that the stoves manufactured by the complainant were so defective that it could not handle them. The answer contained upon that subject the following:

"It is true that this defendant did order of the complainant 1,191 stoves at the prices named in the said exhibit A. and that the complainant did ship to this defendant 1,191 stoves, and at the time of shipment collected from this defendant the contract price therefor, and that the defendant has not ordered nor accepted from the complainant any more stoves than those thus shipped and paid for; but said stoves so shipped and paid for were not such stoves as were required by the terms of the contract, and were not merchantable stoves; and by reason of defective material and workmanship were totally unsuited for the purposes for which they were sold, and by reason of said defective material and workmanship and said unmerchantability, the defendant was unable to sell any more of said stoves than those shipped to it as aforesaid, although it used its best efforts so to do. The defendant was damaged to the extent of \$5,000 through loss of trade and customers, and in loss of its business reputation, and in the time of its servants and employees, and otherwise, by reason of the aforesaid defective character of the stoves so delivered; and was further damaged in the sum of \$5,000, by reason of its failure to sell any more than 1,191 of complainant's stoves, owing to the same aforesaid defects."

The supplemental bill is based upon the ground that the complainant therein, the defendant to the original bill, had sustained loss by reason of the fact that the complainant, pending the running of the contract, had sold between 1,000 and 1,500 stoves to Bondurant & Company.

This seems to be wholly in conflict with the defense set up in the original bill that the goods were worthless, and that the defendant had suffered loss in selling such as he had sold, and great injury to his credit and reputation in attempting to sell others.

On the ground of this incongruity between the two defenses, we do not think that the supplemental bill should have been permitted to be filed, and that the court of chancery appeals erred in giving such permission.

3. We are of opinion that the court of chancery appeals acted correctly in assessing the damages at \$1,182.38, with interest from August 1, 1902. We deem it unnecessary to go into the particulars of this matter, being entirely content with the view 1 L.R.A. (N.S.)

taken of that branch of the case in the opinion of the court of chancery appeals.

A decree will be entered here in favor of the complainant for \$1,182.38, with interest from August 1, 1902, with the unadjudged costs of the chancery court. The costs of appeal will be divided equally between the complainant and the defendant can company.

WASHINGTON SUPREME COURT.

SEATTLE ELECTRIC COMPANY, Respt.,
v.

SNOQUALMIE FALLS POWER COMPANY
et al., Appts.

(.... Wash.)

Injunction—performance of contract—public policy.

Although equity will not specifically enforce a contract to furnish a supply of electricity to a street car and electric lighting company, which creates a monopoly contrary to the terms of a franchise given the company which has contracted to furnish the power, it may enjoin the breach of the contract until such time as an adequate supply can be procured elsewhere, where such breach will result in great public inconvenience.

(October 14, 1905.)

Case Note.—The maxim, *In pari delicto melior est conditio defendentis*, which the court was urged to apply in SEATTLE ELECTRIC CO. v. SNOQUALMIE FALLS POWER CO., is not of universal application. On the contrary, it is well established that, when the interests of public policy will be subserved thereby, equity may grant affirmative relief, even to a party *in pari delicto*, with respect to a contract which is contrary to public policy or otherwise illegal. See, among other cases to this effect, *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Basket v. Moss*, 115 N. C. 448, 48 L. R. A. 842, 44 Am. St. Rep. 463, 20 S. E. 733. In most, if not all, of the cases of this class, however, the relief has been limited to the purpose of restoring the parties to the condition in which they were prior to the contract in question. This relief has sometimes been granted by canceling or restraining the enforcement of an executory contract, and sometimes by setting aside an executed contract and requiring the return of money paid thereunder. It will be observed that the decree affirmed in the SEATTLE CASE went considerably beyond such form of relief, and, in effect, granted the specific performance of the contract for a limited time, notwithstanding that it was apparently assumed that the plaintiff in the suit was *in pari delicto*, with the defendant. Certainly, very little, if any, direct authority can be found for such an application of the exception to the maxim, *In pari delicto*, though the principle upon which the

A PPEAL by defendants from a judgment of the Superior Court for King County compelling them to comply with the terms of their contract to furnish a supply of electricity. Affirmed.

The facts are stated in the opinion.

Mr. Thomas B. Hardin, for appellants:

The contract is clearly illegal and void.

Wash. Const. art. 12, § 22; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 170; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 802; South Chicago City R. Co. v. Calumet Electric Street R. Co. 171 Ill. 391, 49 N. E. 577; Reed v. Johnson, 27 Wash. 43, 57 L. R. A. 404, 67 Pac. 381; State ex rel. Snyder v. Portland Natural Gas & Oil Co. 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; Doane v. Chicago City R. Co.

160 Ill. 22, 35 L. R. A. 588, 45 N. E. 511; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 974; United States v. Addyston & Steel Pipe Co. 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 291; State v. Hartford & N. H. R. Co. 29 Conn. 546; Arnot v. Pittston & E. Coal Co. 68 N. Y. 565, 23 Am. Rep. 190; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 185, 8 Am. Rep. 159; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 598, 22 Am. Rep. 122, 104 Ill. 260; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L. R. A. 175, 85 Am. St. Rep. 125, 28 So. 670; Cummings v. Union Blue Stone Co. 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; Chapin v. Brown Bros. 83 Iowa, 156, 12 L. R. A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 671; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; More v. Bennett, 140 Ill. 69,

exception rests would seem to justify its extension to such a case. Mr. Pomeroy, who recognizes and states the exception within the limits above indicated (2 Pom. Eq. Jur. §§ 940, 941), declares that the proposition is universal that no action arises in equity or law from an illegal contract, and that no suit can be maintained for its specific performance (§ 940). In making this declaration, however, as well as in stating the exception to the maxim, he seems to have had in mind the usual case where the relief, if granted, will inure solely to the benefit of a party to the contract, and will subserve no substantial interests of the public. The vital circumstance which controlled the decision in this case, namely, that a direct and substantial interest of the public, or at least of the part of the public represented by the residents of a city, would be detrimentally affected by the continued refusal of the defendant to perform its contract, is, therefore, not comprehended by that declaration. If, as Mr. Pomeroy states (§ 941), equity may, in compliance with demands of a higher public policy, aid a party *in pari delicto* by canceling and ordering the surrender of an executory contract, or setting aside an executed contract and requiring a return of money paid thereunder, even when all the practical and substantial benefit of the relief will inure directly to a party to the contract, and no public interest, other than that arising from general public policy, will be subserved, it would seem that the court should, even at the instance of a party *in pari delicto*, have the power to enforce, for a limited time at least, the specific performance of a contract containing a provision contrary to general public policy, when a direct and substantial interest of the public, or a part of the public, will be directly subserved by such exercise of power. Story's declaration (1 Story, Eq. Jur. 298) that, 1 L.R.A. (N.S.)

when an agreement is repudiated because against public policy, and the public interest requires that relief should be given, it is given to the public through the party to the contract, was doubtless made with reference to cases in which the public has no direct or substantial interest, and in which the object of the suit is merely to get rid of the contract; but it seems equally pertinent as an answer to the possible objection to the decision in the SEATTLE CASE that the plaintiff was not the public, nor any representative of the public, but a party to the contract. The analogy and principle between the SEATTLE CASE and those cases where affirmative relief has been granted by canceling or restraining enforcement of the contract would doubtless have failed if the effect of the relief granted in the former case had been to violate the public policy which condemned the contract,—in other words, if the attempt in that case had been to enforce the particular provision of the contract which created a monopoly. But it will be observed that the relief actually granted had no such effect, any more than the cancelation of an executory contract has to further the violation of the public policy which the contract offends. The principle applied in the SEATTLE CASE, by which the supervening interest of the public is made to override the general principle which denies equitable relief to a party *in pari delicto*, is conversely applied by Conger v. New York, W. S. & B. R. Co. 120 N. Y. 29, 23 N. E. 983, denying specific performance of a contract because public interest would be prejudiced by its specific enforcement. So Curran v. Holyoke Water Power Co. 116 Mass. 90, holds that the rights of persons not parties to a contract of which specific performance is sought are equitable considerations to be regarded by the court in determining whether or not the relief should be granted, although such rights vested after the contract was made.

15 L. R. A. 361, 33 Am. St. Rep. 216, 29 N. E. 889; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L. R. A. 598, 29 Am. St. Rep. 690, 19 S. W. 276; Culp v. Love, 127 N. C. 457, 37 S. E. 477; Craft v. McConoughy, 70 Ill. 347, 22 Am. Rep. 171; Wiggins Ferry Co. v. Chicago & A. R. Co. 5 Mo. App. 373; Stanton v. Allen, 5 Denio, 440, 49 Am. Dec. 282; Jackson v. Bowman, 39 Miss. 699.

When the illegality of the contract appeared, it was the duty of the court to take notice of its invalidity *sua sponte*, and dismiss the action.

15 Am. & Eng. Enc. Law, p. 1015; Bowman v. Gonegal, 19 La. Ann. 328, 92 Am. Dec. 538; Fowler v. Scully, 72 Pa. 466, 13 Am. Rep. 699; Wight v. Rindskopf, 43 Wis. 348; McMullen v. Hoffman, 174 U. S. 654, 43 L. ed. 1123, 19 Sup. Ct. Rep. 839; Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244; Standard Furniture Co. v. Van Alstine, 22 Wash. 676, 51 L. R. A. 889, 79 Am. St. Rep. 960, 62 Pac. 145; Reed v. Johnson, 27 Wash. 55, 57 L. R. A. 404, 67 Pac. 381; Crichfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L. R. A. 347, 51 N. E. 558; Schmidt v. Barker, 17 La. Ann. 261, 87 Am. Dec. 531; Leigh v. Clark, 11 N. J. Eq. 113; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Wilson v. Parrish, 52 Neb. 6, 71 N. W. 1010; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 736.

Messrs. Piles, Donworth, & Howe, for respondent:

To refuse an injunction in this case would be to hold that the customers of a power company carry on their lines of business at their peril, running the risk of being ruined at any time when it serves the caprice or avarice of the supplying company to open a switch.

Western U. Teleg. Co. v. St. Joseph & W. R. Co. 1 McCrary, 565, 3 Fed. 430; Graves v. Key City Gas Co. 83 Iowa, 714, 50 N. W. 283; Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147; Whiteman v. Fayette Fuel-Gas Co. 139 Pa. 492, 20 Atl. 1062; Brauns v. Glesige, 130 Ind. 167, 29 N. E. 1061; Horsky v. Helena Consol. Water Co. 13 Mont. 229, 33 Pac. 689; Jenkins v. Columbia Land & Improv. Co. 13 Wash. 502, 43 Pac. 328; Southern R. Co. v. Franklin & P. R. Co. 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; Broome v. New York & N. J. Teleph. Co. 42 N. J. Eq. 141, 7 Atl. 851; Simpson v. Pittsburgh Plate Glass Co. 28 Ind. App. 343, 82 N. E. 753.

The courts universally condemn conduct
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by which a party takes the law into its own hands, judges of another's rights without any judicial investigation, and destroys the other's property or business.

Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072; Newton v. Levis, 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Cox v. Huntsville Gaslight Co. 129 Ala. 496, 29 So. 867; Newark Pass. R. Co. v. East Orange Twp. 53 N. J. Eq. 248, 31 Atl. 723.

If it appears that the principal object of the contract was, on the one side, to sell property, and, on the other side, to purchase it, and that the restraint of competition with reference to the article bought and sold was for the reasonable protection of the parties, then the contract was clearly valid.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; San Diego Water Co. v. San Diego Flume Co. 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495; Dolph v. Troy Laundry Mach. Co. 28 Fed. 553. Affirmed in 138 U. S. 617, 34 L. ed. 1083, 11 Sup. Ct. Rep. 412; Moore & H. Hardware Co. v. Towers Hardware Co. 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 42; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946; Keith v. Herschberg Optical Co. 48 Ark. 138, 2 S. W. 777; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L. R. A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Diamond Match Co. v. Roerber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Hitchcock v. Anthony, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779; Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L. R. A. 437, 47 N. W. 806; Herriman v. Menzies, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730; Kellogg v. Larkin, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

Per Curiam:

The appellant, Snoqualmie Falls Power Company, was incorporated in January, 1898, for the purposes of manufacturing and selling electricity to public and private consumers, for heat, light, and power purposes. Its capital stock was fixed at \$500,000, di-

vided into 5,000 shares of the par value of \$100 each, all of which with the exception of four were subscribed for, and have since been owned by one William T. Baker. In August, 1898, the city of Seattle granted a franchise to the said Baker, running for a period of thirty-six years, conferring upon him the right to erect poles upon the streets of that city, and string wires thereon, for the purpose of distributing therein electricity generated at the power plant of the Snoqualmie Falls Power Company. The franchise contained a number of restrictions intended for the benefit of the consumers of the product of the plant. It required the grantee to distribute the current manufactured by him at "his Snoqualmie Falls power house" to "all persons and corporations desiring the same" on equal terms and under reasonable regulations, and prohibited him from entering into any combination whatsoever, whereby the public or the city would be deprived of the benefits of competition in the purchase of electricity. Immediately on obtaining this franchise, Baker organized another corporation, called the "Seattle Cataract Company," and assigned to this company all the rights he had acquired by the grant to him of the above-mentioned franchise. The capital stock of this company was fixed at \$100,000, divided into 1,000 shares of the par value of \$100 each. Of these shares Baker has likewise owned the entire issue except a mere nominal number. In January, 1900, the respondent corporation was organized. At that time the street railways and the electric lighting systems of the city of Seattle were under the control of a number of companies and corporations, operating separately and independently of each other, and the respondent was incorporated for the purpose of acquiring and consolidating these into one system. To that end it succeeded in purchasing almost the whole thereof, since which time it has been and was at the time of the commencing of this action engaged in the business of conducting street railways in the city of Seattle and its suburbs, having in operation at the last-mentioned time some 79 miles of track. It was also engaged in the business of supplying electric lights for public and private use, and electricity for power purposes to private owners as well as to the city of Seattle. On January 20, 1900, the respondent entered into a contract with the Snoqualmie Falls Power Company, by the terms of which the latter company agreed to sell to the former 3,000 continuous electrical horse power, to be delivered at such time or times and in such quantities as might be called for by the respondent for the sum of \$54,000 per annum (being at the rate of \$18 per horse power 1 L.R.A. (N.S.)

per annum), to be paid in monthly instalments; agreeing further to allow the purchasing company a certain excess of power in case it might desire it, at the same rate per horse power per annum it paid for the 3,000. This additional power was afterwards fixed at 250 horse power per annum. The contract entered into between the parties contained numerous conditions, among which was a condition to the effect that no electric current should be sold in the city of Seattle by the Snoqualmie Falls Power Company to be used in any branch of business in which the respondent was engaged; a condition in direct violation of the ordinance under which electric current was permitted to be brought from the power plant of the Snoqualmie Falls Power Company into the city of Seattle. The parties continued to operate under the terms of this contract until the morning of May 24, 1903, when the Snoqualmie Falls Power Company, in violation of the terms of the contract, and without notice, cut the connection between its generator and the respondent's power plant; and, when inquiry was made as to cause, stated that it had decided not to continue any longer in the performance of the contract. Thereupon the respondent brought this action against it, and against the Seattle Cataract Company, to compel the performance of the contract. A temporary mandatory injunction was issued, compelling the appellants to furnish the power until a final hearing could be had on the question at issue between the parties, and on this hearing the injunction was continued in force until June 4, 1904; the court granting to the respondent that length of time in which to obtain power from other sources. The appeal is from the last-mentioned judgment.

In its complaint the respondent set out the contract above mentioned, and alleged a compliance therewith on its own part. It further alleged that it was a public service corporation, engaged in the business of operating street cars and electric-light systems in the city of Seattle by electric power; that its own generating plants were not designed for, and were insufficient to furnish, the power necessary to operate its systems; and that, unless the appellant Snoqualmie Falls Power Company should be compelled to continue in the performance of its contract, it would be unable to keep its system of railways and lights in operation, thereby causing great annoyance and injury to the public, and to those who were dependent upon it to furnish them with transportation and light; and that already great confusion had been caused by the cutting off of the power theretofore furnished it by the appellant last named. The prayer was for relief

appropriate to the allegations of its complaint. The appellants answering denied that the respondent was without means of its own to generate sufficient power for its own use, and set out affirmatively the negotiations leading up to the formation of the several corporations, the execution of the contract, and averred that the contract was designed to create a monopoly, and was in direct violation of the franchise granted to Baker, in which the appellant corporations operated, and was therefore null and void, and such as a court of equity would not enforce. The reply was a denial of all of the affirmative allegations of the complaint going to show a participation by the respondent in any unlawful acts, or acts against public policy, or knowledge on its part of any violations of its franchise, or of public policy, by the appellants.

The evidence in the case is voluminous, and the arguments of counsel in this court have taken a wide range; but it seems to us that the real question presented by the record is one not difficult of solution. It will be remembered that the trial court did not undertake in its judgment to compel a specific performance of the contract between the parties; but he held that the evidence justified the conclusion that the facilities under the command of the respondent were not then sufficient to enable it to generate sufficient electric current to enable it to operate in an efficient manner the public facilities it was required by its franchise to operate; and it required the appellants to continue to furnish the power the respondent had contracted with it to furnish, and had relied upon, only until such reasonable time as the respondent could supply itself from other sources. The only questions presented, therefore, are, Did the court err in its finding that the respondent had not sufficient facilities under its own command to enable it to operate sufficiently the public conveniences operated by it? and, After finding that it did not, did it err in holding, as a matter of law, that the appellants could be compelled to furnish the power they had contracted to furnish until the respondent could with reasonable diligence acquire such facilities? Both of these questions we think should be answered negatively. It must be borne in mind that the questions are not reviewed out of any regard for the appellants. Their confessed violation of their duties to the public cannot be overlooked when they seek redress in a court of equity. Moreover, we cannot but feel that their conduct in cutting off the current they had agreed to furnish found its inspiration in the fact that they had discovered a place where they could dispose of it on more profitable terms than the contract afforded them, rather than

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from any compunctions of conscience because of their past misconduct. But the respondent seems from the evidence not to have been entirely free from blame in its contract with the appellants; hence it is proper to inquire whether it could have performed the public duties required of it without the aid of the power furnished it by the appellants. The evidence reasonably justifies the conclusion that it could not. While it may have had sufficient facilities for generating power to have carried the load required of it even at its most extreme point, it is made clear that this is not sufficient to constitute a safe working basis. Machinery, no matter how perfectly made, will get out of repair; and it is found that, to furnish power for continuous use, there must be a reserve force equal to the largest single unit used in generating such power. This the respondent did not have, and its claim that power from the appellants' power plant was necessary to secure an uninterrupted service seems to have been justified.

Conceding that the power was necessary, there can be no serious dispute over the question of law involved. While courts of equity will not enforce contracts entered into either in violation of positive law or a rule of public policy where the interests of the parties thereto are alone involved, yet, when the public interests are involved, it will enforce such a contract as long as such public interest requires it. It would have been greater wrong than any to which the appellants confessed to have permitted them arbitrarily and without warning to stop from operation the street car and lighting systems of the city of Seattle, especially when the only justification offered for it is a former wilful violation of their franchise privileges. Neither courts of law nor of equity will lend countenance to a plea so utterly without justification.

The judgment appealed from is affirmed.

WASHINGTON SUPREME COURT.

A. W. THORNELY et al., Appts.,

v.

JULIA L. ANDREWS et al., Respts.

(.... Wash.)

1. Appeal—incorporation of exhibits.

A statement in a proposed statement of facts for appeal that certain depositions or

Case Note.—The subject of adverse possession by a mortgagor of his grantee against the mortgagee is complicated somewhat by the statutes of the various states. No settled rule of general application can be laid down in regard to the length of adverse

exhibits were offered in evidence is sufficient to permit their attachment to the statement as finally settled, under a statute which provides that written evidence on file shall be appropriately referred to in the proposed statement, and "when it is certified, the same or copies thereof, if the judge so directs," shall be attached to the statement and become a part thereof.

2. Adverse possession—against mortgagee.

Where a mortgage is a mere security, a grantee, from a mortgagor, of land adjoining the mortgaged premises, who takes possession of a strip beyond the true boundary line, cannot be regarded as in adverse possession against the mortgagee until the mortgage becomes due.

3. Same—effect of failure to foreclose.

Where a mortgage is a mere security, the lien of which expires if not enforced or renewed in six years, failure to enforce the lien against the grantee, from the mort-

possession necessary to establish title, nor, where there is no open act of hostility initiating the adverse claim, in regard to the time from which possession by the mortgagee or his grantee will be deemed adverse,—whether upon maturity of the mortgage, and opportunity to foreclose, or upon foreclosure, but without taking possession of the premises.

Prior to maturity of the mortgage, the general rule is that the mortgagor and his grantee with notice are presumed to hold in subjection to the mortgagee's right, and not adversely, and to establish an adverse claim the evidence must be clear.

The mortgagor's grantee is governed by the same reasons in respect to adverse possession as the mortgagor, and consequently the latter's possession being permissive and friendly under the mortgage, and not hostile to the right of the mortgagee, it will be presumed to so continue until repudiated by acts or declarations of which the mortgagee must be apprised or have such notice as would put a reasonably prudent man on inquiry. *Eyermann v. Piron*, 151 Mo. 107, 52 S. W. 229.

The possession must ordinarily be regarded as in subordination to the mortgage, and it cannot cease to be of that character until there is an open disclaimer of holding under it, and the assertion of a distinct title, with the knowledge of the mortgagee. *Medley v. Elliott*, 62 Ill. 532; *Alsop v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501; *Holmes v. Turner's Falls Co.* 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; *Maxwell v. Hartman*, 50 Wis. 660, 8 N. W. 103; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *State v. Connor*, 69 Ala. 212; *Smith v. Gillam*, 80 Ala. 301; *Higginson v. Mein*, 4 Cranch, 415, 3 L. ed. 664; *Zeller v. Eckert*, 4 How. 295, 11 L. ed. 982.

To constitute adverse possession against a mortgagee it is not sufficient that the mortgagor or those holding under him occupy, use, improve, and pay taxes on the

gagor, of land adjoining the mortgaged tract, who took adverse possession of a strip of the mortgaged property along the boundary between the two tracts, until the lien of the mortgage expires as to it, places the grantee in the same situation as though no mortgage had existed, and his possession is adverse from the time it begins, and not from the maturity of the mortgage.

(November 27, 1905.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Pierce County in favor of defendants in an action brought to recover possession of a strip of land. Reversed.

The facts are stated in the opinion.

Mr. Ira A. Town, for appellants:

The mortgagee could become entitled to possession of the strip only by making ap-

premises as their own absolute property, but the possession, even after maturity of the debt, must be in open denial of the mortgagee's title, and accompanied with such acts or declarations of the holders as are sufficient to put the mortgagee on notice that they claim and hold in hostility to his rights. *Duke v. State*, 56 Ark. 485, 20 S. W. 600.

Notice of adverse claim is not conveyed to the state by a payment by the mortgagor's grantee to the attorney general of a sum less than the amount due under the mortgage on a prior suit to foreclose, where the attorney general had no authority to receive the money or make any settlement, and the prior foreclosure suit was dismissed without prejudice to the state's rights. *Ibid*.

The statute of limitations begins to run only after the relation of mortgagor and mortgagee terminates in some one of the modes known to the law. Neither the mortgagor nor his grantee can defeat the mortgagee's security by retaining possession and paying taxes for seven years. It is the duty of each to do so. *Norris v. Ile*, 132 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 672.

Where, however, at maturity the mortgagee forecloses against the mortgagor only, and fails to make the latter's grantee a party, the latter's title is unaffected by the foreclosure sale, and his continued possession thereafter until the right to foreclose is barred establishes it permanently. *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 490, 39 N. W. 655.

The fact that the right to foreclose is asserted by the mortgagee's infant heirs is immaterial, since the debt matured during their ancestor's lifetime, the statute began running against the right then, and its continued running against such an inherited right is not affected by the infancy of the heirs. *Ibid*.

While recognizing and applying the general rule, the court, in *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766, suggests that a purchaser from the mortgagor with-

pellants parties to a suit for foreclosure of the mortgage.

Pierce's Code (Wash.) § 1162; Denny v. Cole, 22 Wash. 372, 79 Am. St. Rep. 940, 61 Pac. 38; Bacon v. O'Keefe, 13 Wash. 655, 43 Pac. 886; Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748; Montgomery v. Tutt, 11 Cal. 307; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540.

Appellants were the owners by adverse possession.

Bowers v. Ledgerwood, 25 Wash. 14, 64 Pac. 936; Flint v. Long, 12 Wash. 342, 41 Pac. 49; Sukadorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Northern P. R. Co. v. Hasse, 28 Wash. 353, 92 Am. St. Rep. 840, 68 Pac. 882; Northern P. R. Co. v. Ely, 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766, 65 Pac. 555; Buswell, Limitations & Adverse Possession, 1st ed. § 250.

The mortgage never ripens into a right of possession without foreclosure.

Pierce's Code, § 1152; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Parker v. Dacres, 2 Wash. Terr. 439, 7 Pac. 893.

Messrs. Thomas D. Hitchcock and Emmett N. Parker, for respondents:

Adverse possession could, in no event, commence until the maturity of the mortgage.

1 Cyc. Law & Proc., p. 1069; 2 Jones, Mortg. 4th ed. 1211; Alsop v. Stewart, 134

Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; Chouteau v. Riddle, 110 Mo. 366, 19 S. W. 815; Watts v. Creighton, 85 Iowa, 154, 52 N. W. 12; Maxwell v. Hartmann, 50 Wis. 660, 8 N. W. 106.

Mount, Ch. J., delivered the opinion of the court:

This action was brought by appellants to recover from respondents a strip of land about 2½ feet wide, along the north side of lot 8, in block 12, Catlin's addition to Tacoma. The appellants in their complaint alleged that they are the owners of said strip of land by reason of adverse possession for a period of more than ten years prior to July 15, 1903, and that on said date the respondents wrongfully, and by force, dispossessed the appellants of said strip of land, to the damage of appellants in the sum of \$400. Respondents denied these allegations of the complaint, and alleged ownership in themselves. On these issues the cause was tried to the court and jury. A verdict was rendered in favor of respondents. Appellants prosecute this appeal from a judgment rendered on the verdict.

At the time the proposed statement of facts on appeal was filed and served upon respondents' attorneys it contained none of the exhibits or depositions in the case. At the time the statement of facts was settled,

out notice, actual or imputed, of the existence of the mortgage, may acquire adverse title. And it is so held in Stevens v. Brooks, 24 Wis. 326.

So a purchaser on execution sale under a judgment rendered before the mortgage was given was held, in North v. Hammer, 34 Wis. 425, to acquire a title superior to that of the mortgagee, though the execution sale did not take place until after the mortgage transaction. Such a title, it is to be observed, however, is not derived from, but against, the mortgagor, as well as against the mortgagee.

After maturity, it is held, in Jordan v. Sayre, 24 Fla. 1, 3 So. 329, that during the period allowed for foreclosure, neither the mortgagor nor his grantee holds adversely to the mortgagee.

An extreme application of this rule appears in Coe v. Finlayson, 41 Fla. 160, 26 So. 704, where it is held that possession beginning several years after foreclosure proceedings were begun, and continuing for twelve years, did not establish title against the heirs of the mortgagee, who died pending the foreclosure proceeding, which, by reason thereof, was in abeyance twenty years before the appointment of an administrator. The rights of the mortgagee were enforced in this case more than twenty-two years after the maturity of the mortgage, and after twelve years of adverse possession, although the statute of limitations of Florida provides that no mortgage claim shall be 1 L.R.A. (N.S.)

enforced after the expiration of twenty years from the maturity.

In Jamison v. Perry, 38 Iowa, 14, the mortgagor's grantee established actual, open, adverse possession, starting after the maturity of the mortgage debt, but before foreclosure proceedings were begun. This was held to start the statute of limitations to running and establish title against the mortgagee.

In Alabama, upon foreclosure the mortgage becomes *functus*, and a purchaser from the mortgagor thereafter holds possession adversely to the mortgagee or a purchaser at foreclosure sale, even though the latter be the original mortgagee. Garren v. Fields, 131 Ala. 304, 30 So. 775.

On the other hand, in Rhode Island it is held that the exercise of the power of sale in a mortgage by the mortgagee does not change the nature of the possession of the mortgagor, and this possession, not being hostile to the mortgagee during the existence of the mortgage, does not become hostile to the purchaser at the sale. Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709.

Where there is still a period within which, after foreclosure sale, the mortgagor or his grantee may redeem, it is held that adverse possession does not begin until after the expiration of the time open for redemption from foreclosure. Medley v. Elliott, 62 Ill. 532.

A similar decision is found in Norris v. Ile, *supra*.

the court, at the request of appellants, and over the objections of respondents, attached to the statement all the exhibits and depositions in the case, and thereupon certified the statement of facts as containing all the facts. Respondents now move to strike all the exhibits and the depositions which were not attached to the proposed statement of facts at the time it was served, for the reason that respondents had no notice that appellants would ask the court to attach such exhibits or depositions to the statement of facts. An examination of the proposed statement of facts which was served upon respondents discloses that all the exhibits and depositions which were attached to the statement when it was certified were referred to therein as having been offered and received in evidence and filed in the cause. It was not necessary for the appellants to attach to the proposed statement of facts copies of the exhibits or depositions which were already a part of the record, for the statute (at § 5059, 2 Ballinger's Anno. Codes & Statutes) expressly provides that "Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified, the same or copies thereof, if the judge so direct, shall be attached to the bill or statement, and shall thereupon become a part thereof." It was only necessary, therefore, for the proposed statement to appropriately refer to such depositions or exhibits. A statement in a proposed statement of facts to the effect that a certain exhibit or deposition was offered and received in evidence would be an appropriate reference thereto. *Suksdorf v. Humphrey*, 30 Wash. 1, 77 Pac. 1071; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692. There is no merit in the motion, and it is therefore denied.

Upon the trial of the cause it appeared that lots 7, 8, and 9 of block 12, Catlin's addition to Tacoma, are adjoining lots, lying side by side. Lot 7 is to the north of lot 8. Lot 8 is north of lot 9. In the year 1890 all of these lots were owned by R. F. Wells and wife. At that time Wells and wife built two houses upon the lots. One house was built on lots 8 and 9, and the other house was built upon lot 7. In August, 1890, Wells and wife gave a mortgage upon lot 7 to secure a promissory note due August 23, 1893. On November 11, 1890, Wells and wife sold lots 8 and 9 to appellants, who took immediate possession thereof. At the time of the sale of lots 8 and 9 by Wells to appellants the lines of the lots were pointed out as running to certain stakes then existing in the ground. Appellants took possession of all the ground pointed out to them as belonging to lots 8 and 9, which ground included the strip of lot 7 now in dispute. They 1 L.R.A. (N.S.)

planted a hedge fence along the line which was pointed out as the line between lots 7 and 8, and continually thereafter until July, 1903, cultivated said strip in lawn, trees, and shrubs. On November 12, 1890, Wells and wife sold lot 7 to Henry Young and wife, subject to the mortgage above named. In 1895 the mortgage given by Wells and wife was foreclosed against the mortgagors and Young and wife. Appellants, who were at that time in the actual possession of the strip of land in dispute, were not made parties to the foreclosure. In June, 1901, respondents acquired the title obtained on foreclosure, and entered into possession of lot 7, except the strip in dispute. Up to July, 1903, the mortgagors and their grantees, Young and wife, and these respondents acquiesced in the possession held by the appellants. In that month, however, respondents had lot 7 surveyed, when it was discovered that appellants were occupying a strip thereof about 2½ feet wide along the south side of said lot. Respondents thereupon evicted appellants from said strip, and built a fence upon what they claim is the true line between lots 7 and 8. Appellants thereupon brought this action.

The pertinent question in the case is, Did the period of adverse possession begin to run in favor of appellants from the time they took possession of the strip of land in question in November, 1890, or did it begin to run only from the time the mortgage made by Wells and wife became due, in August, 1893? The trial court was of the opinion that adverse possession began to run from the latter date, and so instructed the jury. The rule seems to be well settled that, where a mortgagor conveys mortgaged real estate, his grantee takes subject to the mortgage, and the statute of limitations does not begin to run against the mortgage until it is due and can be foreclosed. 2 Jones, *Mortg. 1st ed.* § 1211; *Buswell, Limitations & Adverse Possession*, § 312; 1 *Cyc. Law & Proc.* p. 1069, ¶ 52; 1 *Am. & Eng. Enc. Law*, 2d ed. p. 815. The reason for this rule is apparent, because the mortgagee is not entitled to possession of the mortgaged premises until the mortgage has been foreclosed. He cannot foreclose until the debt becomes due. In the meantime the mortgagor or his grantees are entitled to the possession of the mortgaged premises. The mortgagee is therefore helpless to enforce his rights against a possessor prior to the maturity of the debt secured by the mortgage. The grantee of the mortgagor, with either actual or constructive notice of the mortgage, is conclusively presumed to stand in the place of the mortgagor, and cannot therefore be said to hold adversely to the mortgagee. If this rule controls the case in hand, then there can be no doubt that the

instruction given by the trial court was correct. But in this state a mortgage conveys no title to the real estate. The property mortgaged is held merely as security for the payment of the debt (*Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923), and ceases to be a lien upon the real estate after six years from its maturity, when no payments have been made and no action to foreclose the lien had been commenced within that time (2 Ballinger's Anno. Codes & Statutes, § 4798; *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485; *Dane v. Daniel*, *supra*; *Krutz v. Gardner*, 25 Wash. 396, 65 Pac. 771; *George v. Butler*, 26 Wash. 456, 57 L. R. A. 396, 90 Am. St. Rep. 756, 67 Pac. 263; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836). The mortgagee is not entitled to possession, and cannot maintain ejectment under his mortgage. 2 Ballinger's Anno. Codes & Statutes, § 5516. One in possession of real estate under claim of right from a mortgagor is a necessary party to a foreclosure of the mortgage, and a decree of foreclosure is not effective as to him. Section 4833, 2 Ballinger's Anno. Codes & Statutes; 9 Enc. Pl. & Pr. p. 305; 2 Jones, *Mortg.* 6th ed. § 1406; *Denny v. Cole*, 22 Wash. 372, 79 Am. St. Rep. 940, 61 Pac. 38. The rule also is that a "title acquired by adverse possession is a title in fee simple, and is as perfect a title as one by deed from the original owner or by patent or grant from the government." 1 Cyc. Law & Proc. p. 1135, B, and cases cited; 1 Am. & Eng. Enc. Law, 2d ed. p. 883, and cases cited.

Under the rule that the grantee of a mortgagor is in permissive possession of the mortgaged premises, and does not hold adversely as to the mortgagee, but stands in the same position as the mortgagor, the appellants in this case did not hold adversely to the mortgagee until the time when the mortgage became due and could be foreclosed. The possession of the appellants was the same as the possession of the mortgagor would have been had he retained possession, and had the mortgage not been foreclosed against him. The statute of limitations began to run against the mortgage lien when the mortgage became due. If the lien had not been foreclosed against anyone until the expiration of six years after the note became due, no payments having been made thereon, the mortgage lien could not have been foreclosed at all. It would, in that event, have ceased to be a lien, assuming, of course, that the mortgagee or his assigns had remained out of possession of the mortgaged property. In that event, it could not be reasonably claimed that 1 L.R.A. (N.S.)

adverse possession did not run against the legal title merely because a mortgage had existed upon the property for a term of years, and had been permitted to expire by limitation. In short, as against the mortgagor, adverse possession began immediately at the time appellants took possession. As against the mortgagee holding a mortgage made and recorded at the time of taking possession, the statute of limitations did not begin to run until the mortgage became due. When the mortgage was foreclosed against the mortgagor, Wells and wife, and Young and wife holding the record title, appellants were not made parties to the foreclosure. Their interest in the land was therefore not affected by the foreclosure, which was a nullity as to them. It was good as to all parties served or appearing in the action, and the foreclosure and sale vested all the interest of the parties, legal and equitable, in the purchaser at the sale, subject to redemption under the statute. If appellants, in possession of the strip of land in question, had been made parties to that foreclosure, their interests, acquired by purchase, by adverse possession, or in any other way, from the mortgagor or persons holding the legal title, would have become vested in the purchaser at the foreclosure sale. Whatever previous rights existed in favor of appellants would have been terminated at that time, and, whether possession was taken or not by the purchaser at the foreclosure sale, adverse possession as to such purchaser could only run from the time of the sale. But, since the appellants were not made parties to the foreclosure proceedings, such proceedings were not effective as to them, and they continued to hold possession and the right of possession the same as though the mortgage had not been foreclosed. Their interest was not foreclosed. If, instead of the foreclosure, the mortgagor and his grantees, Young and wife, in the year 1895, at the time of the foreclosure, had given a deed of the whole of lot 7 to the mortgagee, and the mortgagee and his grantors had permitted the appellants to remain in possession adversely for the period of ten years from the time they first acquired possession, it could not then be claimed that the possession of the appellants had been held adversely only from the time the mortgage became due, because, in that event, the title acquired by the deed would have been subject to all rights against Wells and wife and Young and wife, notwithstanding the mortgage lien. In order to extinguish these rights, it would have been necessary to foreclose the lien of the mortgage against all subsequent holders of the legal title and actual possessors, notwithstanding the deed. Since the appellants were not made parties to this foreclosure.

the purchaser at the foreclosure sale and their grantors held only a mortgage lien against the strip in possession of respondents, and are therefore, under the statute, not entitled to the possession until the lien is foreclosed. They cannot maintain an action for possession until they have foreclosed the lien against the possessor. At the time respondents dispossessed appellants the ten-year period of adverse possession had fully run in favor of appellants against all persons having title, and the legal title was therefore perfect in appellants. At that time, also, the statute of limitations had run against the right to foreclose the mortgage as against the appellants. Their rights were therefore unaffected by the mortgage. If Wells and wife had not given the mortgage, and appellants had been permitted to hold possession, as they have done, for thirteen years, neither Wells and wife nor their grantees could now claim that appellants had not acquired a perfect title to the land in question by adverse possession. The fact that the mortgage lien has been permitted to expire by limitations as to the appellants places them in the same position as though the mortgage had never been given. It follows that the period of adverse possession in this case began to run from the time appellants took possession of the land in question, and that the lower court erred in instructing the jury that it began from the time the mortgage became due.

The judgment must therefore be reversed, and the cause remanded for further proceedings in accord with this opinion.

Dunbar, Fullerton, Dudkin, Crow, and Hadley, JJ., concur.

KANSAS SUPREME COURT.

STATE OF KANSAS, Plff. in Err.,

v.

AMERICAN BOOK COMPANY et al.

(60 Kan. 1.)

1. Foreign corporation—contracts.

Contracts made with a foreign corporation before it has obtained permission, under the provisions of chap. 10, Laws of 1898, and

Headnotes by BURCH, J.

Case Note.—The right of the state to exclude foreign corporations, and prohibit them from doing any business in the state except upon such conditions as the state may choose to impose, logically includes the right to deny validity to unauthorized contracts made by foreign corporations which have not the right to do business in the state. The question, therefore, of the validity of a contract made with a corporation before it

chap. 125, Laws of 1901 (Gen. Stat. 1901, §§ 1259 et seq.), to do business in this state, are not for that reason invalid, or subject to cancellation at the suit of one of the contracting parties.

2. Same—right of individual.

The regulation of foreign corporations under the statutes referred to devolves upon the state, and a private individual is not allowed to interfere except in the single instance of a failure by the corporation to file its annual statement, and then only to the extent of abating a suit against him until the required statement shall have been filed.

3. Same—performance of contract—injunction.

After a foreign corporation has complied with the law, and has received permission to do business in the state, it cannot be enjoined, at the suit of the state, from performing contracts made before such permission was obtained.

4. Same—doing business.

The negotiation of a foreign corporation with the state school-text-book commission, resulting in a contract and bond to supply the public schools with text-books, does not constitute the doing of business within the state by such corporation, within the meaning of the statutes cited in the first paragraph of this syllabus.

(April 9, 1904.)

ERROR to the District Court for Shawnee County to review a judgment in favor of defendants in an action brought to cancel a contract for the supply of school books. Affirmed.

The facts are stated in the opinion.

Messrs. Otis E. Hungate, G. C. Clemens, and Quinton & Quinton for plaintiff in error.

Messrs. W. H. Rossington, Charles Blood Smith, Clifford Histed, H. J. Bone, and Hite & Nichols, *amici curiae*, for defendants in error.

Burch, J., delivered the opinion of the court:

In the year 1897 the legislature passed an act relating to school text-books for use in the public schools of this state, providing for state uniformity and maximum charges for such books, and creating a commission to select them. This act was amended and supplemented at the sessions of 1898 and 1901. The commission thus created consists

has acquired the right to do business in the state, is entirely a question of statutory construction.

There is a decided conflict of authority on the questions as to the validity of unauthorized contracts made with foreign corporations before they have complied with the statutory requirements of a right to do business in the state. This conflict has also been accompanied by some confusion in the

of eight members, and, to enable it to select and adopt uniform series of school text-books for use in the public schools, it is authorized and empowered to advertise for, receive, open, pass upon, and accept bids, and upon such acceptance to enter into definite and binding contracts with bidders for the furnishing of such text-books. In the year 1898 the legislature passed an act, which it amended in certain particulars in 1901, providing methods whereby corporations organized under the laws of other jurisdictions, seeking to do business in this state, may be permitted to do so. The procedure for the purpose of obtaining such permission is practically the same as that for obtaining a domestic charter. The foreign corporation desiring it must file an application therefor, setting forth the following information: "(1) A certified copy of its charter or articles of incorporation. (2) The place where its principal office or place of business is to be located. (3) The full nature and character of the business in which it proposes to engage. (4) The names and addresses of the officers, trustees or directors, and stockholders of the corporation. (5) A detailed statement of the assets and liabilities of said corporation, and such other information as the board may require in order to determine the solvency of the corporation." Laws 1898,

interpretation of the conditions, caused by the failure to distinguish between the cases which deny the right of a corporation to enforce such a contract, and those which involve the right of the other party to enforce the contract against the corporation; but, as is shown by a careful analysis of the decisions in the note in 24 L. R. A. 315, there is a real conflict among the decisions, however carefully they may be interpreted. Some cases hold that when a statute imposes a penalty for unauthorized business by such corporation, the contracts cannot be held void, because to do this would impose an additional penalty. Cases illustrating this are *Clark v. Middleton*, 19 Mo. 53; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37. But many decisions hold that notwithstanding such penalty the contracts of a foreign corporation which has not complied with the statutes are not valid and enforceable on behalf of the company itself. Among this class of cases are *Boulden v. Estey Organ Co.* 92 Ala. 182, 9 So. 283; *American Ins. Co. v. Story*, 41 Mich. 385, 1 N. W. 877.

Where no penalty is imposed, the same conflict exists with respect to unauthorized contracts of foreign corporations; and the right of a corporation itself to enforce such contracts is denied in the great majority of the cases, among which are *Jones v. Smith*, 3 Gray, 500; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Ford v. Buckeye State Ins. Co.* 6 Bush, 133, 99 Am. Dec. 663. On the other hand, some cases are to the contrary, such 1 L.R.A. (N.S.)

chap. 10, § 2, p. 27. The application must be accompanied by a fee, and, as a condition precedent to the granting of the application, the corporation must file its irrevocable written consent submitting itself to the jurisdiction of the courts of this state. A charter board passes upon the application, and, if it be granted, the corporation is required to pay certain additional fees, and to file with the secretary of state a certified copy of its charter. In passing upon the application the charter board is required to make special inquiry with reference to the solvency of the corporation. All corporations doing business in the state are required to file annual statements disclosing varied information regarding their composition, organization, and business. The failure to file such a statement within a given period works a forfeiture of the right to do business, which the charter board may ascertain, declare, and publish. The statute (p. 34, § 12) further provides: "No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that the statements provided for in this section have been properly made." Foreign corporations admitted to do business in this state are made subject generally to the same judicial

as *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931; *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727. But in many cases the courts which deny the right to a foreign corporation to enforce such a contract also deny it the right to set up in defense of an action against it upon such a contract that the contract is invalid. This is on the ground that it is estopped to set up its own default. *Phenix Ins. Co. v. Pennsylvania R. Co.* 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970. There is no possibility of reconciling the conflict in the decisions; but it relates chiefly to statutory provisions more stringent than those considered in the case of *STATE v. AMERICAN BOOK CO.* The opinion in that case expressly says that the statute does not in terms prohibit foreign corporations from doing business in the state, or have any purpose to deny the people the benefit of commercial intercourse with them, or prescribe any penalty for failure to obtain permission to do business. The provision of the act requiring that it should not maintain an action in the state until it had obtained a certificate was held insufficient to show any purpose to prohibit making contracts; and on this point it is fully sustained by *Neuchatel Asphalte Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043, where a similar provision was involved, and the court said that the purpose was not to avoid contracts, but to provide for an effective supervision and control of the business proposed to be carried on by foreign corporations.

control, restrictions, and penalties as those organized under the laws of this state. Prior to the 31st of May, 1902, the American Book Company, a corporation of the state of New Jersey, complied with the corporation law described, in all particulars except those relating to the payment of fees. The state authorities at that time interpreted the law in a manner exempting foreign corporations already doing business in the state from the payment of the prescribed fees, and the book company fell within that category. It filed its annual report, and received a certificate of the secretary of state to that effect. On May 31, 1902, the book company entered into three contracts with the state school-text-book commission to supply the schools of the state with certain text-books, and gave bond for the performance of the obligation it assumed, as the text-book law required. These contracts were made in consummation of accepted bids submitted to the commission on May 5, 1902, pursuant to advertisement therefor. On June 7, 1902, an action of quo warranto was commenced in this court against the book company, which upon July 21, 1902, resulted in a judgment ousting it from doing business in the state, on account of failure to comply fully with the statutes governing its admission to the state. *State ex rel. Shawnee County v. American Book Co.* 65 Kan. 847, 69 Pac. 563. On August 5, 1902, the book company complied with the law in all respects, and was duly admitted to do business in the state. On August 18, 1902, this action was brought in the district court of Shawnee county, in the name of the state, for the cancelation of the contracts the book company had made. At that time the book company had partially performed those contracts, and was proceeding to a full discharge of its obligations under them. On September 2, 1902, a temporary injunction against further performance of the contracts was refused, and the state, by this proceeding in error, seeks a reversal of that order.

To secure an injunction, the state relied upon the failure of the book company to comply with the law before entering into the contracts assailed, and the judgment of ouster. The decision in the case of *State ex rel. Shawnee County v. American Book Company* did nothing more than determine that, for a noncompliance with the law relating to its admission into the state, the book company should be ousted from its claimed right to do business in the state until it should have complied with the requirements of that law. The naked question therefore remains, Are the contracts referred to now subject to cancelation because made before the book company had been admitted to do business
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in this state? The question of capacity to contract is not involved on either side of the case. The book company and the text-book commission each possessed every qualification necessary to bind by contract. By the laws of their creation and organization they were each endowed with this faculty. The case is not like one in which the ability to invest an agreement with any engaging quality is altogether withheld. Nor is it like one in which the limits of some agency have been transgressed. There is here no lack of capability, no defect of power, and no deficiency of authority. The only question is whether power may be effectually displayed as against the provisions of the corporation law. The statute describes itself as an act "providing for the regulation of foreign corporations and the method by which they may be permitted to do business in this state," and it purports to cover that entire field. It prevents the exercise of corporate franchises in this state with respect to matters for which citizens of this state cannot incorporate, prevents concerns which are morally and financially irresponsible and untrustworthy from freely invading the state and imposing upon its citizens, and subjects foreign companies to the jurisdiction of local authorities. Official supervision of these affairs is committed to a state board. Such affairs, however, relate to nothing but the character and condition of the corporation itself. They are all enumerated in the statements of the application for admission and in the annual reports. There is no intimation of any purpose whatever to interfere in the relations between the corporation and the citizen. Business between them is as unregulated as it is between natural persons. Nor does the statute, in terms, prohibit foreign corporations from doing business in this state, or avow any purpose to deny the people the benefit of commercial intercourse with them. Indeed, under its title the statute could not extend beyond regulation. It prescribes no penalty whatever for failure to obtain permission to do business here. It makes no reference whatever to any effect which such failure may have upon the title to property acquired, contracts made, or other incidents to the doing of business. It does not anywhere use the terms "unlawful," "illegal," or "void," or any equivalent for them, as applied to the transaction of business without authority. It does not declare any determination whatever to reach beyond the offending company and nullify wholesome business bargains in matters of lawful trade. Foreign corporations may be supervised, but business is not proscribed. This treatment of the subject did not follow, however, from any oversight on the part of the legislature with reference to

the use of penalties. In the case of failure to file annual statements, the charter board is authorized to ascertain and summarily declare and publish a forfeiture of the right to do any further business, which forfeiture becomes immediately effective; and the right of any corporation doing business in the state to sue or recover in the courts is made to depend upon the ability to obtain a certificate of the secretary of state that § 12 of the law has been observed. The noteworthy feature of the last-mentioned provision is that it creates a field for the intervention of the citizen in the matter of corporate regulation. While contracts are not invalidated, the binding force of obligations impaired, or the doing of business forbidden, the citizen is allowed to interpose a bar to any relief until the proper certificate can be produced.

From this survey of the statute, it appears that the legislature intended it to be complete; that the regulation of foreign corporations, and not the penalizing of business transactions, is its purpose; that such regulation is made the concern of the state in its special capacity as visitor, and not of any individual as a mere party to a contract; that a party to a contract is allowed to interfere in but a single instance, and then only to the extent of abating a suit against him; and that specific penalties are chosen to meet certain contingencies. The conclusion obviously and naturally follows that the legislature intended the state to rely upon the common-law remedies for the enforcement of the statute where none other was expressed; that the courts have no authority to interpolate in the law provisions concerning which the legislature, with all the resources of the English language at its command, remained silent, or to annex penalties for a violation of the law which the legislature, with a great arsenal to choose from, failed to mention. Hence contracts made with a foreign corporation before it has obtained permission to do business in the state are not for that reason invalid or subject to cancellation.

This statute was interpreted by the United States circuit court of appeals of this circuit in the case of *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, decided in February, 1903. A suit in equity was brought by the privies of a party to a contract to cancel it because made with a foreign corporation which had not obtained permission to do business in the state. In affirming a decree denying the relief sought, the court said: "It is also worthy of notice that there is no provision of the statutes of Kansas prohibiting a foreign corporation from doing business in that state, or declaring that any act or contract of a foreign corporation that

fails to comply with the requirements to enable it to obtain permission to do business from the charter board shall avoid any of its acts or contracts. Conceding that the Lanyon Zinc Company had not complied with the corporation laws of Kansas so as to entitle it to permission from the charter board to do business in that state, no reason occurs to us why this fact should be held by the courts to avoid its contracts or the effect of its acts in performance of its agreements. In the absence of the denunciation of any such penalty for the failure to comply with its statutes by the legislature of the state which made them. On the other hand, there are two established and familiar rules of law which prohibit the complainants from availing themselves of the failure of their lessee to comply with the statutes authorizing it to do business in the state, for the purpose of escaping from the performance of their obligations under their contract. One is that the laws relative to the admission of foreign corporations to do business in the state of Kansas were not enacted for the purpose of destroying contracts or prohibiting their performance. It was not the intent or purpose of the legislature, by these laws to regulate the agreements of foreign corporations with the citizens of the state of Kansas, or to supervise or prohibit the performance of their contracts. The object of these statutes was to subject foreign corporations doing business in the state to the jurisdiction of its courts, and to the inspection and supervision of its officers, not to the end that the citizens of the state might avoid their contracts and perpetrate injustice, but to the end that justice might be administered to both the corporations and the citizens. Hence it is that the private citizen is not the party empowered to enforce these corporation laws, nor is the nullification of his contracts, or of acts done in performance thereof, the true remedy for their violation. The state alone is authorized to enforce them, and the ouster and dissolution of the corporation, or an injunction against its proceedings at the suit of the state, is the only remedy available.

. . . The second rule is that where a contract, or an act in performance of it, is not *malum in se*, and its invalidity is not declared as a penalty for a violation of a statute, the courts may not declare it, and thus affix a penalty not prescribed by the lawmaking power. . . . There was no provision in these statutes which inflicted the penalty of the invalidity of contracts made or business done without a compliance with them, nor was there any express prohibition of the conduct of such business before the laws were complied with. As there was nothing morally wrong in the acts of the appellee, as it was not the

primary purpose of the statutes under consideration to invalidate such acts or contracts, and as the statutes contain neither express provision nor clear intimation that this was the intent of the legislators, it is not the province of the courts to do so. While the authorities on this question are variant and conflicting in the state courts, the Federal courts have steadily adhered to the rule, which is sustained by the better reason and the more persuasive opinions in the courts of the states, that, in the absence of an express provision of statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts are done are nevertheless valid and enforceable, because it is not the intent of the authors of such laws to strike down such agreements and acts when they are not evil in themselves." Authorities sustaining these views are abundant. *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Harris v. Runnels*, 12 How. 79, 13 L. ed. 901; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. ed. 430, 431; *State Mut. F. Ins. Assn. v. Brinkley Stave & Heading Co.* 61 Ark. 1, 29 L. R. A. 712, 54 Am. St. Rep. 191, 31 S. W. 157; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; *Kindel v. Beck & P. Lithographing Co.* 19 Colo. 310, 24 L. R. A. 311, 35 Pac. 538; *Ray v. Home & F. Invest. & Agency Co.* 98 Ga. 122, 26 S. E. 56; *Phenix Ins. Co. v. Pennsylvania R. Co.* 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. 471; *Tolerton & S. Co. v. Barck*, 84 Minn. 497, 88 N. W. 19; *Clark v. Middleton*, 19 Mo. 53; *Chicago Mill & Lumber Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128; *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727; *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 42, 49 Pac. 1118; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Edison General Electric Co. v. Canadian Pacific Nav. Co.* 8 Wash. 370, 24 L. R. A. 315, 40 Am. St. Rep. 910, 36 Pac. 260.

In the case of *Fritts v. Palmer*, 132 U. S. 289, 33 L. ed. 319, 10 Sup. Ct. Rep. 93, the Supreme Court of the United States dealt with the question involved as follows: "The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corpora-

tions altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the state before acquiring the right to do so is found in § 262 of the same chapter [chap. 19, Gen. Stat. 1883], which provides: 'A failure to comply with the provisions of §§ 23 and 24 [§§ 260 and 261] of this act shall render each and every officer, agent, and stockholder of any such corporation, so failing therein, jointly and severally personally liable on any and all contracts of such company made within this state during the time that such corporation is so in default.' The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation, and by it conveyed to others.

. . . If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. . . . The views we have expressed are supported by several adjudications in this court in cases somewhat analogous to the present one, among which are those arising under §§ 5136 and 5137 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, pp. 3455-3460. The first of those sections authorizes national banking associations to loan money on personal security. The other section provides: 'A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith

by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.' In *Union Nat. Bank v. Matthews*, 98 U. S. 621, 627, 25 L. ed. 188, 189, the question was directly presented whether a national bank was entitled to the benefit of a deed of trust upon real estate, which, with the note described in it, was taken, not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but for a loan made by the bank at the time the deed of trust was assigned to it. The supreme court of Missouri held the deed of trust to be void, in the hands of the bank, because its loan was made upon real estate security in violation of the statute. But this court, after observing that the result insisted upon did not necessarily follow, said: 'The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.' Again: 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.' In *National Bank v. Whitney*, 103 U. S. 99, 103, 26 L. ed. 443, 444, which involved the validity of a mortgage to a national bank to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principles announced in *National Bank v. Matthews*. The court said: 'Whatever objection there may be to it as security for such advances, from the prohibitory provisions of the statute, the objection can only be urged by the government.' To the same effect are *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939, and *Reynolds v. First Nat. Bank*, 112 U. S. 405, 412, 28 L. ed. 733, 736, 5 Sup. Ct. Rep. 213. In *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. ed. 430, 431, which was an action of ejectment, the question was collaterally raised as to the validity of the title acquired by a banking institution, under a deed of the premises, in consideration of a

certain sum paid by it to the grantor. The bank was created by an act of the territorial legislature of Nebraska, with power 'to issue bills, deal in exchange, and to buy and possess property of every kind.' But when that act passed, there was in force an act of Congress which provided that 'no act of the territorial legislature of any of the territories of the United States, incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever, until approved and confirmed by Congress.' The act of the territorial legislature incorporating the bank, above referred to, never was approved or confirmed by Congress. It was urged, as an objection to the deed made to the bank,—upon which deed one of the parties relied,—that it was not a competent grantee to receive title. This court said: 'It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the territory of Nebraska; but it is said it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its Constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it.' " A leading case among those decided by the state courts is that of *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544. In the opinion it was said: 'The cases which we have cited from the various classes demonstrate, perhaps, the lack of uniformity with more certainty than they point to the correct rule of construction. Yet when studied, the cases are all found seeking one common object,—the legislative purpose. "The intent of the lawmaker is the law." The embarrassment is in declaring that intent. This intention may be declared in the act, or it may be inferred from its provisions in connection with the subject-matter and circumstances. *Howell v. Stewart*, 54 Mo. 400; *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 279, 23 Am. Rep. 641. In the statute under discussion the legislature specified reasonable terms upon which a foreign corporation could launch its business over the entire state, unquestioned by private interests or sovereign power. Whatever may have been the primary purpose of the legislature, it certainly was not to exclude foreign corporations from the state. Nor is it reasonable to presume that it was the legislative intent to declare all contracts made by foreign corporations without compliance with the statute absolutely void. It were a reflection upon legislative wisdom to presume

that consequences so unusually harsh and oppressive were expected to flow from the use of language so mild and uncertain. Our statute is a simple inhibition. It declares no penalty. It does not declare the transaction of business unlawful or contracts void."

The second rule announced by the learned court of appeals in the case of *Blodgett v. Lanyon Zinc Co.* needs a slight modification to bring it into harmony with the views of this court. That which is within the reason of the law is a part of the law, and the matter of penalty is only one consideration in determining the scope of a legislative act. Whenever the law has made the doing of an act a crime, this court has held contracts made in contravention of it to be illegal and unenforceable. *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119; *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207; *Alexander v. O'Donnell*, 12 Kan. 609. But the imposition of a heavy penalty has been construed to entail no such consequence.

In construing a statute of this state relating to the filing of town-site plats, this court said in *Bemis v. Becker*, 1 Kan. 227, 250: "In other words, that contracts in contravention of a statute are not to be held void unless the court, from an examination of the statute, shall judge such to have been the intent of the legislature, though such intent will be presumed unless the contrary can be fairly inferred. We find, on examination of the statute in question in this case, that the manifest object of it was to protect the public and the unsuspecting purchaser against shams and devices of unscrupulous town projectors and proprietors and other persons, by the imposition of a penalty sufficient, in the judgment of the legislature, to secure conformity to its provisions. It is enacted in the 6th section [Stat. 1855, chap. 156, p. 735] that such map or plat, so acknowledged, certified, and deposited in the recorder's office shall be a sufficient conveyance to vest the fee of such lands therein named as intended for public uses, as streets, parks, etc., in the county, for the use of the public; and, to enforce such acknowledgment and deposit of the plat, the act provides a penalty or forfeiture of \$300 for every lot sold previous to the deposit of such plat. Noncompliance with the requirements of the act is not made a misdemeanor punishable by fine, nor is it indictable in the courts. But the penalty is, by the 8th section, to be recovered by action of debt for the use of the county. There is certainly no rule of ethics or principle of common law against the selling of lots in a town without depositing a map thereof in the recorder's office of the county. The offense, therefore, is precisely of the nature, form, proportions, and extent which the 1 L.R.A. (N.S.)

legislature has declared. By that authority, and that alone, the act is made penal; and although the words of the 5th section are that 'any person' who shall sell or offer for sale such lots shall forfeit \$300, yet, as it can hardly be presumed that the legislature intended to impose a penalty upon any except those upon whom it imposes the duty of acknowledging and depositing the plat, we are inclined to the opinion that the words, 'any person,' in the 5th section, are to be construed in connection with and limited by the provisions of the 1st section, which creates the duty. The same power, then, which creates the offense, provides the penalty and designates the offenders. The contrary interpretation contended for by the defendants in error would confound the innocent with the guilty, subjecting them alike to the penalties of the act, and make it, instead of a protection to the credulous and unsuspecting, a trap and a snare for the feet of the unwary."

To say that the legislature intended the statute to render void contracts made without complying with it is to say that the legislature intended that, if a foreign company should write life insurance in this state, it might take the premiums, and then, upon the death of the persons assured, refuse to pay the policies; and it is to say that a farmer of this state may purchase a machine or a herd of cattle from a nonresident corporation on credit, secure the price by a chattel mortgage, refuse to pay, and then defeat an action of replevin for the property. Such an interpretation might attract the enthusiastic admiration of the highwayman, but it has nothing to commend itself to a court of justice. At an early day this court said: "A foreign insurance company doing business in this state, when sought to be made liable for its contracts made here, is estopped from saying that they are doing business contrary to law." *Germania F. Ins. Co. v. Curran*, 8 Kan. 9, 16. And there can be no doubt that the estoppel bears equally upon both parties to the contract. In commenting upon certain cases indicating a contrary view, Mr. Thompson says: "Such decisions put the contracts under consideration, although perfectly innocent and meritorious in themselves, on the footing of contracts which are essentially criminal, corrupt, or fraught with moral turpitude, or otherwise opposed to the public policy of the state. In leveling such contracts to the ground, and in allowing their own citizens to repudiate them on such a plea, while keeping the consideration, the courts degrade the commercial morals of the people, encourage general dishonesty, expel capital from the state, and bring its judiciary into deserved disrepute." 6 *Thomp. Corp.* 6332.

If it be said that the statute is weak unless the court can aid it by laying its hand upon contracts, the reply is obvious,—that stringency is a question of policy, with which this tribunal has no concern. As Mr. Justice Brewer remarked in the Constitutional Prohibitory Amendment Cases, 24 Kan. 700, 706: "Questions of policy are not questions for the courts. They are wrought out and fought out in the legislature and before the people. . . . We make no laws. . . . We inaugurate no policy." And it is utterly illogical to compromise in a matter of interpretation; to palter with the status of such contracts, and attempt to distinguish between those which are executed and those which are unexecuted, or to say they may be voidable if they are not void, or withhold remedies for a time. Such contracts are valid or invalid, and, if valid, are not subject to cancelation, and are enforceable as other contracts are enforceable except as the law has restricted the corporation in its right to maintain an action or recover a judgment.

Thus far the case has been considered as if the contracts assailed were made between a foreign corporation and a private individual. That they were made with a state agency, and that this action is brought by the state, has become immaterial, if it ever did afford a basis for distinction. The prohibition of the statute is against the doing of business in this state. The conditions are such that a corporation may at any time, upon its own volition, qualify itself to do business. When the American Book Company complied with the law, and received permission to do business in the state, such permission was subject to no restriction, and the doing of business no longer remained improper, even though based upon a previous contract. The opinion of Judge Hammond upon this point in the case of *Cæsar v. Capell*, 83 Fed. 403, 424, is clear and convincing: "Whatever invalidity and infirmity there was, arose solely and entirely out of the fact that the legislature had prohibited the making of the contract, and out of the sentiment that that which the legislature chooses to prohibit is just as much unlawful as if it were within itself vicious and immoral. Concede this; yet, if we find that the prohibition itself is only provisional, and not absolute; that the infirmity only arises under prescribed conditions, which may be removed; and that by the very terms of the act itself the conditions are such that they are within the control of the foreign corporation itself; that it may, by doing or not doing a particular thing, create the conditions or remove them,—it necessarily follows, it would seem, that the act of the party itself is all-sufficient to give that validity or invalidity to the contract which depends alone upon compliance or noncompliance with the conditions, according to its choice. Where the conduct is not within itself vicious and immoral, or condemned by a public policy existing entirely outside of any mere legislative expression of it, there would seem to be no very sound reason for holding to the sentimental idea that, once a contract is prohibited, it remains always prohibited, until the legislature may choose, by subsequent enactment, to remove the prohibition. The legislature might undoubtedly in the beginning have imposed such absolute prohibition, but it did not. It imposed only conditional prohibitions, and those conditions were left within the control of the parties to the contract, or one of them. Therefore it seems to us to be correct, in principle, to hold that subsequent compliance with the conditions of the statute would remove any objection that might ever have been made to the making of the contract, in such a case as that. It is no objection to this reasoning to say that this is giving retroactive effect to the act of compliance, because there is no reason why it should not be retroactive; and, in the very nature of the subject-matter of the legislation, such retroactive effect is possible, and will be presumed, in favor of the paramount public policy of freedom of contract, to have been within the contemplation of the legislature, and within its grant of a power to remove by compliance the obstructive conditions." The same reasoning applies to the right to maintain an action and recover a judgment in litigation begun before annual statements are filed. Whether or not an injunction might be granted, at the suit of the state, in aid of a judgment of ouster to prevent the performance of contracts made, or the maintenance of suits begun, after such a judgment, is not now a question calling for decision.

Besides all this, the state must fail in this action upon another ground. The business of the American Book Company to be done in this state was that of supplying the schools of the state with text-books, and, before any books could be sold, the company was required to establish agencies throughout the state, and arrange with dealers for the purpose of carrying on such business in a particular way. The preliminary negotiations with the state text-book commission, whereby the book company became obligated to enter upon and conduct the contemplated business, was not the doing of business itself, within the meaning of the statute. Viewed from the standpoint of the state, the advertisement, the bid, the acceptance, the contract, and the bond amounted to nothing more than the employment of an agent who should within 30 days after the

lidity to the contract which depends alone upon compliance or noncompliance with the conditions, according to its choice. Where the conduct is not within itself vicious and immoral, or condemned by a public policy existing entirely outside of any mere legislative expression of it, there would seem to be no very sound reason for holding to the sentimental idea that, once a contract is prohibited, it remains always prohibited, until the legislature may choose, by subsequent enactment, to remove the prohibition. The legislature might undoubtedly in the beginning have imposed such absolute prohibition, but it did not. It imposed only conditional prohibitions, and those conditions were left within the control of the parties to the contract, or one of them. Therefore it seems to us to be correct, in principle, to hold that subsequent compliance with the conditions of the statute would remove any objection that might ever have been made to the making of the contract, in such a case as that. It is no objection to this reasoning to say that this is giving retroactive effect to the act of compliance, because there is no reason why it should not be retroactive; and, in the very nature of the subject-matter of the legislation, such retroactive effect is possible, and will be presumed, in favor of the paramount public policy of freedom of contract, to have been within the contemplation of the legislature, and within its grant of a power to remove by compliance the obstructive conditions." The same reasoning applies to the right to maintain an action and recover a judgment in litigation begun before annual statements are filed. Whether or not an injunction might be granted, at the suit of the state, in aid of a judgment of ouster to prevent the performance of contracts made, or the maintenance of suits begun, after such a judgment, is not now a question calling for decision.

governor's proclamation take charge of and conduct the school text-book business of the state. If it be an essential feature of the business of a corporation to promote contracts, as a broker may do, then the making of contracts by such company may constitute the doing of business, but no such question is presented here. The case is identical in principle with that of *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604, decided by the supreme court of Missouri in June, 1903. The syllabus reads: "Our statutes do not mean that a foreign corporation must establish a public office within this state, where books are kept and processes may be served, and must have a license from the secretary of state to do business within this state, before it can enter into a contract to do business within the state; and a city which enters into a contract with such foreign corporation for the lighting of its streets cannot be enjoined from carrying out such contract on the ground that it is illegal." In the opinion it was said: "Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this state where books are kept and process may be served, and until it pays its quasi incorporation tax and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that, when advertisements inviting bids on public or private works in this state are read by foreign corporations, they are to understand that they have not the right to bid, and have their bids accepted, unless they shall have already complied with the terms of our statute to enable them to transact business here? No; that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts; foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state; it is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is 'transacting business,' within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used, it means carrying on the work for which the corporation was organized, and, in its application to the facts of this case, it means performing the work called for by the contract." Although the writer fully concurs in the foregoing statement of the law, he is constrained to say that, in his opinion, a more fundamental reason exists for upholding the judgment of the district court. The Bush law has no

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application to the facts of this controversy.

In order better to discharge the exalted duty enjoined upon it by § 2 of article 6 of the Constitution, the legislature undertook to secure uniformity of text-books in the common schools. In doing so, it exercised a sovereign power. The matter of procuring a corporation to supply needed books is purely a state affair. No private right attaches to it. Nor is the act one of ordinary trade or commerce, in which the state may divest itself of the attributes of sovereignty, and conduct itself as an individual may do. The most distinctively sovereign prerogatives of the legislature, under the Constitution, are enlisted and concerned. Unable to attend to certain details of the work proposed, a special agent was created, and clothed with such authority as seemed necessary to accomplish the legislative design. The state text-book commission is a public agency created to aid in the assertion of a public right and the execution of a public power in the interest of the public welfare. Corporate power is withheld from it. It possesses no prerogative personal to itself or its members, and the state alone can enforce the contracts it may negotiate. It is merely the arm of the legislature, and the character of the acts done by it cannot be distinguished from the character of governmental acts performed by the legislature itself. Under the text-book law bids are protected by unconditional, certified checks, forfeitable upon failure to contract, and contracts are protected by bonds forfeitable upon failure to perform. These measures afford ample security to the state in the business it undertakes to do. One of the paramount purposes of the text-book law is to engender the widest possible competition, in order to secure to the children of the state the highest quality of text-books at the lowest possible price. Publishing houses everywhere are invited and expected to place their resources at the command of the state for the good of the common schools. Any limitation or burden other than those the text-book law itself contains would tend to thwart this purpose. In the field selected by the legislature for this exhibition of its power, it is supreme. It may adopt its own method of obtaining bids, and may contract with any one it will, whenever it pleases to do so, through whatever medium it chooses to employ. The transaction is its own, and is subject to no limitation that is not self-imposed. The statute does not in express language refer to the state. Only general terms are used. It is a rule of interpretation that "the general language of statutes will be limited to such persons and subjects as it is reasonable to presume the legislature intended it should apply." *State v. Smiley*, 65

Kan. 240, 87 L. R. A. 903, 69 Pac. 199. It is not reasonable to presume that the legislature intended the general language of the Bush law to be binding upon itself in respect to contracts of the character in question. To do so would be to presume that the legislature undertook to cripple and curtail its own power to discharge governmental functions, and undertook to diminish the fund of its own resources for that purpose, and would put the legislature in the attitude of deliberately compassing the defeat of its own designs. "The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate, etc.') affect not him in the least if they may tend to restrain or diminish any of his rights or interests. For it would be of most mischievous consequence to the public if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject." 1 Bl. Com. 261. This rule has been adapted to the requirements of the political system prevailing in this country, and is now universally recognized. Chancellor Kent states it as follows: "It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication." 1 Kent, Com. 460. Many pertinent authorities illustrating applications of this principle are collated in 26 Am. & Eng. Enc. Law, 2d ed. p. 644, and in cross references there indicated. However, for the reasons first given, the judgment of the District Court is affirmed.

All the Justices concur.

KANSAS SUPREME COURT.

W. C. EDWARDS, Plff. in Err.,

v.

J. A. HARTSHORN.

(.... Kan.)

1. Pleading—different counts.

A party cannot always anticipate what the testimony in a case may develop; and, to

Headnotes by JOHNSTON, Ch. J.

Case Note.—The rule stated in *EDWARDS v. HARTSHORN*, that the contractor will not be bound by the decision of an architect, engineer, or other person appointed as umpire by the contract, in case of fraud or mistake so great as to imply bad faith on his part, 1 L.R.A. (N.S.)

meet the possible phases of the evidence, he may sometimes state his cause of action in different counts.

2. Same—election.

Where a plaintiff set up in his petition three counts based on the same transaction, and at the close of the testimony elected to stand on one of the counts, and the case was submitted to the jury as a single cause of action, the refusal of the court to require an earlier election was not prejudicial error.

3. Contracts—estimates of umpire.

A provision in a contract between a principal contractor and a subcontractor for the grading of a railroad that the work should be done under the supervision of the chief engineer of the former, who should make estimates as a basis for the payment of the work done; and that his decision as to all matters of dispute which arise between the parties should be final and conclusive,—is valid; and the decision of such an umpire is prima facie conclusive upon all matters submitted to and fairly and honestly decided by him.

4. Same—impeachment.

If there was fraud or mistake so great and palpable as to imply bad faith, or the umpire failed to fairly and honestly perform the function assigned to him, his decision will have no binding force.

5. Same—rescission.

Nor will it bind if, by the subsequent agreement of the parties, the decision is not to be relied on, but other fuller and correct estimates are to be made.

6. Same—action for contract price.

In either case a proceeding in equity to set aside the decision of the engineer is not a condition precedent to an action at law to recover the money due under the contract, where the work had been satisfactorily completed by the plaintiff, and had been accepted by the defendant.

7. Same—good faith of umpire.

The fact that the chosen umpire was an employee of the defendant does not of itself weaken the force of his decision; but the law requires of a person so situated the utmost diligence and good faith in the performance of his duties.

(October 7, 1905.)

ERROR to the District Court for Harper County to review a judgment in favor of plaintiff in an action brought to recover the balance of the contract price for grading a section of railroad. Affirmed.

The facts are stated in the opinion.

seems to be universally accepted. A few of the many cases applying the rule are *Louisville, E. & St. L. R. Co. v. Meyer*, 30 L. ed 680; *Fletcher v. New Orleans & N. E. R. Co.* 19 Fed. 731; *St. Louis & P. R. Co. v. Kerr*, 48 Ill. App. 496; *Baltimore, O. & C. R. Co. v.*

Messrs. John A. Eaton and Fred Wash-
bon, for plaintiff in error:

The estimate was conclusive.

Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Brown v. Decker, 142 Pa. 640, 21 Atl. 903; O'Reilly v. Kerns, 52 Pa. 214; Springfield F. & M. Ins. Co. v. Payne, 57 Kan. 291, 40 Pac. 315; Underhill v. Van Cortlandt, 2 Johns. Ch. 339; Berry v. Carter, 19 Kan. 135; Miller v. Brumbaugh, 7 Kan. 343; Groat v. Pracht, 31 Kan. 656, 3 Pac. 274; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106.

The decision and award of the chief engineer are controlling and conclusive, and will not be impeached or set aside except for fraud, or mistake which implies bad faith.

Ogden v. United States, 9 C. C. A. 251, 13 U. S. App. 615, 60 Fed. 725; Lewis v. Chicago, S. F. & C. R. Co. 49 Fed. 708; Newman v. United States, 81 Fed. 122; Breyman v. Ann Arbor R. Co. 85 Fed. 579; Wood v.

Chicago, S. F. & C. R. Co. 39 Fed. 52; Mundy v. Louisville & N. R. Co. 14 C. C. A. 583, 31 U. S. App. 606, 67 Fed. 633; Elliott v. Missouri, K. & T. R. Co. 21 C. C. A. 3, 40 U. S. App. 61, 74 Fed. 707; North American R. Constr. Co. v. R. E. McMath Surveying Co. 54 C. C. A. 27, 116 Fed. 169; Williams v. Chicago, S. F. & C. R. Co. 153 Mo. 487, 54 S. W. 689; Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 20 S. W. 631; Ross v. McArthur Bros. 85 Iowa, 203, 52 N. W. 125; Scanlan v. San Francisco & S. J. Valley R. Co. (Cal.) 55 Pac. 694; Mentz v. Armenia F. Ins. Co. 79 Pa. 478, 21 Am. Rep. 80; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276.

Mr. T. A. Nofztger, for defendant in error:

The estimates made by the engineer are not conclusive. They are only prima facie correct, and may be attacked either for fraud or mistake.

McCoy v. Able, 131 Ind. 423, 30 N. E. 528; Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571; Supreme Council, O. of C. F. v. Forsinger, 125 Ind. 52, 9 L. R. A. 501, 21 Am. St. Rep. 196, 25 N. E. 129;

Scholes, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156; Crawford v. Wolf, 29 Iowa, 567; Moran v. Schmitt, 109 Mich. 282, 67 N. W. 323; Dinsmore v. Livingston County, 60 Mo. 241; Chism v. Schipper, 51 N. J. L. 1, 2 L. R. A. 544, 14 Am. St. Rep. 668, 16 Atl. 316; Dorwin v. Westbrook, 86 Hun, 303, 33 N. Y. Supp. 449.

This is also shown to be the rule, and various applications of it are made, in Page on Contracts, vol. 3, § 1467.

The rule is equally applicable when the decision is against the owner as when it is against the contractor. Haunroth v. Peters, 50 Ill. App. 306; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Gonder v. Berlin Branch R. Co. 171 Pa. 492, 33 Atl. 61; Chandler v. Wheeler (Tenn. Ch. App.) 49 S. W. 278.

The difficult point to determine is, naturally, What constitutes fraud, or such mistake as to imply bad faith? On this point there is no such unanimity as on the preceding. The arbitrary or unreasonable refusal to issue a certificate of performance will, however, constitute such fraud as to render the production of such certificate unnecessary, though made a prerequisite to recovery by the contract. Crane Elevator Co. v. Clark, 26 C. C. A. 100, 53 U. S. App. 257, 80 Fed. 705; Parlin & O. Co. v. Greenville, 61 C. C. A. 591, 127 Fed. 55; Bradner v. Roffsell, 57 N. J. L. 32, 29 Atl. 317; Thomas v. Fleury, 26 N. Y. 26; Nolan v. Whitney, 88 N. Y. 648; New York & N. H. Automatic Sprinkler Co. v. Andrews, 4 Misc. 124, 23 N. Y. Supp. 998; Pittsburg Terra-Cotta Lumber Co. v. Sharp, 190 Pa. 256, 42 Atl. 685; Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139.

So, also, a refusal to issue a certificate on grounds known to be fictitious and without
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foundation may be found by the jury to constitute fraud. Rawle v. Gilmore, 76 Ill. App. 372.

A refusal of a certificate through collusion with the owner also constitutes fraud rendering the production of the certificate unnecessary. Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; McDonald v. Patterson, 186 Ill. 381, 57 N. E. 1027; Van Keuren v. Miller, 71 Hun, 68, 24 N. Y. Supp. 580; Mills v. Paul (Tex. Civ. App.) 30 S. W. 558.

And an underestimate by the engineer through collusion with the owner will also entitle the contractor to recover for the loss resulting. Herrick v. Belknap, 27 Vt. 673.

Mere incompetency or negligence of the engineer is insufficient to indicate fraud, unless his mistakes are so gross as to imply bad faith. Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290. But his decision was held not to be binding where he was partial and incompetent, wrong in his estimates, and unjust in his classification, and controlled by the president and agents of the railroad company whose road was in process of construction. Spaulding v. Coeur D'Alene R. & Nav. Co. 5 Idaho, 528, 51 Pac. 408.

Failure of an engineer to make allowances for excavations to which he believes the contractor entitled under the contract is not fraud authorizing a greater recovery, where the amount allowed was all he was entitled to under a true construction of the contract. O'Brien v. New York, 139 N. Y. 543, 35 N. E. 323, Affirming 65 Hun, 112, 19 N. Y. Supp. 793. But the mistake of the engineer in reducing by one half the price fixed by the contract for excavating a tunnel is so gross as to amount to fraud. Mills v. Norfolk & W.

Louisville, E. & St. L. R. Co. v. Donnegan, 111 Ind. 179, 12 N. E. 153; Kistler v. Indianapolis & St. L. R. Co. 88 Ind. 460; Supreme Council, O. of C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Scott v. Avery, 5 H. L. Cas. 811; Thompson v. Charnock, 8 T. R. 139; Reed v. Washington F. & M. Ins. Co. 138 Mass. 572; Stephenson v. Piscataqua F. & M. Ins. Co. 54 Me. 55; Starkey v. De Graff, 22 Minn. 431; Lindville v. State, 130 Ind. 210, 29 N. E. 1129.

Johnston, Ch. J., delivered the opinion of the court:

This was an action brought by J. A. Hartshorn against W. C. Edwards to recover the balance alleged to be due for the grading of 2 miles of the Kansas City, Mexico, & Orient Railroad, in Oklahoma. Originally the Kaw Valley Construction Company, the Union Construction Company, and the Kansas City, Mexico, & Orient Railroad Company were made defendants; but, on the motion of plaintiff, a dismissal was entered as to these parties, and the case was tried out against Edwards alone. The petition contained three counts, all based upon Hartshorn's claim for work done for

the defendant. The first was upon an account stating the charges for clearing, grubbing, and excavating for the grade of the railroad, and also the credits, and asking for recovery of the balance due, \$5,439.10. The second count set up the contract between the parties, the work done in pursuance of it, and the failure to measure and estimate the work as the contract specified and to otherwise perform the contract; and the third count was like unto the second, except that express malice and intentional fraud was charged against some of the engineers in measuring the excavation and determining the amount due for the work. Hartshorn, however, elected to stand upon the second count of his petition, and the averments of the other counts became immaterial.

In the second count the contract between the parties was set forth, under which Hartshorn was to receive \$15 per acre for clearing, \$25 per acre for grubbing, 9 cents per cubic yard for earth excavation, 27½ cents per cubic yard for loose rock, and 55 cents per cubic yard for solid rock. The work was to be done to the satisfaction of the chief engineer of Edwards, who was to make measurements and estimates, and was to be paid for when he certified that the work was completely performed. The petition al-

R. Co. 90 Va. 523, 19 S. E. 171, 91 Va. 613, 22 S. E. 556.

Fraud is not to be presumed from the mere fact that the price on which the parties originally agree proves inadequate and unjust (Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035); nor that the estimates for work done are less than the amount actually done (Snell v. Brown, 71 Ill. 133); otherwise, however, if the underestimate is in collusion with the owner (Herrick v. Belknap, *supra*).

The offsetting against a claim allowed for extra work, without notice or opportunity to be heard, of damages from delay in performing the work called for by the contract, which had previously been estimated and paid for in full without any suggestion of damages from the delay, is such gross mistake as to imply fraud. Marks v. Northern P. R. Co. 22 C. C. A. 630, 44 U. S. App. 714, 76 Fed. 941.

And the failure to consider some of the matters submitted for decision constitutes a fraud to that extent. Anderson v. Imhoff, 34 Neb. 335, 61 N. W. 854; Kistler v. Indianapolis & St. L. R. Co. 88 Ind. 460.

Bad faith is shown by the refusal to give a certificate because the stone furnished, which was in strict accordance with the contract, rusted to some extent (Badger v. Kerber, 61 Ill. 328); or because the contractor had not done something not required by the contract (Highton v. Dessau, 46 N. Y. S. R. 922, 19 N. Y. Supp. 395).

Fraud in giving an architect's certificate is 1 L.R.A. (N.S.)

not shown by the fact that the work specified therein lacked a few dollars of completion (Lincoln v. Schwartz, 70 Ill. 134); nor by the mere discovery of defects in the work after the certificate was given (McAlpine v. St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173); nor because of the poor quality of the work, unless the architect's real judgment was not exercised (Davis v. Gibson, 70 Ill. App. 273); nor by the sinking of the building causing great damage to it, if due to the plan of construction, although it would be otherwise if it had been due to acts or omissions of the contractor in violation of the contract (Weeks v. Little, 15 Jones & S. 1).

But bad faith is shown where the contract required the use of good sound timber and materials, and the architect accepted the work against the owner's objection, with knowledge that a large part of the materials were rotten. Tetz v. Butterfield, 54 Wis. 242, 41 Am. Rep. 29, 11 N. W. 531.

The burden of showing fraud is on the party complaining. Mundy v. Louisville & N. R. Co. 14 C. C. A. 583, 31 U. S. App. 606, 67 Fed. 633; McCoy v. Able, 131 Ind. 417, 30 N. E. 528; Eldridge v. Fuhr, 59 Mo. App. 44; Kilgore v. North West Texas Baptist Edu. Soc. 89 Tex. 405, 35 S. W. 145.

The umpire's decision may be impeached for fraud in an action at law as well as in equity. Williams v. Chicago, S. F. & C. R. Co. 112, Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631; Louisville, E. & St. L. R. Co. v. Meyer, 30 L. ed. 680.

leged that the contract contained a provision "that the decision of the chief engineer of the defendant, W. C. Edwards, should be final and conclusive on any dispute which might arise between the parties to said agreement relative to or touching the same, and that each of said parties did thereby waive any right of action or other remedy, in law or otherwise, by virtue of the contract; so that the decision of the chief engineer should in the nature of an award be final and conclusive on the rights and claims of said parties, and no suit should be brought until the award of the said chief engineer should have been made and published, and then for the purpose only of enforcing said award." It was further alleged that Edwards was the agent of the construction and railroad companies; that he chose as chief engineer M. P. Paret, who was the chief engineer of these companies, and who was interested in estimating the work done at a lower figure than the correct amount; that Paret, pretending to act as chief engineer for Edwards, made certificates of the work done, but failed and neglected personally to measure and estimate the work done; that, instead of making estimates or measurements of the work personally, he relied upon measurements and classifications made by E. B. Coulson, who was commonly known as a resident engineer; that Coulson was wholly incompetent for the work; that the estimates made by him were erroneous, incorrect, and incomplete; and that neither Paret nor Coulson have ever made any correct estimate, but made one which placed the value of the work done at the sum of \$5,439.16 less than the true amount and value under the terms of the contract. It is further alleged that two final estimates were made on the work, one for each of the miles graded; but at each time Hartshorn refused to receive the sum allowed on these pretended estimates, asserting that they were incorrect, and that a mistake had been made in the classification and measurement of the work; and that it was then agreed between him and Edwards that the chief engineer would make a personal examination, and upon this agreement the amounts of the estimates were accepted; that the plaintiff refused to accept said sums, or either of them, until Edwards agreed to make full, correct, and final estimates and classifications, and finally accepted the money only as part payment of the work under an agreement that correct estimates and classifications should be made; but that the defendant has since unreasonably and fraudulently refused and neglected to make further final and correct estimates and classifications. It was further alleged that the work done has been

accepted as being in full compliance with the contract; but the defendant, on account of the mistake of the chief engineer, and the fact that Coulson was careless, negligent, and incompetent, and failed to correctly measure, estimate, and classify the work done under the contract, has failed to pay him the amount due under the terms of the contract, and that there is still due \$5,439.16, for which he asks judgment. In his answer Edwards alleged that the chief engineer did make estimates and classifications of the work done, and that he had paid to Hartshorn the amount of the estimates, which were received by the plaintiff. The plaintiff, in reply, alleged that the estimates mentioned in the answer were those described in the petition as being incorrect, false, and fraudulent. The trial resulted in favor of the plaintiff; the jury awarding him the sum of \$5,439.16.

Error is assigned on the ruling of the court denying the motion of Edwards to require the plaintiff to elect on which count of his petition he would rely. The Code requires that the petition shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Civ. Code, § 87. A party may, however, have demands of a different nature founded on the same transaction, and which he may state in separate counts, although only one recovery can be had. There are times when a party cannot well anticipate what the testimony will develop, and to meet any possible phase of the evidence he may state his cause of action in different counts. Bliss, Code Pl. § 120; 5 Enc. Pl. & Pr. p. 321. Whether such a practice was permissible in this instance is of little consequence. At the close of the testimony the plaintiff did elect to rely on the second count of his petition, and the case was submitted to the jury as involving but a single cause of action, and hence the defendant did not suffer any prejudice.

It is contended that the facts stated in the second count do not constitute a cause of action. In part, this is based on the ground that the contract pleaded provided that the decision of the chief engineer should be final and conclusive upon the rights and claims of the parties, and that, as an award or decision had been made by him, a resort to an action in court was precluded. It may be conceded that it was competent for the parties to agree that final estimates should be made by the chief engineer of the defendant, and that his decision should be taken as correct and binding. Such an award or decision is *prima facie* conclusive as to all matters submitted to and fairly and honestly determined by the

chosen umpire. *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 300, 46 Pac. 315. Of course, if there were fraud, gross mistake, or the failure to exercise an honest judgment by the umpire, his estimate or award would not be binding. *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156; *Norfolk & W. R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556. Passing for the time being the question whether fraud, mistake, inefficiency, or bad faith is sufficiently alleged to set aside the decision of the chief engineer, there are in the petition averments that, by agreement of the parties, the decision of the chief engineer as made was put aside and treated as not of binding force; that, when Hartshorn protested that the final estimates were incorrect and unfairly made, Edwards then agreed that further, full, final, and correct estimates and classifications should be personally made by the chief engineer; but that he had unreasonably and fraudulently refused and neglected to make such estimates and classifications. Having in effect set aside the decision of the chief engineer, and agreed that another and correct one should be made, a decree of a court to cancel it was certainly unnecessary. The reasons for ignoring the discredited decision become immaterial, since the petition alleges that new and correct estimates were to be made. The petition alleged that the work was performed by Hartshorn in conformity with the contract; that it was accepted by Edwards as complete and satisfactory; the amount due for the work, when measured correctly as the contract specified, was set up; and also the failure and refusal to measure and estimate the work in accordance with the agreement. This stated a cause of action at law for the recovery of money under the contract.

It is argued that the decision of the chief engineer was in the nature of an award, binding upon the parties, and that the plaintiff could not maintain an action to recover under the contract so long as the award stood. The contention is that it could only be set aside by an equitable proceeding. Against the objection of the defendant, the court impaneled a jury, and the case was tried as an action at law. Since the award or decision made by the chief engineer was taken out of the case by subsequent agreement there is little room to claim that it was an action for equitable cognizance. But, treating the case upon 1 L.R.A. (N.S.)

defendant's theory, it was practically an action at law, and the court could not safely have denied the demand of either party for a jury. By the averments of the petition, as well as the testimony offered in behalf of the plaintiff, the chief engineer did not personally classify or measure the material excavated by the plaintiff in grading the railroad. There was an attempt to do so by Coulson, the subordinate engineer. It is alleged that he was not only incompetent, but that he was careless and negligent, and therefore did not correctly measure and classify the work, so that Hartshorn was allowed but \$12,691.58, when, according to the contract, he was entitled to \$18,130.74,—a mistake or variance of \$5,439.16. The petition did not expressly charge intentional fraud or bad faith, but it did charge inefficiency, negligence, and mistakes so great and palpable as to imply bad faith. It is true the pleading does not state in express terms that fraud was committed by the engineers; but facts as to inefficiency, negligence, and gross mistake are related, which in themselves are sufficient to constitute bad faith and invalidate the estimates of the chief engineer. Little strength would have been given the pleading by adding a conclusion that the facts stated constituted bad faith. If the estimates had been fairly made, they would have been binding; but when not fairly made, and there are mistakes so gross as to amount to fraud on the plaintiff's rights, the estimates and decision of the chief engineer may be ignored, and a recovery of the contract price had in an action at law. Although the equitable elements of mistake and fraud may be involved, the case is essentially one at law for the recovery of money under the contract; and hence a jury was properly allowed. *Louisville, E. & St. L. R. Co. v. Meyer*, 30 L. ed. 689; *Williams v. Chicago, S. F. & C. R. Co.* 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631; *Norfolk & W. R. Co. v. Mills*, *supra*; *Graham v. Woodall*, 86 Ala. 313, 5 So. 687; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Illinois & M. Canal v. Lynch*, 10 Ill. 521; *Baltimore, O. & C. R. Co. v. Scholes*, *supra*.

A somewhat general attack is made on the instructions which the court gave to the jury, but much of the complaint in this respect is answered in the determination already made. The respective theories of the parties were fairly presented to the jury. With respect to the estimates and award of the chief engineer, the court did not minimize the mistakes necessary to invalidate it. The jury were informed that the award of the chief engineer was final and conclusive in the absence of mistake or fraud, and that, "while the final estimates of the chief

engineer may be set aside on account of mistakes made by him in his final estimates and classifications of the work under the contract, yet I say to you that slight discrepancies in measurements should be disregarded; and, even where there are discrepancies of some magnitude, you should accept the estimates of the chief engineer, unless the proof clearly shows such gross mistakes as would imply bad faith, or a failure on the part of the chief engineer to exercise an honest judgment in making his final estimates and classifications." This statement of the law was exceedingly liberal to the defendant, and he, at least, has no reason to complain of the rule applied.

Complaint is made that the court referred to the contention that the chief engineer did not personally do all of the work but in the same connection the jury were instructed that he was not required to personally make the estimates and classifications, and could intrust the work in part to his subordinates and assistants. They were told, however, that, "if the chief engineer intrusted the work of making up the final estimates and classifications to his subordinates and assistants, the mistakes and errors of the subordinates and assistants became and were the mistakes and errors of the chief engineer, if he adopted them in making up his final estimates." The terms of the contract under which the classifications were to be made were fairly stated by the court, and we find nothing in any part of the charge which can be regarded as prejudicial error.

While the sufficiency of the evidence is vigorously assailed, we are unable to say that the verdict and judgment are without support. It appears that Paret, the chief engineer, gave little personal attention to the work as it progressed, and relied almost entirely on Coulson, the resident engineer. There is testimony that Coulson had only passing acquaintance with the work. He did not give it the attention during its progress necessary to a correct and complete estimate. Changes were made by him which indicated carelessness and a lack of definite information; and, indeed, the testimony tends to show that the classifications were not made with any care, and that his measurements were incomplete and little more than approximations. After a protest had been made against his estimates, and Edwards had agreed that other estimates should be made, the chief engineer sent two of his subordinates, who went over the work, and who made reports differing materially from the estimates of Coulson. Notwithstanding this, the chief engineer refused to change the estimates which Coulson had originally given him. Two 1 L.R.A. (N.S.)

engineers went over the work at the instance of the plaintiff, and, after measuring it, one of them reported that there were 17,807 yards of solid rock excavated, while Coulson's estimates only credited Hartshorn with 1,392 yards. The other engineer, who was a witness on behalf of plaintiff, estimated that there were 16,704½ yards of solid rock excavated. Although these witnesses did not see the work during its progress, their testimony indicates that their measurements were made with considerable care, and the jury were warranted in accepting their estimates in preference to those made by Coulson. Enough appears in the testimony to warrant the inference that the so-called final estimates were not fairly and honestly made, and the discrepancies are such as to show palpable mistakes and utter disregard of the rights of Hartshorn. The fact that the chief engineer, who was to classify, measure, and make final estimates, was an employee of the defendant, does not of itself weaken the force of his decision; but the law does require of persons so situated the utmost diligence and good faith, and the testimony offered in behalf of the plaintiff tends rather to show inefficiency and negligence on his part, instead of fair and honest performance of duty.

The judgment of the District Court will be affirmed.

All the Justices concur.

Petition for rehearing denied.

GEORGIA SUPREME COURT.

A. R. FULGHUM, Admr., etc., Plff. in Err.,
v.

J. P. WILLIAMS COMPANY.

(114 Ga. 643.)

Sale of property in custodia legis.

Where personal property has been duly advertised for sale by a mortgagee in ac-

Headnote by LITTLE, J.

Subject Note.—Right to sell property while in custody of law.

I. Introduction, 1055.

II. Title of property in custody of law.

a. *Obiter dicta* opinions in respect to, 1056.

b. Effect of custody upon right to alienate personal property, 1057.

c. Effect as to real estate, 1062.

I. Introduction.

This note is meant to cover only those cases in which the right to sell property

cordance with the terms of a power of sale contained in his mortgage, and, subsequently to such advertisement, but prior to the sale, an execution held by a third party against the mortgagor is levied upon the mortgaged property, and the same is seized in pursuance of such levy, and while so held is sold by the mortgagee under his power of sale,—Held, that a sale of such property by the mortgagee under the power, while the same was in the custody of the sheriff by virtue of such levy, is void, and ineffectual to pass title to the purchaser.

(February 5, 1902.)

ERROR to the Superior Court for Pulaski County to review a judgment sustaining the claim of defendant in error to property upon which plaintiff had levied an exe-

cution to satisfy a debt of G. R. Allison. Reversed.

The facts are stated in the opinion.

Messrs. W. L. Grice & Sons, for plaintiff in error:

The property, when sold and purchased by the claimant, was in the hands of the sheriff under two different levies, and hence there could be no valid sale by the mortgagee under the power in his mortgage.

Brown v. Warren, 57 Ga. 214; Crocker, Sheriffs, §§ 449, 472; 1 Hilliard, Mortg. p. 119; Penland v. Leatherwood, 101 N. C. 509, 9 Am. St. Rep. 38, 8 S. E. 234.

Any unauthorized interference with property in the custody of the court is punishable as a flagrant contempt.

7 Am. & Eng. Enc. Law, p. 52.

in custody of the law was asserted by persons not acting under authority of process or order of court. The question has not been up many times, probably because the chance of selling without notice of the custody is slight, and because purchasers of that sort of property are few, if they know what they are getting.

What effect the taking of property into the custody of law has upon the title, and the rights of the owner to dispose of it, has been the subject of some discussion in the courts in cases where the question of sale was not actually involved.

These *dicta* are conflicting, but the opinions in the more recent cases are on the side of the debtor's right to deal with his property as if nothing had happened; holding that a special property is in the sheriff, and that the general property is left in the debtor, who may convey it, subject to rights acquired by virtue of the custody of the law.

The weight of authority in cases where the question of sale was directly before the court is to the same effect; but in no case has it been held that a sale of property in custody of law by the owner is good as against such custody.

Where personal property is in actual custody of the law, the general owner cannot, of course, deliver it to a buyer; but this does not seem to make any difference, as the courts hold a symbolical delivery sufficient.

II. Title of property in custody of law.

a. *Obiter dicta* opinions in respect to.

The *dicta* in some of the early cases will shed light on the subject, and account in part for the conflict in later decisions.

In Wilbraham v. Snow, 1 Vent. 53, 1 Lev. 282, the question was whether trover could be brought by the sheriff against the execution defendant, who took the goods seized away from the officer. It was urged that trespass should have been brought, and not trover, as trover could not be maintained, 1 L.R.A. (N.S.)

because the title was in the debtor. The court held the action maintainable, and said defendant's property ceased by the seizure.

This case was cited in 3 Salk. 159, as authority for the proposition that the property of the first owner ceases upon seizure of his goods on execution.

Property seized on execution is out of the defendant, and in abeyance, said the court in Clerk v. Withers, 6 Mod. 293, 1 Salk. 323. To the same effect is Mountney v. Andrews, Cro. Eliz. pt. 1, p. 237.

In Ladd v. North, 2 Mass. 517, it was said by the court, that, upon seizure on execution, the special property was in the sheriff, and the general property in abeyance.

In Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322, it was said that while an estate is in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without leave of the court for that purpose.

And in Ladd v. Blunt, 4 Mass. 403, Parsons, Ch. J., said that when goods sufficient to satisfy the judgment were seized on a *feri facias*, the debtor was discharged even if the sheriff wasted the goods or misapplied the money arising from the sale, or did not return his execution; for, he said, by a lawful seizure, the debtor had lost his property in the goods; but he declared that the law was different in a case of an extent on lands. This statement was referred to with approval in Chandler v. Furbish, 8 Me. 408.

But in Tuttle v. Gates, 24 Me. 395, it was said that the remark in the opinion of Parsons, Ch. J., that the debtor lost his property in the goods by their seizure by the sheriff, might be considered to be incorrect according to the case of Giles v. Grover, 6 Bligh, N. R. 279.

In the latter case Patteson, J., said that the property vested in the sheriff upon seizure of goods was merely that which resulted from his being the appointed officer of the law, and to enable him to sell the goods and raise the money; not that

Generally, there must be delivery, actual or symbolical.

Ga. Code, 3345; *Anderson v. Baker*, 1 Ga. 595; *Bowers v. Anderson*, 49 Ga. 143; *Benjamin, Sales*, § 679, and note.

Messrs. J. H. Martin and Jordan & Watson also for plaintiff in error.

Mr. Eldridge Cutts, for defendant in error:

This court has repeatedly recognized the validity of powers of sale contained in mortgages and of sales thereunder when had "according to its terms, fairly and honestly pursued."

Robenson v. Vason, 37 Ga. 66; *Calloway v. People's Bank*, 54 Ga. 441; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928.

A creditor who obtains his judgment sub-

sequent to the execution of such a mortgage takes it subject to the mortgage and subject to the exercise of the power of sale.

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Mutual Loan & Bkg. Co. v. Haas, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980.

Where the power is conferred and the terms are not prescribed in the mortgage, the mortgagee may fix the time, place, and terms of sale.

Calloway v. People's Bank, *supra*.

A mortgagee may purchase at such a sale when so provided in the mortgage.

Mutual Loan & Bkg. Co. v. Haas, *supra*; *Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805.

If a mortgagee sells fairly and openly at time and place fixed, it cannot be objected

the property was thereby taken out of the debtor. He said that the goods were, in substance, *in custodia legis*. Seizure made by the officer of the law was for the benefit of those who were, by the law, entitled: that it was made against the will of the debtor, and that no property was transferred by any act of his to the sheriff. In this respect it differed from all cases of special property and all charges on goods created by the debtor, while he had absolute dominion over the goods.

And Lord Harwicke stated in 2 Eq. Cas. Abr. 381, that neither before the statute of frauds nor since was the property of goods altered by mere seizure, but continued in the defendant until execution was executed.

In *Samuel v. Duke*, 3 Mees. & W. 622, it was urged that no valid transfer or sale of a debtor's property could be made after a delivery of a writ of execution to the sheriff against the debtor. But the court held that the debtor had the right to sell his property subject to the obligations which attached upon it as regarded any other person, and that the property passed to the buyer notwithstanding the delivery of the writ to the sheriff. Parke, B., said that, subject to the execution, the debtor had the right to deal with his property as he pleased, and that if he transferred it in market overt, the right of the sheriff ceased altogether. This case was decided under the English statute providing that the debtor's property shall be bound from the delivery of the writ to the sheriff.

And in *Harrison v. Wilson*, 2 A. K. Marsh. 551, it was held that personal property subject to execution may be sold by the debtor and the title transferred subject to the lien of the execution.

In *Towar v. Barrington, Brightly* (Pa.) 253, it was said that property of a judgment debtor after levy was not wholly divested, but remained in him, subject to the levy, and at his disposal, burdened with the encumbrance.

In *Banker v. Caldwell*, 3 Minn. 94, Gil. 46, the court, in holding that the sheriff could not make a copy of the book he had

levied on, said that in the interval between the levy and sale a debtor was not divested of his ownership in the property, but the incident of title—the right to possess, use, and dispose of it—was suspended only, and that he might regain it at any moment by paying the debt.

The owner of personal property may, after it has been taken on attachment or execution, sell it subject to the attachment, so that, if the attachment turns out to be bad, the buyer will not be affected by it. *Warner v. Everett*, 7 B. Mon. 262.

To the same effect are, *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13,315; *Churchill v. Warren*, 2 N. H. 298, 9 Am. Dec. 73; *Folsom v. Chesley*, 2 N. H. 432; *Rice v. Tower*, 1 Gray, 426; *Pierce v. Kingsmill*, 25 Barb. 631.

b. Effect of custody upon right to alienate personal property.

As to the sale of personal property in custody of law, the weight of authority, as before stated, upholds the right of the owner to transfer it as if it had never been taken from him, and to pass title, subject to the encumbrance arising through lien and custody. He cannot, of course, make an actual delivery of the thing sold, because it is in the hands of the law; but in such a case symbolical delivery will do, and the title goes to the buyer, subject to the custody. If the lien springing from the custody is satisfied, the buyer's title becomes perfect. This rule is of much importance to owners of property taken under process, and is vital where the rights of private-sale purchasers and later attachment or execution creditors are in dispute.

In *Fuller v. Loring*, 42 Me. 481, the court said the doctrine that the property of a debtor in goods was changed and lost by the mere seizure on execution rested mainly upon incidental dicta of judges, that might be gathered from books, and not upon settled opinions of courts, where the point had been directly raised and considered, and that the notions that the property was altered from the owner, and given to the party

that he might have obtained a greater price by waiting.

2 Jones, Mortg. § 1875.

Little, J., delivered the opinion of the court:

Certain personal property, to wit, a horse, ten mules, wagons, harness, etc., was, on December 8, 1900, levied on by the sheriff of Pulaski county, as the property of G. R. Allison, to satisfy an execution in favor of Fulghum, administrator. J. P. Williams Company filed a claim to the property, and, issue having been joined, evidence to the following effect was introduced: On the 30th of November, 1897, J. R. Allison & Co., J. R. Allison, and H. B. Moore executed a mortgage on the property levied on, in favor of

J. P. Williams Company to secure a number of promissory notes given by the mortgagors to the mortgagee. This mortgage contained a power giving to the mortgagee the right, in case of default in the payments of any of the notes named in the mortgage, to sell the property described, at the courthouse door in Hawkinsville, after posting a notice of sale for ten days at the courthouse door. The mortgage also recited that the mortgagee should be allowed to bid at the sale, and to purchase any or all of the property, if the same should be sold. The proceeds were directed to be applied to the indebtedness of Allison & Co., and the surplus, if any, to be turned over to them. It was also stipulated that the sale of the property, under the power in the mortgage, might take

at whose suit it was seized, and that the general property, after seizure on execution, was in abeyance, were derived in the same way. The law, said the court, was manifestly otherwise; for, by the seizure of goods on execution, the officer acquired a special property in them, but the general property remained in the debtor until they were sold.

In *Atwood v. Pierson*, 9 Ala. 656, it was held that after a levy the debtor might transfer or sell the property, subject to the levy. It was urged that title could not be passed to personalty held adversely, because delivery was requisite, and that nothing passed without it. The court said the question presented was entirely novel, but was one of such important bearings in many respects that it deserved to be most carefully considered. It might be conceded that, when property was attached or seized under execution, it was at once within the custody of the law; but did it also follow that the rights of the true owner were so entirely divested as to render any contract invalid to pass the title to another? "It may be as well to examine the principle asserted in the first instance in connection with the debtor whose estate is thus seized," continued the court. "The right which the sheriff or other officer acquires gives a special property only, and this for the sole purpose of enabling him to perform the duty which the law enjoins. But the general property, as well as the title, remains in the debtor, clogged, it is true, with the lien created by the levy; and so it would be in like manner if, instead of actual seizure, the execution was in the sheriff's hands. It cannot be said, therefore, that the seizure creates an adverse title to the debtor, for the general property remains with him, capable of disposition in any way which does not impair the lien."

In *Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82, it was said that the right or title to personal property was not changed by the levy of any attachment or execution, that the general property continued in the debtor, who might alienate it, subject only to the lien of the process. It was held that 1 L.R.A. (N.S.)

the debtor could not, by agreement with the plaintiff in attachment after the sale of the attached property, consent to allow judgment to be entered against him so as to impair an assignment of his property to a third person, made after the attachment; nor could he waive defects or irregularities in the process to the harm of his assignee.

In *Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450, it appeared that a sheriff, armed with an execution, seized certain personal property, which he left in charge of a watchman. When part of the execution had been paid off, the watchman was let go, and the property left in the custody of the execution defendant. It was then sold, and, after the sale, was levied on under an attachment placed in the hands of the sheriff by another creditor. The purchaser from the execution defendant, without satisfying the first execution, then attempted to replevy the property, but failed. The court held that the absolute title or general property in goods levied on by virtue of an execution remained in the owner, who might sell them while so in the custody of the sheriff, such sale being subject to the lien of the creditor,—the execution plaintiff,—and subject to the officer's special title and right to keep them for the purposes of the writ.

In *Nichols v. Patten*, 18 Me. 231, 36 Am. Dec. 713, the court said that an attachment did not take away the debtor's right to convey his property subject to it, and that any merely formal act of delivery which did not resist or deprive the officer of the actual control of it was no violation of the latter's rights, and would not subject the purchaser to an action by the officer. It did not occasion any injury or deprive the officer of any right.

In *Denny v. Willard*, 11 Pick. 519, 22 Am. Dec. 389, an officer who had attached certain personal property delivered it to a receiver, who turned it over to the debtor, by whom it was then assigned. It was urged that the property was in the possession, actual or constructive, of the officer, and that it could not, therefore, have been legally assigned, inasmuch as the debtor had no such possession as would enable him to make a

place and be legal without carrying the property to the place of sale. It was shown that there was a default in the payment of the notes and on November 27, 1900, the mortgagee, through his attorney, posted a notice of sale, to take place December 8, 1900, in accordance with the terms of the mortgage, and the property was, on that day, sold in pursuance of that notice, and purchased by the claimant. It further appears that prior to this sale the sheriff of Pulaski county levied the *fi. fa.* of the plaintiff in error upon this property, and took the same into his possession, the levy having been made on the morning of the day that the sale was made by the mortgagee, and before such sale. Several months prior to the sale, still another execution had been

levied on the same property, which was arrested by an affidavit of illegality, which was pending at the time the sale was made. It was further shown in behalf of plaintiff in *fi. fa.* that the property was in possession of one of the defendants after the judgment on which his execution issued had been obtained. The sale by the mortgagee was regular in all respects and in accordance with the power contained in the mortgage. Under this evidence the court directed a verdict finding the property not subject, which was accordingly returned by the jury. Plaintiff in *fi. fa.* moved for a new trial, which was overruled, and he accepted. It was claimed in the motion for a new trial that the court erred in directing a verdict for claimant, and that the verdict

delivery to the assignee. The court upheld the assignment, stating that the possession of the property remaining in or being restored to the debtor, he could make delivery in fact to any purchaser; that the possession having been given up by the officer or his servant to the debtor, the real owner, the latter might lawfully sell the property, whether it remained bound by the attachment or not. The general property, the court said, would pass, subject to the lien of the officer, but absolute as to all others.

In *Whipple v. Thayer*, 16 Pick. 25, 26 Am. Dec. 626, after certain cotton had been taken in execution, the debtor made a general assignment, after which a second attachment levy was made on the goods by the officer having custody of them. The assignee, who paid off the first attachment, brought replevin for the cotton and got it. The point was made that the assignment was bad because the goods could not be delivered while in the hands of the officer; but the court held that the delivery of the instrument of assignment was a sufficient delivery of the goods.

In *Fettyplace v. Dutch*, 13 Pick. 388, 23 Am. Dec. 688, certain property of a wood wharfinger, taken by an officer on attachment, was left on the wharf, in charge of a watchman. It was then assigned by the debtor, subject to the attachment, the delivery being made by putting a stick of wood in the hands of the assignee. After the assignment, other attachments were levied upon the property. It was held that the title passed by the assignment, so that, upon the discharge of the first attachment, the assignee took the property in preference to the other attachment creditors. The court held that an attachment constituted a lien, and that, as the general property remained in the owner, subject to such lien, if the general owner could, without a trespass, make actual delivery of the property, subject to the lien created by the attachment, a sale with such delivery was lawful, and would vest the property in the vendee, subject to such attachment, so as to give the

vendee a prior title to that of a subsequent attaching creditor.

In *Arnold v. Brown*, 24 Pick. 89, 35 Am. Dec. 296, it appeared that after certain goods had been attached they were sold to the attaching officer, subject to the attachment. Upon the dissolution of the attachment, the officer, as buyer, was held entitled to the goods as against a creditor levying on them by virtue of a later attachment. The court said that an attachment constituted a mere lien upon the property, and that the general owner might as well sell subject to that lien as any other. The effect of the sale would be to pass the general property, encumbered by the attachment. If that were extinguished by the settlement, or the failure of the suit, or the neglect to levy the execution within the period fixed by law, the sale of the property would become absolute, and the purchaser would hold it free from the encumbrance. If a part of it were taken to satisfy the judgment, he would hold the remainder; but, if the whole were needed on the execution, he would acquire nothing by his purchase. These principles applied both to real and personal property.

In *Appleton v. Bancroft*, 10 Met. 231, in which the right to mortgage attached property was up, the court said that it had been repeatedly decided, and that the point could not then be called in question in that commonwealth, that property under attachment might be sold by the general owner, and a good title given to the purchaser, subject only to the lien created by the attachment. Perhaps, said the court, upon considerations of policy, it might better have been decided otherwise, but it was too late to question it; that it was founded on the great principle lying at the foundation of the right of property,—that general ownership carries with it a full power of disposition, and that when such ownership is not taken away, but only limited, as in the case of a lien, the power of disposing still remains, subject only to the lien. The same decisions which showed this right proved that it could be fully carried into effect without an actual delivery, that is, a change of cus-

so rendered was contrary to the evidence. An exception was also taken to the exclusion of certain evidence, which, under the view we take of the law governing the case, it is not necessary to consider.

The claimant rested his title to the property on his purchase at the sale under the power contained in the mortgage; and the naked question is presented, whether, under such a sale and purchase, the claimant derived a valid title to the property. We think not. While freely admitting that, under the proper exercise of a power of sale given in a mortgage, the title of the mortgagor is divested, and passes into the purchaser, there is one reason why the sale in the present instance did not have this effect under the circumstances which are

shown to have existed at the time it took place. The effect of the mortgage was simply to create a lien on the property mentioned therein, in favor of the claimants, to secure the payment of their debt. It conveyed no title. Under an ordinary mortgage, a valid sale of the mortgaged property could only have been had by a foreclosure in the methods pointed out by law, and a sale under the levy of the execution issued thereon. The power given by the mortgagor to the mortgagee to sell the property mortgaged, in case of default by the former, is but a substitution by agreement of such method in lieu of the ordinary sale under foreclosure (*Mutual Loan & Bkg. Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980), and we cannot imagine how a

tody, because the custody of such property was always in the attaching officer to preserve the lien, and constructive delivery was sufficient.

In *Bates v. Moore*, 2 Bail. L. 614, it was held that a debtor might sell property levied on, subject to execution. In this case the agreement was that the purchaser should buy the property at sheriff's sale, and pay a certain price in cash, and a further specified sum in one year, without reference to the price at which the property was bid off by him at the sale. The court held this contract of sale a good one as between the parties.

In *Alexander v. Springs*, 27 N. C. (5 Ired. L.) 475, it was said by the court to be very clear that a *fieri facias*, although it created a lien on property which prevented the owner from selling it unless subject to the lien, yet it did not divest the property out of the debtor until seizure, and that even after a seizure the sheriff gained but a special property, such as was necessary for the satisfaction of the debt, and which left in the original owner the general property, an interest he might sell and convey at law.

In *Popelston v. Skinner*, 20 N. C. (4 Dev. & B. L.) 293, it was held that personal property levied on could be sold by the debtor. In this case a slave which had been seized under execution was left with the debtor; but the court said it would have made no difference if it had been otherwise; if the property had been taken and kept by the sheriff personally, said the court, the right of the defendant in execution would not have been absolutely divested, but an interest would have been left in him, capable of being sold and legally conveyed. The court said that the interest of the sheriff was limited for the purpose for which it was created, which was the creditor's satisfaction. Beyond that the sheriff held for the original owner, whose interest was therefore obviously a valuable present property, the subject of sale and conveyance, but liable in the hands of the assignee, as it was in those of the assignor, to be defeated by a sale of the chattels for the debt, where not otherwise discharged.
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In *Dixon v. Barnett*, 3 Wash. 645, 29 Pac. 209, it appeared that, after certain personal property had been taken under an attachment, it was sold by the debtor, who gave the buyer a bill of sale, which was placed on record. Afterwards other attachments were levied upon it while in the hands of the sheriff. The purchaser, it was held, took the property against creditors under later attachments, although he gave no notice of his claim until after the levy of the second writ. The court said that a seizure of property under a writ of attachment did not divest the owner of his title; that it only created a lien; that the attachment debtor could sell the property, subject to the lien, and that, upon the discharge of the attachment, the title became absolute.

But the mere custodian of property seized under attachment, if he sells it, can convey no title. *Jetton v. Tobey*, 62 Ark. 84, 34 S. W. 531. In this case a special constable, who took the property under attachment, delivered it to the creditor, without authority, in settlement of his debt. The creditor sold it to a third person, who had no notice of the equities. The court held that the purchaser got no title.

A case which seems to be out of line is *Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274, in which it was held that the sale of slaves in the hands of a receiver, pending foreclosure of a mortgage upon them, was absolutely void. The court said that this was a purchase made while the property was in suit and actually in the custody of the law. Under these circumstances the doctrine applicable to purchases *pendente lite* applied; that under it there could be no doubt that the purchaser took nothing by his contract, not even in a case where he paid whole value and had no actual notice of the pendency of a suit.

And in *Steffin v. Steffin*, 4 N. Y. Civ. Proc. Rep. 179, the court saw no force in the theory that the execution debtor should be restrained from selling or encumbering personal property which had been levied on, as after levy on it by the sheriff, the court held, the debtor could transfer no title to it, even to a bona fide purchaser for value re-

sale had under a power given in the mortgage is entitled to any more consideration, or has attached to it incidents of a higher dignity, than those which attach to a sale under foreclosure. As to the relative rights of third persons, we think they stand on the same footing. The evidence does not show that at the time the sale under the power took place the property had been delivered to the mortgagee. On the contrary, it shows that at the time of such sale the mortgage was not in possession of the property, but that the same was in the possession of the sheriff, who seized it under the levy made under plaintiff's execution. This court has more than once ruled that it was necessary for the full execution of the power of sale contained in a mortgage that the

mortgaged (personal) property should be in the possession of the mortgagee, so that he may fully effectuate the purposes of the sale by delivering possession to the purchaser. Here the property at the time of the attempted sale was in the possession of an officer of the court, who had seized it to satisfy by execution sale a valid judgment having a lien thereon. It was therefore *in custodia legis*, and, under the rule which obtains in such cases, the possession of the property by the sheriff who levied on it could not be disturbed by the levy of another process; and, had the mortgagee in this case foreclosed his mortgage and placed it in the hands of the sheriff, possession of the property would have remained in that officer by virtue of the first levy. Mr. Free-

ceived, without notice. This statement was based on the authority of *Butler v. Maynard*, 11 Wend. 548, 27 Am. Dec. 100. But the latter case does not seem to bear out the broad proposition laid down by the court. It simply holds that the sale by the debtor of property levied on is not good as against the levy; that any levy which would justify a sale under it would operate to defeat a later purchase, though bona fide and for a valuable consideration.

A buyer from the owner does not obtain any right as against the custody of the law. In *McConnell v. Kaufman*, 5 Wash. 686, 32 Pac. 782, after a debtor's personal property under attachment had been taken by the sheriff, it was sold by the debtor to another creditor, who notified the sheriff of the transfer, and called upon him to set aside enough goods to satisfy his attachment, and release the rest. This he would not do, and several subsequent attachments were levied against the goods in his hands. The court then ordered the property sold on motion of one of the subsequent attaching creditors, joined in by the first attachment creditor. The purchaser from the debtor afterwards brought an action against the buyer at the sheriff's sale for the conversion of the goods claimed by him, but failed. The court said that a purchaser from the debtor bought with notice that the court was liable, in the ordinary course of proceedings, to make an order for the sale of the goods; that it could not be admitted for a moment that a debtor might defeat the power of the court to make the order by transferring his title to the property attached after a writ had been levied. If there were any irregularities in connection with the sale, it was the sheriff who was responsible, and not the purchaser at the sheriff's sale. In this case the court conceded, for the sake of the argument, that the judgment debtor might make a valid sale of property under attachment in the hands of the officer, so as to vest title in the purchaser, subject to existing attachment liens, and so as to cut off subsequent creditors' rights.
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In *Bevis v. Landis*, 59 N. C. (6 Jones, Eq.) 312, 82 Am. Dec. 418, it was held that one who had bought from the owner property which had been seized under execution could not, by giving notice at the execution sale, force the sheriff to sell other property of the debtor first, to satisfy his execution. The rule contended for, the court said, was of first impression. No case or *dictum* had been cited to support it, and the court was unable to see any principle upon which such an equity could be based. Such a purchaser was an intermeddling stranger, who had no business to buy any part of the debtor's property without taking care to see that the prior lien was satisfied.

In *Bilby v. Hartman*, 29 Mo. App. 125, the owner of standing corn, after it had been levied on, sold it to another creditor to apply on an indebtedness. The buyer then brought replevin, but failed; the court, among other reasons for its decision, stating that after seizure under the writ, the corn was in custody of the law, and that, in general, when things were in custody of the law, they could not be interfered with by a private person or by another officer, acting under the authority of a different court or jurisdiction.

Property in possession of receivers is, of course, in custody of law, but it is also in custody of the court, and any special rules applicable to receiverships are probably due to that fact. It might be a contempt of court to sell property in the hands of a receiver without leave, but whether such a sale, if made, would be void, is another question. No cases have been found on this point, except *Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274, *supra*.

In *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271, it was held that, where a receiver refused to take goods under a contract of sale, the vendor could resell them without disturbing the possession of the receiver. It was urged that the seller could not sell the property without leave of the court, and thereby acquire any rights as against the receiver; but the court held that the receiver had no possession or

man, in the second volume of his work on Executions (§ 268), in treating of the effect of a levy upon property, says, on authority: "The lien of an execution gives the officer intrusted with its service no general or special property in the defendant's goods. . . . But the moment that a levy is made the rights and remedies of the officer are materially changed; or, more accurately speaking, he, from that moment, is vested with rights and entitled to remedies to which he could before urge no valid claim. . . . The officer is entitled to retain such possession and control of the property as may be necessary to make it productive under the writ. The law, therefore, concedes to him as to a bailee a special property in the goods in his custody. . . . As against strangers to the title, the special property continues until the officer can redeliver the property to the defendant." The same author, in the same section, also says that another consequence of taking property under an execution is that it is put in custody of the law, and cannot be levied upon by any officer, nor can it be replevied from the officer in whose charge it is by the defend-

ant, nor by anyone claiming title under him subsequently to the levy. For this proposition he cites *Burket v. Boude*, 3 Dana, 213; *Rives v. Wilborne*, 6 Ala. 45; *Kemp v. Porter*, 7 Ala. 138; *Langdon v. Brumby*, 7 Ala. 53; *Hartwell v. Bissell*, 17 Johns. 128; *Bilby v. Hartman*, 29 Mo. App. 125, and other cases. The title upon which the claimant stood in the present case being derived from the defendant by virtue of the sale under the power given in the mortgage after levy of the execution by the sheriff, if the proposition laid down by Mr. Freeman be true, the claimant relying on such title could not have recovered the property levied on from the sheriff. It has frequently been ruled that money or property in the hands of an officer who has collected it under legal process is not the subject of attachment or of a levy, because it is in *custodia legis*. *Hardy v. Tilton*, 68 Me. 195, 28 Am. Rep. 34; *Turner v. Fendall*, 1 Cranch, 117, 2 L. ed. 53. In *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322, it was ruled that money in the hands of a receiver, being in *custodia legis*, is exempt from execution or attachment. Also, see *Field v.*

right of possession, and no title to the property in question, but only had the right to receive the property purchased upon paying the agreed price, and that no right of possession in the receiver had been disturbed.

In *Re Styer*, 2 N. B. N. Rep. 205, 98 Fed. 290, it was said that a referee in bankruptcy, although having power to order a sale of the bankrupt's property, could not order it sold if in the hands of a receiver.

c. Effect as to real estate.

It is not intended to make this note exhaustive on the question of the right to sell real estate under levy. A few illustrative cases are taken, because the principle seems to be the same,—the question of inability to make actual delivery in the case of personal property in custody of law, as has been seen, not affecting the right of the owner to sell it.

The question which was up in *FULGHUM v. J. P. WILLIAMS Co.* could not arise in all jurisdictions. The subject is largely regulated by statutes which provide for recording chattel mortgages and protection of rights of mortgagees from subsequent liens. If the mortgagor is considered to have a mere equitable interest, this cannot be taken or sold on execution unless permitted by statute. But where there is nothing to prevent mortgaged property from being taken into custody of law under later executions, such a question as that presented in *FULGHUM v. WILLIAMS Co.* might arise.

Nearly the same question was raised in *Mutual Loan & Bkg. Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980, in which it was held that land might be sold 1 L.R.A. (N.S.)

under a power of sale in a mortgage after the property had been levied on under an execution on a judgment younger than the mortgage. It was contended on the part of the judgment creditor that the mortgagee, not having the legal title, and being merely an agent of the mortgagor in the sale of the land, a purchaser at the sale would take the land subject to the lien of the judgments against the mortgagor, existing at the time of the sale, just as he would if the land were sold by the mortgagor himself. The court, however, held that the power of sale was part of the security itself, and could not be cut off by seizure of the property under the execution. The court said that if a subsequent creditor could effect a revocation of the power by obtaining judgments against the mortgagor, the mortgagor himself could, at any time before the exercise of the power, effect a revocation by contracting the indebtedness to others, and permitting or procuring judgments to be taken against him; so that at last the right of the mortgagee to avail himself of the power which he had contracted for as a part of his security would be dependent on the will of the mortgagor.

And in *Bancroft v. Ashhurst*, 2 Grant. Cas. 520, it was stated that to permit a mortgagor of land to prevent the exercise of a power of sale by subsequent grants, or to allow his creditors to defeat it by subsequent judgments, would be, in substance, a revocation of the power, and would render the security worthless so far as its value depended on the power.

There would seem to be no reason why, if the reasoning in the last two cases is sound, the rule they lay down would not

Jones, 11 Ga. 413. The rule also embraces money in hands of certain trustees when appointed by the court (Bentley v. Shrieve, 4 Md. Ch. 412); and assignees in bankruptcy (Jones v. Gorham, 2 Mass. 375); and sheriffs (Wilder v. Bailey, 3 Mass. 289). It was ruled in Hackley v. Swigert, 5 B. Mon. 86, 41 Am. Dec. 258, that property in the custody of the law cannot be levied on, seized, or sold under execution. In Wiswall v. Sampson, *supra*, Mr. Justice Nelson, in delivering the opinion of the court, said (on page 68, 14 How., on page 329, 14 L. ed.) "that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose." In the case of Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, it was ruled that, "the principle that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, applies both to a taking under a writ of attachment on mesne

process and to a taking under a writ of execution." Mr. Justice Matthews, who delivered the opinion of the court in that case, said "that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purpose of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdic-

apply with equal force to a sale under a power in a chattel mortgage.

On the general question, the court, in Addison v. Crow, 5 Dana, 271, in holding that the lien of an execution on land did not defeat the debtor of his title, nor deprive him of the power of passing it by sale to another, subject to be overreached and defeated by subsequent valid proceedings under the execution, said: "The sole purpose of the law in declaring a lien in favor of executions is to secure the object of the execution against the effect of any subsequent alienation of the land by the debtor. To do this, it holds the land subject to all regular proceedings under the execution, and ultimately to sale and conveyance, notwithstanding any such alienation. This is, in fact, the essence and extent of the lien. It is not necessary, for the effectuation or security of its objects, to say that it actually disables the debtor from alienating his land, and renders such alienation absolutely and to all purposes void. It is sufficient that such alienation is wholly inoperative as against the lien, and forms no obstruction to the regular proceedings under the execution, and that it will therefore be wholly defeated by a valid sale and conveyance."

But the sale cannot be good as against a valid levy. In Ozmore v. Hood, 53 Ga. 118, it was held that the sale of land, after the levy of an attachment upon it, was not good. The court said: "However fair the sale may be, though it be for cash and with the most innocent intentions, it cannot be that a sale of property by the defendant, after the levy of an attachment upon it, 1 L.R.A. (N.S.)

can be good against the levy. The property is in the hands of the law, and an attachment on land would be utterly valueless if this were the law. The attachment and the levy is in the nature of *lis pendens*; the officer, by his levy, has impounded the property; and whatever right the defendant has must await the disposal of the court." The sale in this case was made by the attachment defendant.

And in the course of a dissenting opinion in Tilton v. Cofield, 2 Colo. 406, as to the effect of increasing the attachment creditor's demand after sale of the attached property, Belford, J., said: "He who buys property while it is in the custody of the law, and subject to a decree or judgment that may be made or entertained by a court in the enforcement of a specific lien, is not a favored purchaser, nor is he entitled to the most benignant consideration of a court of equity. Anciently, such purchases were regarded as void; but this harsh doctrine has yielded to the softening influences of time, and the later decisions, instead of holding that a conveyance is annulled by the pendency of an action, simply affirm that the property purchased shall be held subject to the rights of the parties in litigation." The majority of the court held that the buyer took subject to the lien of the creditor for the sum stated in the affidavit or writ; but that by adding to his demand, the attachment creditor lost his preference, so that the buyer's title became absolute. This case was reversed in 93 U. S. 163, 23 L. ed. 858, which sustained the view taken in the dissenting opinion in the Colorado case.

H. C. S.

tion of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter." See also *Conner v. Long*, 104 U. S. 228, 20 L. ed. 723. The principle which we rule as being applicable to the facts of this case under the above authorities is that, when the sheriff of Pulaski county, in obedience to the process, seized the property in question, no valid sale thereof could afterwards, while the property was in the possession of the court under such seizure, be made, under execution or otherwise, unless by leave or order of the court. And inasmuch as the sale under which the claimant derived his title in this case was made after seizure, and while the property was in the possession of the court by its officer, the purchaser took no title. It is not, of course, to be understood that the mortgagee, if he had a prior or superior lien to that of the judgment on which the execution issued, has not the right to enforce his lien, either against the property itself or the proceeds of the same under execution, and in the manner pointed out by our statute. The fact that the mortgage contained a power of sale does not render the exercise of that power the only method of enforcing the lien. *McGuire v. Barker*, 61 Ga. 339. Therefore no substantial right of the mortgagee is denied by the ruling which is made. When a court having jurisdiction has, by proper process, taken property into its custody for the purpose of satisfying a judgment against the defendant in *fi. fa.*, while any person having a lien on such property or interested in the proceeds thereof may rightfully come into the court having possession of the property and assert his rights, yet he cannot disturb that possession, nor assert as to such property a title which he has acquired subsequent to the seizure. We are not now dealing with the lien which the claimant had to the property by virtue of his mortgage, but only with the title which he insists he has by virtue of the sale made by the mortgagee after the levy. We think he took nothing by that sale, and that the trial judge erred in directing a verdict in his favor.

Judgment reversed.

All the Justices concur.

KANSAS SUPREME COURT.

GRAND LODGE ANCIENT ORDER UNITED WORKMEN OF THE STATE OF KANSAS, Plff. in Err.,

v.

JANE HADDOCK.

(.... Kan.)

1. Benefit insurance — by-law excluding liquor dealers.

The adoption, by a fraternal insurance or 1 L.R.A. (N.S.)

der, of a by-law declaring that no person shall be admitted or retained as a member who is engaged in the sale of intoxicating liquors, does not, in the absence of a specific provision to that effect, avoid the beneficiary certificate of a member who is already engaged in that business in a state where it is not unlawful, who continues therein, and against whom no action is taken.

2. Same—suspension of member.

A by-law of such an order, which provides that any member who shall, after the date of its adoption, have entered, or who shall thereafter enter, into the business of selling intoxicating liquors, shall stand suspended from his rights to participate in the beneficiary fund; and that his certificate shall become void from the date of his so engaging in such occupation,—does not in terms apply to the case of a member who, prior to that time, was engaged in such business, and who remains in it continuously thereafter.

Headnotes by MASON, J.

(October 7, 1905.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Farrelly & Evans and J. B. Tomlinson, for plaintiff in error:

Where members agree to obey and conform to subsequently enacted by-laws, as well as laws existing at the time, or the by-laws themselves contain provision for their alteration, a change regularly made, and not unfair in itself, will be binding, although it may seem to impair vested rights.

Bacon, Ben. Soc. 2d ed. §§ 91a, 92; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 369; *St. Patrick's Male Beneficial Soc. v. McVey*, 92 Pa. 510; *Richardson v. Union Congregational Soc.* 58 N. H. 187; *Com. ex rel. Whiteside v. Lancaster*, 5 Watts, 152; *Crossman v. Massachusetts Ben. Assn.* 143 Mass. 435, 9 N. E. 753; *Stadler v. Bnai Brith*, 5 Ohio Dec. Reprint, 221; *Hussey v. Gallagher*, 61 Ga. 86; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 262, 1 N. E. 571.

Assured had ceased to be a member.

Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390; *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; *Miller v. National Council. K. & L. of S.* 60 Kan. 234, 76 Pac. 830.

Messrs. Angevine & Cubbison, for defendant in error:

The amendment relating to the selling of liquor was not operative as to the deceased or his beneficiary, and constituted no defense to the action.

Deuble v. Grand Lodge, A. O. U. W. 66 App. Div. 323, 72 N. Y. Supp. 755; Kent v. Quicksilver Min. Co. 78 N. Y. 159; Matthews v. Associated Press, 136 N. Y. 342, 32 Am. St. Rep. 741, 32 N. E. 981; Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso. 148 N. Y. 287, 35 L. R. A. 289, 42 N. E. 710.

Members could not be deprived of property rights without notice.

Hale v. Equitable Aid Union, 168 Pa. 377, 31 Atl. 1060; Supreme Council, A. L. of H. v. Getz, 50 C. C. A. 153, 112 Fed. 119; Fargo v. Supreme Tent, K. of M. 96 App. Div. 491, 89 N. Y. Supp. 65; Supreme Council A. L. of H. v. Batte, 34 Tex. Civ. App. 450, 79 S. W. 629; Starling v. Supreme Council R. T. of T. 108 Mich. 440, 62 Am.

St. Rep. 709, 66 N. W. 341; Wheeler v. Supreme Sitting, O. of I. H. 110 Mich. 437, 68 N. W. 229; Courtney v. United States Masonic Ben. Asso. (Iowa) 53 N. W. 239.

Mason, J., delivered the opinion of the court:

The Grand Lodge of the Ancient Order of United Workmen of the State of Kansas, an insurance association, prosecutes error from a judgment rendered against it in favor of Jane Haddock upon a beneficiary certificate issued to her husband, John Haddock. The judgment must be affirmed, unless the certificate was avoided under the rules of the order by the fact that John Haddock was a saloon keeper. He became a member of the Workmen in 1880, being

Case Note.—The weight of authority holds the view that all matters relating to the conduct of members of a mutual benefit or fraternal insurance society, and laws passed after the issue of the benefit certificate, will be valid and binding on a member, providing no new condition is injected into the contract, which will materially change or affect it, and to which he does not consent. Northwestern Benev. & Mut. Aid Asso. v. Wanner, 24 Ill. App. 357; Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Langan v. American L. of H. 34 Misc. 629, 70 N. Y. Supp. 663; Supreme Commandery, K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Miller v. Tuttle (Kan.) 73 Pac. 88; Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712.

The same doctrine is laid down in 1 Cooley's Briefs on Insurance, pp. 715, 719, and in 1 Bacon, Ben. Soc. § 188a.

By-laws of fraternal insurance associations will not be given a retroactive effect, so as to change the standing of those who became members before their adoption, in the absence of a clearly expressed intention to the contrary. Sovereign Camp W. of W. v. Thornton, 115 Ga. 798, 42 S. E. 236; Wist v. Grand Lodge A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195.

It will be presumed that an amendment to the by-laws of a mutual benefit association was not intended to affect a contract previously issued. Modern Woodmen v. Wieland, 109 Ill. App. 340. In this case, when membership in the fraternity was acquired, the applicant was a stationary engineer, and a by-law was then in force which declared that manufacturers of liquor, saloon keepers, bartenders, etc., should not be admitted. Subsequent by-laws were enacted which increased the number of prohibitory occupations, but in each by-law it was expressly stated that it should not be construed so as to invalidate certificates issued prior to a certain date, which was after such 1 L.R.A. (N.S.)

membership was acquired. After the adoption of such by-laws the member changed his occupation to that of keeping a saloon, and, subsequent to this change in occupation, a by-law was adopted which provided that "if, after a person has become a member of this fraternity, he engages in any of the employments herein enumerated [that of saloon keeper being included] his benefit certificate shall be forfeited by such act, and the same shall be null and void." This by-law omitted the proviso that it should not be construed as invalidating certificates issued prior to the aforesaid certain date. The court, in construing this by-law as applying only to those who enter the business of saloon keeper after its adoption, said that, as the member entered upon the business of saloon keeping when the by-laws permitted him to do so, and, as the order so adjusted its by-laws that he could and did continue to be a member for several years, it could not thereafter deprive him at once of his certificate and of the benefits of all payments he had made, and practically confiscate that which was to him a property right, as such a by-law would be destructive of the liability the society had assumed, and would be unreasonable.

But in *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390, which is cited in *GRAND LODGE A. O. U. W. v. HADDOCK*, it was held that a by-law of a masonic mutual benefit society, to the effect that, if any one of its members should become a saloon keeper, he would forfeit his membership, and his certificate would thereby become *ipso facto* void, would apply to those who were saloon keepers at the time of the adoption of the by-law, as well as to those who afterward became such. In this case, however, the one affected had lost his membership in the society before its enactment of the resolution against saloon keepers, because the grand lodge had already debarred him from membership in the order of masons, and, when such membership in good standing was thus lost, membership in the masonic mutual benefit society was *ipso facto* forfeited by virtue of the provisions of its charter, which was in existence when membership was ac-

then engaged in the business of selling liquor in Kansas. At that time neither the laws of this state nor of the association forbade that occupation. After the enactment of the prohibitory law Haddock continued in the same business, but changed its location to Missouri, so that there is no claim that he was at any time a violator of the statute. He remained in the business until his death, in 1903. In 1889 a by-law of the grand lodge was adopted, providing, among other things, that, "no person shall be admitted to membership, or retained as a member, in this jurisdiction . . . who is engaged in any way in the sale of intoxicating liquors as a beverage." The by-law was silent as to how this requirement should be enforced, except for a further declaration that any lodge offending against any of the provisions of the section in which it was found should be deprived of its charter. On August 1, 1898, the supreme lodge of the order adopted a law reading as follows: "Any member of the order who shall, after August 1, 1898, have entered, or who shall hereafter enter, into the business or occupation of selling by retail intoxicating liquors as a beverage, shall stand suspended from any and all rights to participate in the beneficiary fund of the order, and his beneficiary certificate shall become null and void

from and after the date of so engaging in said occupation, and no action of the lodge of which he is a member, or of the grand lodge or any officer thereof, shall be necessary or a condition precedent to any such suspension. In case any assessments shall be received from a member who has thus engaged in such occupation after August 1, 1898, the receipt thereof shall not continue the beneficiary certificate of such member in force, nor shall it be a waiver of his so engaging in such occupation." After the adoption of this law Haddock maintained his relations with the order, and continued to pay his assessments regularly. They were received by the officers of the local lodge with knowledge of the facts regarding his occupation, and were by them forwarded to the proper officers of the grand lodge. All payments made after that time, however, have been tendered back to Mrs. Haddock since her husband's death. The questions involved are (1) whether the terms of the by-laws referred to preclude a recovery upon the certificate, and (2) if so, whether it was competent for the order to adopt them as against Haddock, and (3) whether the grand lodge was estopped to invoke the benefit of these by-laws in this case. Owing to the conclusion we reach re-

quired, and which declared that "a requisite qualification for membership shall be that the applicant be a mason in good standing."

The adoption of a new article of incorporation by a mutual benefit association, making certificates void where the holders engage in extra hazardous occupations, does not become part of the contract with a member to whom a certificate had been previously issued, or destroy a right, which he previously had, to change his occupation without invalidating his certificate. *Hobbs v. Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L. R. A. 299, 31 Am. St. Rep. 466, 47 N. W. 983.

The adoption of an amendment to the by-laws, to the effect that, if any member shall become a freight brakeman, he shall thereby forfeit his membership and certificate, is unreasonable and void as to one who became a member of the order when he had the right to follow such employment, and who was given no notice of the adoption of such an amendment. *Tebo v. Supreme Council, R. A.* 89 Minn. 3, 93 N. W. 513.

When a member stipulates to be governed by the laws in force when he is admitted to membership and those which may thereafter be adopted, the authorities agree that he is bound by an after-enacted by-law forfeiting a certificate in case such member continues to engage, or in the future engages, in certain prohibitory occupations. Thus, the court, in *Hobbs v. Iowa Mut. Ben. Asso.* *supra*, said, that whether members are bound by after-enacted by-laws will depend upon the terms of the contract; and, if that pro-

vides that members shall be bound by all articles and by-laws which may at any time be adopted, we know of no reason why they are not valid, because in such cases changes are not in violation of the contract, but are in harmony with it.

So, one who joined a fraternal benefit association under an express agreement that membership should be forfeited if he should engage in any employment which was then or might thereafter be considered extra hazardous, was bound by an after-enacted amendment which placed upon the prohibited list the occupation which the member entered after the adoption of the law. *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, 58 Atl. 223.

A by-law of a benefit society, providing that any member engaging in the saloon business shall stand suspended from that date, and forfeit all interest in the beneficiary fund, operates, without any formal suspension or notice, to forfeit the certificate of one who had engaged in such business before the passage of the by-law, where, at the time he became a member, the by-laws prohibited members from engaging in the saloon business, but provided in such case for formal suspension and notice thereof, and his application for membership contained a stipulation that he would comply with all the laws, rules, and usages of the association which were then in force, or which might thereafter be adopted; since the new by-law created no new ground for forfeiture, but operated merely to repeal the provisions of the prior by-law as to the man-

garding the first question, it will be unnecessary to consider the others.

It is sufficiently clear that the by-laws adopted in 1889 did not affect Haddock's standing in the lodge or the rights of the beneficiary under the certificate. While it forbade the acceptance or retention as members of the lodge of persons engaged in the business of selling liquor, it did not profess to be self-operating. It provided no machinery by which it could be enforced, and no effort was in fact ever made under it to terminate Haddock's membership. A very similar question was discussed in *Steinert v. United Brotherhood, C. & J. 91 Minn. 189, 97 N. W. 668*, where it was said: "The constitution provided that 'no person who engages in the sale of intoxicating drinks can be admitted or retained as a member.'"

. . . The question is: Must charges be preferred, and an opportunity to defend given, to an accused member, before his membership ceases, or does the act of selling intoxicating drinks terminate the membership without any further proceedings? That Steinert disregarded the laws of the order stands admitted; but it does not follow that this fact of itself ended all liability of the defendant on his certificate of membership, issued when he was eligible, under which he

had good standing, and in which he had acquired a property right. This depends entirely on the contract of membership, of which the constitution was a part. It was expressly provided in the certificate that a member must strictly adhere to his obligation and obey the constitution and all rules of the union based thereon. No person who engages in the sale of intoxicating drinks can be 'retained' as a member. Provisions of this kind, which may deprive one of property rights acquired when paying dues from time to time, are to be construed strictly, for forfeitures are not favored in the law. A member should not be deprived of benefits arising out of his certificate of membership, unless a construction of the constitution makes such a result absolutely necessary. We do not regard these constitutional provisions, taken as a whole, as indicating an intent to make the one above quoted self-executing or operative. It would have been very easy for the association, which undoubtedly prepared its own constitution, if such had been the intent, to have provided explicitly that in case a member engaged in the sale of intoxicating drinks his membership should forthwith and immediately cease, his certificate should stand canceled,

mer of proceeding in case of a violation of rules. *Moerschbaeher v. Supreme Council, F. J. 188 Ill. 9, 52 L. R. A. 281, 59 N. E. 17; People ex rel. Goett v. Grand Lodge, A. O. U. W. 32 Misc. 528, 67 N. Y. Supp. 330.*

In *Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012*, the court held that the contention that, after a person had once been properly admitted as a member, he was at liberty to enter upon some prohibited business, and the order was powerless to forfeit his certificate, is answered by showing that when membership was acquired the applicant agreed to comply with the "conditions, laws, and such by-laws and rules as" were then, or might thereafter "be, adopted by the head camp or local camp." The same doctrine was applied to a similar case in *Schmidt v. Supreme Tent K. of M. 97 Wis. 528, 73 N. W. 22.*

In *Langnecker v. Grand Lodge A. O. U. W. 111 Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 800, 87 N. W. 293*, which was cited and discussed by the court in *GRAND LODGE A. O. U. W. v. HADDOCK*, the application for membership contained the following stipulation: "I agree that compliance on my part with all the laws, regulations, and requirements which are, or may be hereafter, enacted by said order is the express condition upon which I am entitled to participation in the beneficiary fund, and to have and enjoy all the other benefits and privileges of said order."

In *State ex rel. Schrempp v. Grand Lodge, A. O. U. W. 70 Mo. App. 466*, the facts show that at the time membership was acquired 1 L.R.A. (N.S.)

no by-law existed prohibiting a saloon keeper or bartender from becoming a member of the order, nor any by-law prohibiting any member from engaging in either of these occupations; but the applicant agreed to be bound by the requirements "which are, or may be hereafter, enacted by said order." After the adoption of a by-law declaring that no person who is now, or who may hereafter become, a member of this order shall engage in the business of keeping a saloon or dramshop, or of tending bar, a member began business as a saloon keeper. The court held that, having agreed in advance to any reasonable change in the by-laws, and a by-law against the saloon business being in force when such business was entered into, the member was amenable to such by-law; and his membership was forfeited.

Niblack on Benefit Societies, § 26, says: "Whether or not a member is bound by an amendment to the by-laws adopted after his contract of insurance was made, depends upon the terms of his contract, or upon his consent to the change. If the contract provides that he shall be bound by any such amendment, and it is properly passed, there is no reason why it should not be valid against him. . . . Where there is nothing in the contract of insurance which in terms, or by implication, authorizes any change in its provisions or conditions, by-laws subsequently passed do not become a part of that contract."

1 *Bacon, Ben. Soc. § 187*, and 1 *Cooley, Briefs on Insurance, p. 708*, lay down the same doctrine.

and that he should have no further rights under it."

A more difficult question is whether the law adopted in 1898 is to be interpreted as intended to affect the status of one who, like Haddock, having already engaged in the business of selling liquor, continued such occupation after that time without interruption. Construed literally, it has no application to such a case. Haddock did not enter into the forbidden occupation after August 1, 1898. He entered into it long before that time, and remained in it continuously. To make the expressions used apply to one in his situation, it would be necessary to give them a very liberal, if not strained, construction. No freedom of interpretation, however, should be indulged to accomplish the forfeiture of property rights. If it had been the design of the framers of the new law that it should apply to members who were already liquor sellers, it is reasonable to suppose that language would have been employed plainly indicating such purpose, and that there would have been express reference to those who remained in the business, as well as to those who entered it. In that case it seems probable, too, that some time would have been fixed within which such persons might save their rights by changing their occupation. It is hardly conceivable that there was a deliberate intention to make the amended law operate as an immediate decree of expulsion against any members who were at the time engaged in the interdicted business. Yet such would be the effect given it by the interpretation proposed by the plaintiff in error. The provision that a member's certificate should become null and void from the date of his engaging in the business also supports the theory that the operation of the enactment was intended to be wholly prospective. We conclude that the law of 1898 did not affect, and was not intended to affect, the standing of Haddock. This accords with the view taken in *Deuble v. Grand Lodge, A. O. U. W.* 66 App. Div. 323, 72 N. Y. Supp. 755 (Affirmed in 172 N. Y. 665, 65 N. E. 1116). The scope of the opinion, so far as affects this matter, is shown by the second paragraph of the syllabus, reading as follows: "An amendment to the laws of an insurance order, providing that any member who shall, after a specified date, have entered into the business of selling liquor, or who shall thereafter enter into such business, shall stand suspended from all rights in the beneficiary fund, and his certificate shall become void, does not in terms cover the case of a member who was previously engaged in such business and continued therein." In *Langnecker v. Grand Lodge A. O. U. W.* 111 1 L.R.A. (N.S.)

Wis. 279, 55 L. R. A. 185, 87 Am. St. Rep. 860, 87 N. W. 293, it was held that a similar amendment reached the case of a member who, having once abandoned the occupation of selling liquors, afterwards re-entered it; the discussion clearly indicating, however, that, if he had remained continuously in the business he would have been exempt from the operation of the law. In *Ellerbe v. Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390, in discussing a provision similar to the one under consideration, the writer of the opinion expressed the belief that it was intended to apply to all saloon keepers who remained in that business, no matter when they entered it, upon the ground that the by-law should be interpreted "so as to meet the abuse or thing prohibited, and to correct it, if possible." The determination of that case, however, was controlled by other and unassailable reasons, and we cannot regard this *dictum* as seriously impairing the authority of the New York decision.

The judgment is affirmed.

All the Justices concur.

NEBRASKA SUPREME COURT.

WESTERN TRAVELERS' ACCIDENT ASSOCIATION, Plff. in Err.,
v.

LENA MILLER MUNSON.

(.... Neb.)

1. Pleading—conclusion of fact.

The rule that permits conclusions of law to be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or defense is called in question has no application to conclusions of fact.

2. Same—demurrer—motion.

When thus assailed, the pleading is good

Headnotes by ALBERT, C.

Case Note.—The above case is a distinct addition to the authorities cited by the court as bearing on the question of waiver of the statutory provisions against physicians testifying to confidential disclosures made in the course of their professional employment. In all the cited cases the provisions of the policies contained express waivers, and consequently they do not go as far as the decision under discussion.

Re *Coleman*, 11 N. Y. 220, 19 N. E. 71, cited by the court as being the same in principle as the case before it, is one of a harmonious line of authorities holding that a testator waives the provisions of a similar statute relating to confidential communications to attorneys by having the attorney

if the ultimate facts constituting a cause of action or defense are alleged. If the facts thus alleged do not make the pleading sufficiently definite and certain, the remedy is by motion.

3. Evidence—disclosures to physician.

The prohibitions, in § 333 of the Code, against a physician's testifying to confidential disclosures made to him in the course of his professional employment, are for the benefit of the patient, who, by the express provisions of § 334, is permitted to waive them.

4. Same—waiver.

It is not necessary that such waiver be made at the time of the trial. It may be included in and made a part of the contract sought to be enforced in the action in which such testimony is offered.

5. Same—life-insurance contract.

A stipulation, in a contract of life insurance, to the effect that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver within the meaning of said sections, and renders the attending physician a competent witness as to the confidential disclosures made to him by the assured concerning his last sickness.

6. Same—declarations of bodily condition.

Statements of fact fairly indicative of a relevant bodily condition of the declarant at the time of the declaration are admissible as evidence of the existence of such condition, although made a considerable time after the injury was received.

7. Same—testimony of wife.

The admission of the testimony of the wife as to communications made to her by her husband in his last sickness, held not

prejudicial error under the circumstances disclosed by the record in this case.

(May 17, 1905.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to enforce payment of an amount alleged to be due on a benefit insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. O'Neill & Gilbert, for plaintiff in error:

The jury could not have said, as men, that Munson received this injury in the caboose, and therefore it was not permissible for them to say so as jurors.

Sovereign Camp W. W. v. Hruby (Neb.) 96 N. W. 998; Agen v. Metropolitan L. Ins. Co. 105 Wis. 217, 76 Am. St. Rep. 903, 80 N. W. 1020.

A verdict resting upon conjecture cannot be permitted to stand.

Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; Merrett v. Preferred Masonic Mut. Accl. Asso. 98 Mich. 338, 57 N. W. 169; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Sovereign Camp W. W. v. Hruby, *supra*; United States v. Ross, 92 U. S. 281, 23 L. ed. 707; Spencer v. Chicago, M. & St. P. R. Co. 105 Wis. 311, 81 N. W. 407; Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729; Douglass v. Mitchell, 35 Pa. 440; United States v. Crusell, 14 Wall. 1, 20 L. ed. 821; Globe Accl. Ins. Co. v. Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563.

sign the will as a witness thereto. Re Mullin, 110 Cal. 252, 42 Pac. 645; Pence v. Waugh, 135 Ind. 143, 34 N. E. 860; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69; McMaster v. Scriven, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149.

A case approaching very nearly, if not quite, the facts of the case under annotation, but not cited by the court, is that of Proppe v. Metropolitan L. Ins. Co. 13 Misc. 266, 34 N. Y. Supp. 172, in which it was held that the statement made in the proof of loss, by the insured's physician, as to the cause of death, and as to his previous condition of health, is binding upon the beneficiary; and that the insured waived the privileged nature of the physician's statement by a clause in the policy making the contents of such proof of death evidence of the facts therein stated. The only apparent difference between this case and the one under annotation is that in the latter case the physician was permitted to testify as a witness on the trial, while in the Proppe Case, the question involved was as to the evidentiary effect of the proofs of loss.

But in Redmond v. Industrial Ben. Asso. 1 L.R.A. (N.S.)

78 Hun, 104, 28 N. Y. Supp. 1075, Affirmed in 150 N. Y. 167, 44 N. E. 769, it was held that the filing of a proof of loss containing a physician's certificate as to the cause of death did not constitute a waiver of the protection of the statute. This case differs from the Proppe Case in the apparent absence of any reference in the policy to the effect of the proofs of loss.

A statement in an application for insurance designating a physician as one of whom the insurer might inquire as to the health of the applicant before accepting the risk does not waive the privilege so as to permit such physician to testify, in an action upon the policy, as to the health and physical condition of the insured. Robinson v. Supreme Commandery, U. O. of G. C. 38 Misc. 97, 77 N. Y. Supp. 111.

Neither does a statement in the application of the name and residence of the applicant's family physician operate as a consent that such physician may testify concerning the ailments of the insured. Masonic Mut. Ben. Asso. v. Beck, 77 Ind. 203, 40 Am. Rep. 295.

It was not proved that notice was ever given of the accident sued on.

If the place were unknown and the manner were unknown, then it must be unknown that it was in the caboose of the Burlington & Missouri train; and, if it were unknown that it was there, then there would be failure to prove it was there.

Traver v. Shaeffe, 33 Neb. 531, 50 N. W. 683; Imhoff v. House, 36 Neb. 28, 53 N. W. 1032; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Elliott v. Carter White-Lead Co. 53 Neb. 458, 73 N. W. 948.

The allegation that the injury was received through accidental means is not a statement of a fact, but merely a conclusion of the pleader.

Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932.

There is a wide distinction between injuries "received through accidental means" and "accidental injuries."

Carnes v. Iowa State Traveling Men's Asso. *supra*; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L. R. A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Westmoreland v. Preferred Acci. Ins. Co. 75 Fed. 244; Keefer v. Pacific Mut. L. Ins. Co. 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366; American Acci. Co. v. Carson (Ky.) 30 S. W. 879.

The term "confidential communication" covers all knowledge acquired while acting in a professional capacity.

Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; Heuston v. Simpson, 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 201; Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; Prader v. National Masonic Acci. Asso. 95 Iowa, 149, 63 N. W. 601.

This prohibition of the statute may not be waived by a mere appointee of a deceased patient.

Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; Re Hunt, 122 Wis. 400, 100 N. W. 874; Shuman v. Supreme Lodge K. of H. 110 Iowa, 480, 81 N. W. 717; Beil v. Supreme Lodge, K. of H. 80 App. Div. 609, 80 N. Y. Supp. 751; Kelly v. Highfield, 15 Or. 277, 14 Pac. 744.

The present judgment of this court is diametrically opposed to *Sovereign Camp W. W. v. Hruby, supra*; *Dunbier v. Day*, 12 Neb. 599, 41 Am. Rep. 772, 12 N. W. 109; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 657, 54 N. W. 976.

Messrs. Watt G. Sheldon, Frank T. Ransom, and Wright & Stout, for defendant in error:

Where one dies as the result of an injury, the presumption is that it was accidental, 1 L.R.A. (N.S.)

and the burden is on one alleging the contrary to establish that fact.

Western Travelers' Acci. Asso. v. Holbrook, 65 Neb. 474, 91 N. W. 276, 94 N. W. 816; *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L. R. A. 406, 44 Am. St. Rep. 367, 38 N. E. 973; *Peck v. Equitable Acci. Asso.* 52 Hun, 255, 5 N. Y. Supp. 215; *Jenkin v. Pacific Mut. L. Ins. Co.* 131 Cal. 121, 63 Pac. 180; *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 240, 76 N. W. 562; *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 677, 55 L. R. A. 291, 89 Am. St. Rep. 777, 87 N. W. 546.

Albert, C., filed the following opinion:

The terms "plaintiff" and "defendant" will be used herein with reference to the title of the cause in the court below. The defendant is a fraternal insurance association. Charles J. Munson, deceased, was a member thereof, and held a membership certificate therein insuring him, among other things, against death "through external, violent, and accidental means." The plaintiff is the widow of the assured, and the beneficiary named in the certificate.

The constitution of the association, which is a part of the contract of insurance, provides that no claim shall be valid unless notice in writing of the accident is received in the office of the association within fifteen days from the date thereof, and affirmative proofs in writing of said claim, as required by the executive board, are received within thirty days after the loss occurs; such proof in case of death of the assured to consist of the affidavit of the beneficiary and the attending physician, which "shall state the cause of death, giving dates of the accident and particulars thereof, and also the date of death, and such information as may be required by the association." In the petition upon which the cause was submitted to the jury, among other things, it is alleged: "That at all times subsequent to becoming a member of defendant association, as aforesaid, and up to the time of his death, as hereinafter set forth, he, the said Charles J. Munson, continued a member thereof in good standing, and while so in good standing, and within three months immediately prior to his death, was accidentally cut, wounded, bruised, and injured by external, violent and accidental means; the exact time, place, and manner of receiving said accidental cuts, wounds, bruises, and injuries as aforesaid, is unknown to the plaintiff;

and that the said Charles J. Munson, after receiving said injuries, and on, to wit, August 27, 1902, and by reason thereof, and independently of all other causes, died." It is further alleged that the assured had fully kept and performed all the terms and conditions of said contract of insurance on his part to be kept and performed, and that the plaintiff has fully kept and performed her part thereof, except to furnish or file the proofs of death hereinbefore mentioned; but that the furnishing and filing of such proofs had been waived by the association within thirty days from the death of the assured. In the answer to said petition the allegations as to the cause and manner of death, notice to the defendant of the accident as required by the constitution, and a waiver of formal proofs of death, are denied. The answer also contains allegations to the effect that no such notice was given or proof made, and that the death of the deceased was due to natural, and not to accidental, causes. There was a verdict for plaintiff, and judgment according.

It is claimed by the defendant that the petition does not state facts sufficient to constitute a cause of action, in that it fails to show that the injury was received through accidental means. In making this claim counsel do not overlook the positive averment of the petition, hereinbefore set out at length, that the assured "was accidentally cut, wounded, bruised, and injured by external, violent, and accidental means; the exact time, place, and manner of receiving said accidental cuts, wounds, bruises, and injuries, as aforesaid, is unknown to the plaintiff;" but insists that the allegation that "the exact time, place, and manner of receiving said accidental cuts, etc., are unknown to the plaintiff," negatives the allegation that such injuries were accidental, and destroys its force and effect. We do not believe that the language will bear that construction. There is a positive allegation that the injuries were received through accidental means. That plaintiff afterward disclaims knowledge of the exact time, place, and manner of receiving such accidental injuries in no wise negatives her allegation that they were accidental. For example, a man is found crushed and dying between the rails of a railroad track in the wake of a passing train. In the absence of any explanation of the circumstance, that his injuries were due to accidental means would be a reasonable inference. This inference, though slightly weakened, would not be negated, by the fact that "the exact time, place, and manner" of receiving the injuries were unknown.

It is also urged that the allegation that the injuries were received through accidental
1 L.R.A. (N.S.)

means is a mere conclusion. It is an elementary rule that a bare conclusion of law adds nothing to the value of a pleading, and should be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or a defense is called in question. But this rule does not extend to conclusions of fact. Such conclusions do not render a pleading vulnerable to a demurrer. Ordinarily, it is only necessary to plead the ultimate facts upon which the pleader relies. Such facts, of necessity, are conclusions drawn from intermediate and evidential facts. If the ultimate facts are not stated with sufficient certainty, the remedy is by motion. Whether the injuries were received through accidental means is purely a question of fact, and the allegation that they were thus received is a conclusion of fact, and does not fall within the rule invoked by the defendant. The court directed the jury that the question for their determination was whether the assured died as a result of an injury received while traveling as a passenger on a freight train on the Burlington & Missouri River Railroad, near the town of Brush, Colorado; and the defendant insists that the evidence is insufficient to show that the assured received any injury by accidental means at that time. The evidence shows that on the 20th day of August, 1902, the assured left his home in Denver. Two days afterward he was seen in Akron, Colorado, where, at 11:30 P. M., he boarded the caboose of a freight train on the Burlington & Missouri River Railroad. At about 1:30 the next morning, when the train was near Brush, in that state, and while it was running about 40 miles an hour, an axle on one of the freight cars broke, one end of which was driven through the car; the other struck the track, tearing up the ties for some distance. The evidence sufficiently shows that the assured was in good health when he left home, and remained in that condition to the time of the accident to the train. He was the only passenger on the train, and there is no direct testimony that he was injured by the accident. After the accident the assured was taken on the engine to Brush, and there took passage on a train for Sterling, Colorado, where he arrived about 6 o'clock the same morning. His appearance on his arrival there indicated that he was ill, and he at once sought a hotel and retired. In the afternoon a physician called to treat him, and found him in bed, apparently suffering and complaining of pains in his back. The physician continued to treat him and some two or three days after his first visit examined his back and found bruises in close connection with the lower lobe of the left lung and at or about the place where

the assured located the pain. The assured died the fourth day after his arrival at Sterling. The testimony of the attending physician is to the effect that the assured died of pneumonia or congestion of the lungs, produced by the injury indicated by the bruises, and that such injury was the primary cause of his death. From these facts it is reasonably clear, we think, that the assured up to the time of the accident was in good health, within a few hours thereafter suffering from injuries peculiarly likely to result from the accident to the train on which he was a passenger, and that within four days thereafter he died of such injuries. It is true the conductor of the freight train testified that he was in the cupola of the caboose when the accident occurred, and that the assured was lying on one of the seats, apparently asleep; that the accident caused no sudden stopping of the car, and no unusual jolt or jar, and apparently did not awaken the assured, or cause him to change his position. He also testified that as a result of the accident the engine separated from the cars, and the air brakes were immediately set. He was the only witness present with the assured on the caboose and the defendant insists that his testimony absolutely negatives the theory that the assured was injured in that accident. We do not think so. The jury were not bound to accept his testimony at its face value. He was not wholly a disinterested witness. He was conductor of the train, and, to some extent, was responsible to his employer for its proper management and the safety of his passengers. His home is in Denver and he attended as a witness at the request of his employer. As against his testimony as to the effect of the accident on the caboose is the evidence of another trainman to the effect that the caboose, under such circumstances, would stop or slacken its speed suddenly, and with a jolt or jar. Taking into account the nature of the accident, this evidence is more in accord with reason and common knowledge, and the jury had a right to accept it as true. Taking the evidence as a whole, we are satisfied that the inference drawn by the jury therefrom, that the assured died of injuries received while riding on the train at the time of the accident related, is a reasonable one. Proof amounting to a demonstration is never attainable, and never required, in cases of this kind. All that is required is to establish a reasonable probability. *Western Travelers' Acci. Asso. v. Holbrook*, 65 Neb. 474, 91 N. W. 276, 94 N. W. 816. That, in our opinion, was done in this case.

It is also insisted that the evidence is insufficient to show that such injuries, independently of all other causes, caused the

death of the assured. Whether such injuries did thus cause his death is peculiarly a question of fact. *Modern Woodman Acci. Asso. v. Shryock*, 54 Neb. 250, 39 L. R. A. 826, 74 N. W. 607; *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 560, 73 S. W. 592. It was submitted to the jury on conflicting evidence sufficient to sustain a finding either way, and under the settled rule of law the finding of the jury thereon under such circumstances is conclusive.

The cause was tried on an amended petition. In her original petition the plaintiff, instead of alleging, as in the amended petition, that the injuries causing the death of the assured occurred within three months preceding his death, and that the exact time, place, and manner of receiving such injuries were unknown to her, alleged that they occurred August 23, 1902, while he was traveling in the caboose of a freight train going from Akron to Brush, Colorado, and that by reason of the accident to the train hereinbefore related he "was violently thrown against the floor, roof, and walls of said caboose, and was thereby accidentally cut, wounded, bruised, and injured by external, violent, and accidental means," etc. The defendant insists that the amended petition amounts to an admission that the allegations in the original petition as to the time, place, and manner of receiving the injuries were untrue, and that such injuries were received at some other time and place, and in a different manner. Hence, it is argued that the notice of the accident which gave the time, place, and manner of receiving the injuries as alleged in the original petition was not notice of the accident relied upon in the amended petition. One answer to this is that, while the original petition states the facts with greater exactitude, it does not purport to give the exact time, place, and manner of receiving the injuries. If, in the amended petition, the plaintiff had averred that she was unable to give the time, place, and manner with greater exactitude, there would be some ground for holding that the allegations of one pleading or the other must be untrue. But in the amended petition she merely avers that she cannot state what she did not state in the original petition, namely, the exact time, place, and manner of receiving the injuries. The evidence shows that the defendant had due notice that the assured was injured in the accident on the train near Brush. The court limited the proof to that accident, and we are all of the opinion that the defendant's claim of a want of notice is unfounded.

It is also claimed that the evidence fails to show a waiver of proofs of death. This claim is based on the same line of reasoning as that of a want of notice, and what we have said with respect to that claim applies here. The question of waiver was duly submitted to the jury, and the finding of the jury thereon is abundantly sustained by the evidence.

The physician who attended the assured in his last sickness was permitted to testify, over the objection of the defendant, as to the nature of such illness, and other matters of a confidential nature relating thereto, intrusted to him in his professional capacity. The defendant now assigns the reception of this evidence as error. Section 333 of the Code provides that "no attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication intrusted to him in his professional capacity, necessary and proper to enable him to discharge the functions of his office, according to the usual course of practice or discipline." Section 334 provides that the prohibitions in the preceding sections do not apply where the party in whose favor they apply waives them. The secrecy enjoined upon physicians by § 333, *supra*, is for the protection of the patient, and from the provisions of § 334 it is quite clear that when the patient is willing to waive that protection, and to permit a disclosure of the secrets of the sickroom, he may do so. It has been held that the patient may waive the protection of the statute, even though there is no provision for such waiver. *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173. It is not necessary that such waiver should be made at the time the testimony is offered, but it may be made a part of a contract, and is available in an action brought to enforce such contract. *Adreveno v. Mutual Reserve Fund Life Asso.* 34 Fed. 870, was an action to recover the amount due on a benefit certificate. In the contract of insurance the assured in express terms had waived the benefit of provisions of a statute in Missouri similar to § 333, *supra*. In passing on the effect of such waiver, the court said: "The statute is construed in this state as conferring a privilege, merely, that may be waived. It is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of

Cahen v. Continental L. Ins. Co. 9 Jones & S. 296; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 3 N. W. 173. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on anyone who claims under the contract, whether it be the patient himself or his representative." This case was followed in *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456. See also *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 77, 6 L. R. A. 765, 23 N. E. 35; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52. In *Re Coleman*, 111 N. Y. 220, 19 N. E. 71, an attorney of the testator, who had signed the attestation clause of the will as a witness, was called as a witness, and his testimony was objected to on the ground that it was prohibited by a statute similar to the one under consideration. The court said: "The act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove." In the present case the constitution of the association expressly requires the affidavit of the attending physician as a part of the proofs of death, and that such affidavit shall state the cause of death, and such information as may be required by the association. This provision was a part of the contract of insurance, and was assented to by the assured when he became a member of the association and accepted his certificate of membership. By assenting to those provisions, it seems to us the assured clearly and unequivocally waived the benefits of § 333, *supra*, and agreed that the attending physician should be permitted to disclose the cause of death and such other facts and circumstances as might be disclosed to him in his professional capacity while in attendance on the assured in his last sickness. In other words, he expressly stipulated that the secrecy enjoined by § 333 upon his attending physician should not be observed. The proper treatment of a patient often involves an intimate knowledge on the part of his physician of facts of a delicate nature, and which the patient would object to having disclosed to third persons. The common law protects the patient against the volun-

tary disclosure of such facts, and the statute protects him against their involuntary disclosure by his physician. But where the patient himself not only consents, but expressly stipulates, that such disclosures be made in order to give force and effect to his contract, it would be a harsh and unwarranted application of a salutary rule to hold that the plaintiff could not avail herself of such stipulation for the enforcement of the contract made for her benefit. The case in principle is much like the Coleman Case, *supra*, and, in our opinion, the testimony of the attending physician was properly received. See also *McKinney v. Grand Street, P. P. & F. R. Co.* 104 N. Y. 352, 10 N. E. 544.

It is further claimed that the plaintiff in this case was permitted to testify to communications made to her by her husband in his last sickness, contrary to the provisions of § 332 of the Code. It is conceded by both sides that the assured died of congestion of the lungs, or pneumonia; the only controversy on this point being whether it was brought on by external injuries received through accidental means or otherwise. The testimony of the plaintiff, the reception of which is now criticised, simply detailed the complaints of suffering made by the assured on his deathbed. The ground had been substantially covered by the testimony of the attending physician, whose evidence as to these particulars is uncontradicted. The complaints and symptoms described were such as would be the natural concomitants of congestion of the lungs, or pneumonia, whether the disease was brought on by the accident alleged or otherwise. The reception of this evidence, if erroneous, would seem to be error without prejudice.

Another error assigned is that the court permitted a witness to testify, over objection, that when he entered the sickroom of the assured the assured said: "I am badly shaken up. No bones broken, old fellow; and it might have been worse." The testimony was given in response to the following question, "State now the words that he used in expressing his then condition." This was objected to as incompetent, calling for hearsay, and for matter no part of the *res gestæ*. The court then instructed the witness as follows: "Give his words that he used at that time about the condition you found him in,—as to his condition at that time." The attorney for the defendant added, "And not what caused it. Is that correct?" The court then said, "Must give his words as to his condition." The witness then answered by giving the words of the assured as above quoted. We do not think that there was any error in the reception of this evidence. It was not offered as part 1 L.R.A. (N.S.)

of the *res gestæ*, but as a statement of the assured of his then physical condition. This statement was made a few hours after his arrival at the hotel in Sterling. The statement was not an inapt description of his then bodily condition, although somewhat figurative. The rule is well settled that statements of fact fairly indicative of a relevant bodily condition of a declarant at the time of the declaration will be received as circumstantial evidence of the existence of that condition, although made a considerable time after the injury was received. *Bacon v. Charlton*, 7 Cush. 581; *Bredlau v. York*, 115 Wis. 554, 92 N. W. 261; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724, 22 N. E. 635, 24 N. E. 208.

The defendant complains of an instruction of the court, hereinbefore referred to, relating to the time and manner of receiving the injury alleged as the cause of the death of the assured. The argument on this point proceeds on the theory heretofore noticed, that the plaintiff, by filing an amended petition, had abandoned the claim that the assured came to his death as a result of an injury received on the railroad train near Brush. We have already noticed that theory in a former part of this opinion, and what is there said we think disposes of the criticism of this instruction.

The defendant complains of another instruction of the court, given at the request of the plaintiff, wherein the question whether the assured at the time of receiving the injury alleged was free from actually existing disease and bodily infirmity which might naturally produce death, was submitted to the jury, on the ground that the evidence is conclusive that the deceased at the time of the alleged accident was affected with bodily infirmity in the form of pleural adhesions of the lungs and curvature of the spine. Whether, at the time of receiving such injuries, the assured was suffering from the bodily infirmities just enumerated, is one of the questions embodied in an instruction which the defendant itself tendered. By tendering that instruction it impliedly asked the court to submit that question to the jury, and it cannot now be heard to complain of its submission.

The defendant complains of some of the special findings, but, as the judgment was rendered on the general verdict, we do not think the discussion of the special findings at this time will be productive of any good.

The petition in error contains 212 assignments, some of which were abandoned on argument. Not all of those argued have been specifically noticed in this opinion, but we think the points involved therein are covered by what has already been said. In our

opinion, the record contains no 'reversible error.

We therefore recommend that the judgment of the District Court be affirmed.

Duffie and Jackson, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

YAKIMA VALLEY BANK, Appt.,
v.

CHARLES McALLISTER.

(37 Wash. 566.)

1. Negotiable paper—securing indorsement by trick.

No liability attaches to one whose indorsement is secured upon a note by the trick of inducing him to sign his name to a paper placed upon the note in such a way that the ink penetrates through to the note without his knowledge and intent.

2. Evidence—of other frauds.

Upon the question of fraud in securing an indorsement upon a note by means of a

trick, evidence is admissible that the same trick was employed by the same persons to secure the signatures of other persons, the effect of which is to show a general scheme to perpetrate this particular fraud upon the people of the neighborhood at the same time, to effect a common purpose.

3. Note—action on—burden of proof.

Where the signature to a note upon which suit is brought is denied in the answer, evidence to prove its genuineness is part of the plaintiff's case in chief, and cannot be brought forward in rebuttal.

(March 23, 1905.)

APPEAL by plaintiff from a judgment of the Superior Court for Yakima County in favor of defendant in an action brought to enforce payment of a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Snyder & Preble, for appellant:

The answer, in legal effect, admits the execution of the note, and, at most, only tenders issues as to its validity.

Dinsmore v. Stimbirt, 12 Neb. 433, 11 N. W. 872; Henry v. Hinman, 21 Minn. 378.

The facts upon which the charge of *mala fides* is based must be distinctly set forth, so that plaintiff may know the charges he is to meet.

14 Enc. Pl. & Pr. p. 680.

Case Note.—It would seem that the securing of a signature to a paper by the trick of having the ink strike through another was little more than forgery. Although the great weight of authority, as shown by a note to Green v. Wilkie, 36 L. R. A. 434, is to the effect that fraud in the procuring of a note, or the signature of it, which secures the assent of the signer so that it is his voluntary act, will not avoid the note in the hands of a bona fide holder. On the contrary, if the signature is without the assent of the owner to the act which he actually performs, or if it is secured under circumstances which make it practically a forgery, no liability attaches. Thus, in Detwiler v. Bish, 44 Ind. 70, and Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675, it was held that, where the signature was secured by representing that the paper was of a different character, no liability attached; and in Farmers' & M. Bank v. Butler, 48 Mich. 192, 12 N. W. 36, the latter case was explained by saying that the paper was no more the maker's than if his signature had been forged to it. If the paper is signed under the supposition that it is an agency contract, no liability attaches. Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Kagel v. Totten, 59 Md. 447; so, if the name is placed on a blank piece of paper for some innocent purpose, no liability will attach if a promissory note is written above it. Cline 1 L.R.A. (N.S.)

v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236. But the liability will not be avoided if the signature was placed upon the paper for the purpose of having some instrument written over it, since, under those circumstances, the loss should fall on the one whose agent caused it. Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353, 24 Atl. 864.

In Nebeker v. Cutsinger, 48 Ind. 436, a special emphasis is placed upon the fact that the maker was ignorant of the character of the note, and had no intention of signing such an instrument; and the same is true of Dupuy v. Schuyler, 45 Ill. 306, and People's State Bank v. Ruxer, 31 Ind. App. 245, 67 N. W. 542. The same is true of the leading case of Foster v. Mackinnon, L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Week. Rep. 1105.

There are a few cases, however, which hold that, if the signature was actually affixed by the maker with the intention of signing some kind of a paper, the mere fact that he was defrauded as to what he was actually signing would be no defense to a note in the hands of a bona fide holder. First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506; Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; Battles v. Laudenslager, 84 Pa. 446; Loomis v. Metcalf, 30 Iowa, 382.

The cases, holding that, upon an issue of fraud, other similar frauds may be proved, limit such proof to the issues of *scienter*, purposes, motives, intent, or other mental state of the persons accused of fraud.

McKay v. Russell, 3 Wash. 378, 28 Am. St. Rep. 44, 28 Pac. 908; Johnson v. Gulick, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883; Parker v. Armstrong, 55 Mich. 176, 20 N. W. 892; Monitor Plow Works v. Born, 33 Neb. 747, 51 N. W. 129; Berghoff v. State, 25 Neb. 213, 41 N. W. 136; Com. v. Jackson, 132 Mass. 16, 44 Am. Rep. 299, note.

The admission of the testimony as to the collateral transactions with Pugsley and Place was prejudicial to plaintiff.

Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731.

It is negligence *per se* for a man, intending to sign some paper, to sign a negotiable instrument without knowing it.

1 Dan. Neg. Inst. 4th ed. § 850; First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506; Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; Mackey v. Peterson, 29 Minn. 298, 43 Am. Rep. 211, 13 N. W. 132.

The issuing of said negotiable draft was sufficient consideration to make plaintiff a bona fide holder for value.

1 Dan. Neg. Inst. 4th ed. § 187; Adams v. Soule, 33 Vt. 538; 1 Edwards, Bills & Notes, 322.

The note was fair upon its face; if defendant relied upon fraud to support his contention that he did not execute it, it was necessary for him to allege the circumstance of such fraud, and to confine his proof to his allegations.

West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Hazard v. Griswold, 21 Fed. 178; Cummings v. Thompson, 18 Minn. 246, Gil. 228.

Dunbar, J., delivered the opinion of the court:

This action was brought by the Yakima Valley Bank, a corporation, against the respondent, upon a promissory note for \$790.20, dated November 20, 1902, signed on the face thereof by the defendant, Charles McAllister, payable to the order of said Charles McAllister, and purporting to bear his indorsement upon the back thereof. The complaint is the ordinary complaint for recovery upon a negotiable promissory note; alleges execution and delivery of the note by defendant to one J. B. Pugsley, and the transfer before maturity to plaintiff, for a valuable consideration, in the ordinary course of business. The answer denies the execution of the note, and alleges, by way of affirmative defense, that the note was without consideration, in that it was

signed on the face thereof by the said defendant in the sum of \$790.20, the amount of the annual premium upon a \$10,000 life insurance policy upon defendant's life, which said Pugsley and one E. R. Place, associated with Pugsley in business, agreed to thereafter deliver to defendant, upon the express understanding between defendant and said Pugsley and Place that the note was not to be binding, and was to be returned to defendant, if, upon an examination of the said policy, defendant would not accept the same, and that defendant did not accept said policy; that the defendant did not intend to sign his name upon the back of said note, but that, as a part of said transaction with Pugsley and Place, he signed his name to a contract releasing the insurance company from liability in case of his death while said policy was in his custody for inspection, and before he had accepted it; and that, in signing said contract, his signature penetrated through the paper upon which said contract was written, and appeared as an indorsement on said note. This is the substance of the answer. The answer, however, also alleged that the plaintiff had notice of the infirmity of the note before he paid for the same. This was denied by the reply of the plaintiff. Upon these allegations the case went to trial. The testimony of the defendant was to the effect that Pugsley and Place solicited him to take insurance in the Home Mutual Life Insurance Society of New York city, and that he agreed to take a policy for \$10,000 on the condition that, when he had examined the policy and had submitted it to his legal advisers, it corresponded with the representations made by the solicitors, and that he was to have until the 1st day of January to determine, the application being made upon the 20th of November, 1902; that the solicitors or agents of the company represented to him that it would be necessary for him to draw up a note payable to himself, and signed by himself, as an earnest of his intention to do business with the company, and that it was also necessary for him to sign a contract releasing the company from liability to him in case he should die before the final consummation of the contract, they representing to him that the note could not be collected from him without an indorsement, and that he would be safe in giving them the note; that the transaction occurred in the corral of a farm in Yakima county; that he was instructed to sign the application and the release, and that he did so; that a book with several papers upon it, placed there with the ostensible purpose of making it smooth, was handed him to write upon, and a fountain pen furnished by the agents, with the instruction to bear

on hard, as the pen was stiff; that he was afterwards informed by the bank, the plaintiff, that they had purchased a note signed by him in the sum of \$790.20 in favor of himself, and indorsed by him on the back thereof. This indorsement he denied having made; his theory being that, by the fraudulent manipulation of the solicitors, the ink had been transmitted through the agreement which he signed onto the back of the note which had been placed there for the purpose of receiving the signature, and that he knew nothing about the note having been indorsed until he was notified by the bank; admitting that the signature was his, or very much like his, and alleging that it was a trick and a fraud; insisting that the signature had been obtained through the perpetration upon him of a trick and a fraud, and that it was not in fact his signature. Judgment was rendered in favor of the defendant.

A demurrer was interposed to the affirmative answers of the defendant, which was overruled, and the action of the court in overruling the demurrer is the first error assigned; the appellant contending that the allegations of fraud do not amount to a denial that the defendant indorsed the note; that the answer, in legal effect, admits the execution of the note, and, at most, only tenders issue as to its validity; that the charges of *mala fides* are not distinctly set forth, so that plaintiff may know the charges he has to meet; and that, if the note was indorsed through the physical act of the defendant, he is responsible for the payment of the note, and for the results of that physical act, to an innocent purchaser. This we think is not the law under any authority. It is not the physical act which constitutes a transaction of this kind, but it is the intention of the parties to the contract. It is true that, if a party by any negligent act is the cause of an investment made by an innocent person on the strength and credit of that act, he cannot escape liability; but, if the matters set forth in the answer are true, there was no action on the part of the defendant at all, so far as indorsing the note was concerned. The indorsement was the effect of a fraudulent device and trick, which the defendant was in no way responsible for.

Several succeeding assignments are based upon the action of the court in admitting, over the objection of the appellant, the testimony of numerous witnesses to the effect that Pugsley and Place had perpetrated, in the judgment of the witnesses, the same fraud upon them, in like transactions. It was testified by witnesses O'Neil, Purdin, Kandle, and Chamberlain that, during the same month in which this transaction with

respondent occurred, these solicitors had obtained their indorsement of notes in the same manner and under the same circumstances which were related on the witness stand by the respondent; and it is noticeable that there was a similarity of methods in each instance. The business was not transacted as it ordinarily is, in a house or upon a table, but the plan was to obtain these signatures out of doors, by the buggy in which these men traveled; and in each instance, with one exception, the signatures were written upon a pocketbook with documents and papers on top of it, under circumstances that would not be as liable to challenge the attention of the parties signing as would the interposition of the note under the agreement signed upon a table. In each instance these parties swore that they did not indorse the note which they had made out to themselves, and knew nothing about their having executed such a note until notice came to them to that effect from the bank, and that they had paid the notes rather than to risk a lawsuit with the company; in many instances the notes being small. It is insisted by the appellant that this testimony was inadmissible, and reliance is placed upon the case of McKay v. Russell, 3 Wash. 378, 28 Am. St. Rep. 44, 28 Pac. 908; and it might appear at first blush that that case was in point, in favor of appellant's contention. In that case, which was an action to recover money paid upon a contract for the sale of real estate on the ground that the sale was procured by fraudulent representations, it was held that it was inadmissible to show that, in a similar transaction prior thereto, defendants had made like misrepresentations to another party. But an examination of that case fails to show that there was any testimony offered that would show a general scheme connecting the transaction which it was sought to prove with the transaction which was in issue in the case. It is, no doubt, true, as a general proposition, that testimony tending to show that a person has committed another crime is not admissible for the purpose of showing the probability of his commission of the crime charged. But it is equally true that it is competent to show a general scheme to defraud, so connected with the case under consideration by time and circumstances that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proved. This court held in Oudin v. Crossman, 15 Wash. 519, 46 Pac. 1047, that, in an action to recover a sum of money which plaintiff had been induced to pay for the purchase of a mine in reliance upon false representations of the defendants, evidence

was admissible, showing that the defendants had made representations to other parties than plaintiff, and to people in the vicinity generally, regarding the existence and character of the mine and the value of its ores; such representations being part of one continuous scheme or transaction for the purpose of selling the mine to anyone that could be induced to buy. And so, in this case, the testimony, if true, showed conclusively a general scheme to perpetrate this particular kind of a fraud upon the people of a certain neighborhood at the same time for the purpose of selling them insurance policies. The rule is thus clearly announced in 14 Am. & Eng. Enc. Law, 2d ed. pp. 196, 197: "A charge of fraud in a particular transaction cannot be proved by evidence of other and independent frauds of the party charged, though in a similar transaction, unless it appears that there is such a connection between the transactions as to authorize the inference that the frauds are both parts of a general scheme or purpose to defraud. . . . If the other fraud as to which evidence is offered is similar in character to the fraud alleged, and so connected with the transaction under investigation in point of time and otherwise as to reasonably authorize the inference that both frauds were in pursuance of a general scheme or purpose to defraud in such cases, the evidence is admissible. This is well settled, as a general rule, though in its application there is not entire unanimity in the cases. The chief reason for admitting evidence of other frauds in such a case is that, where transactions of a similar character by the same party are closely connected in time, the inference is reasonable that they proceed from the same motive." The Supreme Court of the United States has spoken plainly on this proposition in *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877. Suit was brought by an assignee of a policy of life insurance, obtained on the application of the assured at the instigation of the assignee, to recover of the insurers, after the death of the assured; and the defendants set up that it was plaintiff's purpose, in procuring the insurance to be obtained, to cheat and defraud defendants, and offered to show that he effected insurances upon the life of the assured in other companies at or about the same time for the like fraudulent purpose; and it was held that the testimony was admissible. In the course of the opinion, it is said: "A repetition of acts of the same character naturally indicates the same purpose in all of them; and if, when considered together, they cannot be reasonably

explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act;" citing *Butler v. Watkins*, 13 Wall. 456, 20 L. ed. 629, where it was said: "In actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that, in pursuing that line, a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another at or about the same time, and in relation to a like subject, was actuated by the same spirit." This case also cites many cases in support of this view of the law. We think that, while it is difficult to apply the rule to varying circumstances, the circumstances surrounding these transactions, as shown by the testimony, bring the case squarely within the rule that testimony tending to show a general scheme to perpetrate a fraud is admissible.

But even if the admission of this testimony had constituted reversible error, it was cured by the instructions of the court, which we think were more favorable to the appellant than they should have been. After the conclusion of the testimony, the court, evidently taking the view of the law that this testimony could not be admitted as against a bona fide purchaser of the note, instructed the jury as follows: "This case has been tried upon two theories, and evidence has been received here by the court in support of each theory. Part of the testimony received here, in the opinion of the court, is entirely competent in support of one of these theories, but it is incompetent in support of the other theory. These two theories are these: First, that the plaintiff in this action was a bona fide holder of the promissory note in suit; and, second, that the plaintiff was not a bona fide holder of the promissory note in suit." Then the court proceeds to state what a bona fide holder is, and says: "Under the admitted facts in this case, I charge you, as a matter of law, that the plaintiff in this action is a bona fide holder of the note in suit." Continuing, the court says: "Certain testimony was received here tending to show that other notes were received by these parties by the same means. In the opinion of the court, this testimony was competent, as tending to show that the note was obtained by fraud and without consideration. But these questions of fraud and failure of consideration the court now withdraws from you, and I charge you, as a matter of law, that you cannot consider in this trial the testimony relating to the other acts, if any, committed in this case. In other words,

proof tending to show other forgeries, or tending to show the obtaining of other notes under like circumstances, is not competent as to whether this note was or was not indorsed, and you cannot consider it in that light. The only question that I will submit to you, as I have stated, is the one in answer to the question as to whether this defendant indorsed his name on the back of this note." It is alleged that the court erred in that part of the instruction quoted above, viz.: "In the opinion of the court this testimony was competent as tending to show that the note was obtained by fraud and without consideration." But a glance at the instructions in the record shows that the court withdrew this testimony from the consideration of the jury by withdrawing from their consideration the question of fraud and failure of consideration as affecting a bona fide holder. We will not specially review the alleged errors in refusing to instruct, for we think the instructions of the court, as given, covered the whole case, and were favorable to appellant. Nor did the court err in refusing to admit the so-called expert testimony in relation to the genuineness of the signature. The signature had been denied by the answer, and the burden, under such circumstances, was upon the plaintiff, in his case in chief, to prove the signature; and, being offered only in rebuttal, it was not competent. Nor do we think that the somewhat heated expressions of counsel in the argument of the case would justify a reversal of the judgment.

No discernible error appearing in the record, the judgment is affirmed.

Mount, Ch. J., and Hadley and Fullerton, JJ., concur.

ILLINOIS SUPREME COURT.

PAUL SCHAEFFI, Appt.,
v.

GEORGE BARTHOLOMAE.

(217 Ill. 105.)

1. Mortgage—foreclosure—rights of purchaser.

A purchaser at foreclosure sale under a mortgage of real estate is entitled to the

Case Note.—The right of a purchaser on foreclosure to rents or income during the receivership, and before the purchaser's title is perfected, depends in each case on the particular statute involved. Under the Illinois statute the courts have consistently maintained the position taken in *SCHAEFFI v. BARTHOLOMAE*, that the purchaser 1 L.R.A. (N.S.)

rights conferred by the decree of foreclosure, and cannot claim additional rights under the provisions of the mortgage.

2. Same—right to income.

A provision in a mortgage that, in case of foreclosure, a receiver shall be appointed to collect the income, which shall be paid to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money, in case the property is redeemed, does not, even in the absence of redemption, entitle a purchaser at foreclosure sale to the income of the property before the title becomes perfect in him.

(October 24, 1905.)

APPEAL by complainant from a judgment of the Appellate Court, First District, affirming an order of the Superior Court for Cook County, distributing the proceeds of the foreclosure sale of certain real estate among the holders of various trust deeds thereon. Reversed.

Statement by Hand, J.:

The appellant filed a bill in chancery in the superior court of Cook county to foreclose a trust deed in the nature of a mortgage upon premises situated in said county, known as Nos. 870 and 872 West North avenue, Chicago. John H. Glade filed a cross bill to foreclose a trust deed held by him upon No. 870 West North avenue, and Phillip Bartholomae filed a cross bill to foreclose a trust deed held by him upon No. 872 West North avenue. It was held by the court that the trust deeds of Glade and Bartholomae, respectively, were superior liens to that of the appellant, and a decree of foreclosure and sale was entered, directing that said premises be sold by a master, and that he first pay the Glade trust deed from the amount received from the sale of the premises covered thereby, and apply the overplus, if any, upon the trust deed of appellant, and that he first pay the Bartholomae trust deed from the amount realized upon the sale of the premises covered thereby, and that he apply the overplus, if any, upon the trust deed of appellant. On May 3, 1902, the premises covered by the Glade trust deed were sold to Glade, and the premises covered by the Bartholomae trust deed were sold to the executor of Bartholomae. On the 14th day of the same month the master reported the sales, and that there

has no right, as against the mortgagor or owner of the equity of redemption, to any amount that may remain in the receiver's hands after payment of the deficiency, if any, due on the mortgage. *Stevens v. Hadfield*, 178 Ill. 532, 52 N. E. 875, in addition to cases cited in *SCHAEFFI v. BARTHOLOMAE* in support of its holding.

was a deficiency remaining unpaid on the Glade trust deed of \$1,006.38 and on the Bartholomae trust deed of \$540.92, for which amounts deficiency decrees were rendered. After the filing of the original and cross bills, a receiver was appointed, who took possession of the premises and remained in possession until the time of redemption had expired and deeds were made. On the 6th of August, 1903, the receiver filed a report, in which he showed he had collected rent to the amount of \$855.14 on No. 870 West North avenue, which he had paid to Glade to apply upon the deficiency decree rendered in his favor, and had collected rent to the amount of \$726.90 on No. 872 West North avenue; that he had paid to Henry Bartholomae, Jr., executor of Phillip Bartholomae, the sum of \$574.07 in full of the deficiency decree, including interest, rendered upon the Bartholomae

trust deed, and that he had paid to the appellant, to apply upon the decree in his favor, the sum of \$152.23. The certificate of purchase upon the Bartholomae trust deed had been assigned by the executor to George Bartholomae, and he had received a master's deed conveying to him No. 872 West North avenue. George Bartholomae filed objections to the approval of the receiver's report, and took the position that he, as the owner of No. 872 West North avenue, was entitled to be paid by the receiver said sum of \$726.90, by virtue of the following provision found in the Bartholomae trust deed: "The grantors waive all rights to the possession of and income from the said premises pending such foreclosure proceedings and until the period of redemption from any sale thereunder expires, and agree that a receiver shall be appointed to take possession or charge of said

And the fact that the owner of the mortgage becomes the purchaser does not entitle the mortgagor, as against the owner of the equity of redemption, to have the receiver continued during the period allowed for redemption, to enable him to collect out of the rents and profits the overdue interest and costs which he had agreed to pay to the mortgagee, in consideration of which she had bid the full amount of the mortgage, interest, and costs. *Bogardus v. Moses*, 181 Ill. 554, 54 N. E. 984.

The Indiana statute of 1861 provided that the judgment debtor should be entitled to the possession of the premises for one year after the sale, and that in case they were not redeemed at the end of the year he should be liable to the purchaser for their reasonable rents and profits. Under this statute the court held that where the mortgage and the foreclosure decree both provided that the mortgagee might apply the rents and profits to payment of costs and insurance, such mortgagee, who became the purchaser on foreclosure, was entitled to have a receiver appointed to collect the rents during the year of redemption, and apply them on such costs and insurance until they were paid. *Chase v. Ball*, 79 Ind. 311. And the purchaser on foreclosure was held entitled to have a receiver appointed to collect the rents and hold them until the end of the period of redemption, and then pay them to him if the premises had not been redeemed, where it was shown that the tenant had contracted to pay the rents to the mortgagor, and that the latter was insolvent and could not redeem. *Connelly v. Dickson*, 76 Ind. 443. But notwithstanding the insolvency of the mortgagor, one to whom he assigned the rents during the year of redemption, in payment of a just debt, was not liable therefor to the purchaser on foreclosure, where no receiver for such rents had been asked for or appointed. *Ridgeway v. First Nat. Bank*, 78 Ind. 119.

In 1881 the statute was changed so as to provide that the owner of the real estate

should be entitled to the possession of the same for one year from the date of the sale. Under this statute a mortgagee to whom the premises were sold on foreclosure for the full amount of the judgment, interest, and costs was not entitled to the rents and profits during the year for redemption, although a receiver had been appointed on his application without objection by the mortgagor. *World Bldg. Loan, & Invest. Co. v. Marlin*, 151 Ind. 630, 52 N. E. 198. But where the mortgaged lands are inadequate to secure the debt, and the debtor is insolvent, the mortgagee, who becomes the purchaser on foreclosure, may have a receiver appointed to receive the rents and profits during the period for redemption, to be paid to him if the mortgagor does not redeem, and to the latter if he does. *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277, 27 N. E. 136. And the fact that the mortgagee, who purchased on foreclosure for less than the amount of the judgment, did not obtain a personal judgment against the owner of the land, who had purchased it from the mortgagor, did not affect the mortgagee's right to the rent of the land during the redemption period.

The assignee of a mortgage on an interest in a mining claim, who becomes the purchaser on foreclosure, is entitled, under the law of California, to have a receiver appointed to receive his share of the profits from the working of the mine during the period for redemption, where it is shown that the mortgagor is insolvent, and that the claim will be worked out and become useless before the expiration of such period. *Hill v. Taylor*, 22 Cal. 191.

But in *Cowen v. Arnold*, 58 Hun. 437, 12 N. Y. Supp. 601, the purchaser on foreclosure made no claim to rent in a receiver's hands accruing between the time of purchase and the delivery of the deed, his only claim being that he was entitled to that portion of the month's rent, paid in advance, accruing after the delivery of the deed.

premises and collect such income, and the same, less receivership expenses, pay to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money, if said premises be redeemed," which provision was set out in full in the decree of foreclosure and sale; and Henry Bartholomae, Jr., upon the hearing of objections to the master's report, by his solicitor in open court waived any right to the said sum of \$726.90, or any part thereof, as executor of Phillip Bartholomae, deceased, and averred the same belonged to the said George Bartholomae, as the owner of No. 872 West North avenue, under the provisions of the Bartholomae trust deed. It also appeared that, although the report recited payment to said executor of said sum of \$574.87, the executor had not received said sum, but that the same had been tendered to him by the receiver. The superior court sustained the objections of George Bartholomae to the receiver's report, and ordered the receiver to pay said sum of \$726.90 to George Bartholomae as the person entitled to receive the same under and by virtue of the provisions with reference to rent contained in the Bartholomae trust deed. Paul Schaeppi prosecuted an appeal from the order of the superior court sustaining exceptions to said receiver's report to the appellate court for the first district, where the order of the superior court was affirmed; and, a certificate of importance having been granted, he has prosecuted a further appeal to this court.

Messrs. Fred H. Atwood, Frank B. Pease, William S. Corbin, Charles O. Loucks, and Edward C. Nichols, for appellant:

When the entire indebtedness secured by the first trust deed was paid in full, the receiver had no further relation with its owner, and the money on hand belonged to the holder of the second trust deed.

Davis v. Dale, 150 Ill. 243, 37 N. E. 215.

The decree extinguished the mortgage lien.

Bogardus v. Moses, 181 Ill. 559, 54 N. E. 984; Lightcap v. Bradley, 186 Ill. 526, 58 N. E. 221; Davis v. Dale, 150 Ill. 230, 37 N. E. 215; Ogle v. Koerner, 140 Ill. 170, 29 N. E. 563; Seligman v. Laubheimer, 58 Ill. 124; Haigh v. Carroll, 209 Ill. 576, 71 N. E. 317.

The purchaser at the master's sale acquired no equities under the Phillip Bartholomae trust deed that would entitle him to the income, rents, and profits of said premises during the period of redemption.

Davis v. Dale, Ogle v. Koerner, Seligman v. Laubheimer, and Haigh v. Carroll, *supra*; 23 Am. & Eng. Enc. Law, p. 1030; United States L. Ins. Co. v. Ettinger, 32 Misc. 378, 66 N. Y. Supp. 1; Degener v. 1 L.R.A. (N.S.)

Stiles, 2 Silv. Sup. Ct. 30, 6 N. Y. Supp. 474; Brick v. Hornbeck, 19 Misc. 218, 43 N. Y. 301.

Mr. William W. Case, for appellee:

The rents to accrue from a man's land are property, which he has a right to dispose of like other property.

Chase v. Ball, 79 Ind. 311; Travellers Ins. Co. v. Brouse, 83 Ind. 62.

The right of a mortgagee to enforce his mortgage according to its terms is a thing of value, which cannot be taken away even by the legislature.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; Greenfield v. Dorris, 1 Sneed, 548.

Hand, J., delivered the opinion of the court:

The appellant, Paul Schaeppi, has assigned as error, and Emil R. Haase, the receiver, has assigned as cross error, the action of the superior and appellate courts in refusing to approve said receiver's report, and the only question discussed in this court is the legality of the order of the superior court directing the receiver to pay said sum of \$152.23 to George Bartholomae, instead of to appellant, Schaeppi.

The sole objects of the several trust deeds sought to be foreclosed in this proceeding were to secure the payment of the several sums of money mentioned therein, and, in case of foreclosure and sale, during the time of redemption the grantor in the trust deeds was entitled to the possession of the premises and to receive the rents, issues, and profits thereof. If, however, the premises were inadequate security, the person liable to pay the indebtedness insolvent, the person in possession of the premises committing waste, or other equitable grounds were shown, and any part of the decree of foreclosure was not satisfied by the sale, the court in which the foreclosure suit was pending might, through a receiver, and not otherwise, appropriate the rents, issues, and profits arising from the premises during the period of redemption for the purpose of paying the portion of the indebtedness which was not satisfied by a sale of the premises. The result of the foreclosure proceedings was to merge said trust deeds into the decree, and the purchaser at the foreclosure sale held under the decree, and not under the trust deeds, and after a sale such purchaser was entitled only to such rights as were conferred upon him by the statute, which were (1) a right to a certificate of purchase; (2) a right to a deed of the premises at the expiration of fifteen months

from the date of sale, in case no redemption of the premises was made; and (3) in case of redemption, to receive back the purchase money, with interest, and any taxes he had paid upon the property during the period of redemption.

It is urged, however, that by virtue of the provision found in the Bartholomae trust deed the person entitled to a deed under the foreclosure sale, in case no redemption took place, was expressly granted the rents during the period of redemption, and that, no redemption having taken place and a deed having been made to George Bartholomae, he was entitled to the rents arising from said premises during the period of redemption. We cannot accede to this contention. The provision with reference to rent, found in the trust deed, was a covenant between the grantor in the deed and the *cestui que trust*, and prior to the foreclosure sale was merged in the decree of foreclosure (Davis v. Dale, 150 Ill. 239, 37 N. E. 215; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; Haigh v. Carroll, 209 Ill. 576, 71 N. E. 317); and the purchaser at said sale took title under the decree, and he can claim no right by virtue of said provision found in the trust deed with reference to rent. In Davis v. Dale, *supra*, the trust deed provided that the grantors should pay the taxes and assessments levied upon the property described in the trust deed, and should not suffer the premises, or any part thereof, to be sold or forfeited for any tax or assessment, and that, upon default in the performance of any of the covenants of the trust deed, the trustee, or any person appointed by the court, might take possession of the premises, collect the rents, issues, and profits, and apply the same toward the payment of taxes, etc. A bill was filed to foreclose the trust deed, and a decree of foreclosure and sale was made, and the premises were sold by the master to the complainant for the full amount of the decree. A receiver had been appointed upon the filing of the bill, who remained in possession of the premises during the period of redemption, and, upon his final report coming in, he was ordered by the court to pay the taxes upon said premises which had accrued during the period of redemption, under the provisions of said trust deed, out of the rent in his hands which had been earned during that period. That decree, upon appeal to the appellate court for the first district, was reversed and upon a further appeal to this court the judgment of the appellate court was affirmed; and it was held that the only object of the appointment of the receiver was to preserve the security and to collect and apply the rents and profits to the payment of the

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indebtedness secured by the trust deed, and that, the indebtedness having been satisfied by a sale of the premises, there was no occasion for the continuance of the receivership; but, as the grantor was entitled to the rents and profits arising from the premises during the period of redemption, the receiver would be treated as having been in possession of the premises for his benefit. It was, however, urged that the complainant, who was the purchaser at the foreclosure sale, was entitled to have the taxes which had accrued during the period of redemption paid out of the rents earned during that period by virtue of the provisions of the trust deed. In reply to that contention the court (on page 243 of 150 Ill., page 216 of 37 N. E.) said: "The contention of counsel for appellant that in some way the purchaser at the master's sale acquired equities, under the clauses and covenants of the trust deed, for the payment of taxes by the grantor, is equally untenable. By virtue of the lien created the mortgagee or *cestui que trust* had the right to have the security foreclosed, and the property sold, and the proceeds applied in payment of the secured debt. But when this has been done, and the lien enforced by a sale of the property, and the proceeds applied, the mortgage or trust deed has expended its force and the property is no longer subject to its provisions. Ogle v. Koerner, 140 Ill. 170, 29 N. E. 563; Seligman v. Laubheimer, 58 Ill. 124. Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust* or not. By becoming the purchaser a new relation created by the statute exists, in no wise dependent upon any privity of contract between the purchaser and mortgagor." In Lightcap v. Bradley, *supra*, the court held that, upon the foreclosure of a trust deed in the nature of a mortgage, all the rights and liabilities growing out of the trust deed are merged in the decree, and that upon a sale of the premises under the decree the only interests of the purchaser at the sale are those rights which are evidenced by the certificate of purchase. In Haigh v. Carroll, *supra*, a trust deed was foreclosed upon a leasehold interest. One of the complainants purchased the premises at the foreclosure sale for the entire amount of the decree. A receiver had been appointed, who remained in possession of the premises during the period of redemption. He paid out of the rents collected by him from the property something like \$7,000 for ground rent, taxes, insurance, etc. The trust deed provided that any rents that might be collected, less a commission of 5 per cent for

collecting, after the foreclosure sale and before the time of redemption had expired, should be paid to the purchaser of the premises at the foreclosure sale. On a contest over the approval of the master's report it was held that, notwithstanding said provisions in the trust deed, the rents did not pass to the purchaser at the foreclosure sale, but that they belonged to the owner of the equity of redemption; that all the complainants were entitled to was to have their debt paid; and that all the purchaser was entitled to were such rights as he acquired by the certificate issued to him upon the sale.

It could there have been urged, as it is urged here, that by virtue of the provisions of the trust deed the purchaser should receive the rents during the period of redemption, as he must be held to have bid more for the premises than he would have bid but for such provision, and that he should be protected in his bid by being decreed the rents collected during the period of redemption. It is, however, clear that whatever rights the purchaser obtained at the foreclosure sale were represented by the certificate of purchase, and that the rents did not pass to him by virtue of said certificate; that his rights as such purchaser were created by the statute, and were in no wise affected by the provisions of the trust deed, which were merged in the decree of foreclosure. In the Haigh Case (on page 581 of 209 Ill., page 319 of 71 N. E.) it was said: "Reliance is placed upon that provision of the trust deed to the effect that during the period of redemption the rents of the mortgaged premises shall be paid to the purchaser at the foreclosure sale. So far as that provision is concerned, the sale satisfies the mortgage and renders all its provisions inoperative. They were effective only for the purpose of securing satisfaction of the mortgage debt. When that purpose was accomplished, their force was entirely spent." And again: "The rights of the complainants under the trust deed were at an end; and, as the purchasers had no right to the possession or rents until the certificate of purchase had ripened into a deed, it is apparent that no right existed by which either the complainants or the purchasers could control the money arising from rent during the redemption period."

The debt secured by the Bartholomae trust deed, with the exception of \$540.92, was satisfied by a sale of the premises. That amount, with interest, out of the rents in his hands arising from the premises, was tendered to the executor of Phillip Bartholomae by the receiver, which paid the Bartholomae foreclosure decree and was a satisfaction of that indebtedness. The holder of such indebtedness, having received payment 1 L.R.A. (N.S.)

thereof, must be satisfied, and the purchaser of the premises covered by the Bartholomae trust deed, no redemption having taken place, having received a deed for the premises, has received all that, under the statute, he is entitled to, and must also be satisfied. The balance remaining in the hands of the receiver, to wit, \$152.23, under the decree, is overplus and should be paid to the appellant as the holder of the junior encumbrance.

The judgment of the Appellate Court and the order of the Superior Court will be reversed, and the cause will be remanded to the Superior Court for further proceedings in accordance with the views herein expressed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CORDELIA NUTTER

v.

BEESON H. BROWN et al., Appts.

(.... W. Va.)

1. Appeal—from decree for costs.

Ordinarily an appeal does not lie from a decree for costs only in a chancery suit; but there are exceptions to the rule, turning on the question of the discretionary power of

Headnotes by POFFENBARGER, J.

Case Note.—In addition to the many cases cited in the opinion countenancing the general statement that an appeal does not lie from a decree for costs only in a chancery suit, see also *DuBois v. Kirk*, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729, and *City Nat. Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675. But the strong reasoning of the court in favor of an exception where the right to costs is determinable, as a matter of right, under a statute or under a settled rule of law, is supported by a few cases not cited in the opinion.

While recognizing the attitude of the Federal Supreme Court as expressed in the cases cited above, and in *NUTTER v. BROWN*, the circuit court, in *The City of Augusta*, 25 C. C. A. 430, 50 U. S. App. 39, 80 Fed. 297, an admiralty case, traces the position of the Supreme Court to the decision in *Canter v. American Ins. Co.* 3 Pet. 307, 7 L. ed. 688, and distinguishes that case upon the ground that at the time of its rendition there was no statutory regulation of the question of costs, that, consequently, their allowance was in every case a matter of discretion, and therefore not subject to review; whereas now, by statute, costs are made a matter of right under certain conditions and to disallow them is an infringement of legal right which should be redressed upon appeal. "We therefore hold,"

the trial court respecting costs. A decree for such costs as are discretionary is not appealable; but one for costs not in the discretion of the court is appealable, provided the amount thereof is more than \$100.

2. Costs—discretionary.

Extraordinary costs, such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary, and a decree respecting such costs is appealable.

3. Same—decree appealable.

Such costs may, in a proper case, be provisionally allowed to the officer out of the fund, and ultimately decreed to be paid to the party entitled to the fund by his adversary; but in either case a decree of such character is appealable.

4. Receiver — compensation — irregular appointment.

Mere irregularities in the appointment of

a special receiver, acquiesced in by the parties, will neither deprive such receiver of his compensation, nor the successful party of a decree over against his adversary for the amount thereof, when it has been allowed out of a fund belonging to the party so prevailing.

5. Same—when appointed.

When, in a suit in equity, the title to personal property of such character as renders sale thereof necessary for the adequate protection of the rights of the parties interested is involved, the court in which such suit is pending may properly appoint a receiver to take charge of it, and make sale thereof.

6. Decree for costs—disturbance on appeal.

When, in such case, one defendant claimed five sixths of the property in dispute, and two others jointly claimed the remaining interest, and the court adjudged the property to belong to the plaintiff, and gave the ordinary costs against all the defendants.

says the court, "that while, perhaps, there may be no appeal from the ordinary questions within the common jurisdiction of taxing masters, there may be when the force of a statute or some positive rule of law is involved, although it concerns only costs."

This decision is followed in *Primrose v. Fenno*, 113 Fed. 375, where the lower court, upon its determination solely as to the manner of taxing costs for witness fees, a matter governed by statute, holds that the party considering himself aggrieved is entitled to a writ of error on exceptions taken to the court's rulings upon the question of costs alone.

It is again upheld in *Re Michigan C. R. Co.* 59 C. C. A. 643, 124 Fed. 727, where mandamus was granted by the circuit court of appeals, directing the district court to allow an appeal upon the question of allowance of costs only, where such allowance was based upon a construction, alleged to be erroneous, of a statute establishing the right to a given item as costs. The court states: "We see nothing in any of the decided cases to justify us in holding that an appeal will not lie when the decree complained of involves the construction and application of a positive statute involving the allowance of any costs at all. If the provision of § 828 applied, the court had no discretion as to the compensation to be allowed. If it did not apply, when properly construed, to the facts of the case, it was error of law to hold that it did control, and to allow compensation according to its terms. That the decree was final and appealable, we entertain no doubt."

After noting the recognized exception in favor of an appeal where the costs are payable out of a particular fund in court (*Citing Internal Improvement Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Williams v. Morgan*, 111 U. S. 684, 28 L. ed. 559, 4 Sup. Ct. Rep. 638, and *Mason v. Pewabic Min. Co.* 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847), the court further says: "Nor is 1 L.R.A. (N.S.)

it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest."

An appeal solely upon the question as to the allowance of costs was heard in *State v. Lewis*, 10 Lea, 168, and, although the action of the lower court was affirmed, the matter being discretionary, and not governed by any statute or settled rule of law, the court does not deny the right to bring this question alone before the court by appeal, but inferentially asserts its jurisdiction to revise where the allowance has been made in abuse of the discretion possessed.

Similarly, on dismissal without cost of a bill to set aside a judgment, an appeal was taken in *Biddle's Appeal*, 5 Sadler (Pa.) 288, 19 W. N. C. 219, 8 Atl. 640, upon which the only question raised was as to the disallowance of costs to the defendant. While the right to entertain such an appeal was not questioned or discussed, jurisdiction was exercised, and the decree reversed, on the ground that the disallowance was an abuse of discretion.

See also *Spengler v. Hahn*, 95 Wis. 472, 70 N. W. 466, where, a case coming up on various exceptions, all were overruled except that as to the allowance of costs, upon which subject the action of the trial court was reversed for manifest abuse of discretion in failing to allow them to a successful plaintiff.

So, in *Haire v. McCardle*, 107 Ga. 775, 33 S. E. 683, a judgment appealed from was affirmed as to all points except in regard to the allowance of costs, upon which point it was reversed as contrary to statutory provisions governing the situation.

reserving its judgment as to the extraordinary costs, and afterwards decreed that the defendant who had claimed the five-sixths interest pay the same, the decree as to the extraordinary costs will not be disturbed on appeal, unless the court can see that such defendant has been required to pay more than his due proportion of the entire cost.

(Brannon, P., dissents.)

(November 7, 1905.)

APPEAL by defendants from a judgment of the Circuit Court for Harrison County in plaintiff's favor in a suit brought to reform a deed and to compel an accounting for oil and gas taken from the property involved. Affirmed.

The facts are stated in the opinion.

Messrs. W. Scott and William T. George for appellants.

Messrs. E. G. Smith, E. A. Brannon, and Millard F. Snyder for appellee.

Poffenbarger, J., delivered the opinion of the court:

This is a third appeal in the case of *Nutter v. Brown*, the history of which may be obtained by reference to 51 W. Va. 598, 42 S. E. 661, and 54 W. Va. 82, 46 S. E. 375, where the dispositions made of the first and second appeals are reported. The decree from which the second appeal was taken directed the special receiver to pay over and deliver the proceeds of the property in controversy to the plaintiff, Cordelia Nutter, and the defendants C. T. Arnett and J. M. Garrett, in the proportions in which they were entitled, one half to Cordelia Nutter, and one fourth to each of the other two parties, and required the defendants Beeson H. Brown, Henry R. Smith, and Gertrude Duncan to pay to the plaintiff, Cordelia Nutter, her costs. But that decree reserved for future adjudication all questions relating to the compensation of the receiver and his costs and expenses, and also the question whether such costs and expenses should be taxed against the defendants as part of the costs in the cause. After the affirmation of said decree by this court, the receiver filed his report in the court below, showing that he had received on account of the oil 14,052.42, had paid out on account of taxes \$404.04, had paid a fee of \$25 to the attorney of the receiver, and had retained his commission of 5 per cent, amounting to \$702.62, making a total of \$1,127.66, which, deducted from the total receipts, left \$12,924.76, which he had distributed to the parties entitled under the decree aforesaid; and the court confirmed his report and discharged him. Later, May 28, 1904, Cordelia Nutter, James M. Garrett, and C. T. 1 L.R.A. (N.S.)

Arnett, out of whose funds said attorney's fee and receiver's compensation had been retained, applied to the court for a decree against Beeson H. Brown, one of the defendants, for said sums as part of their costs in the prosecution of their suit, and such decree was entered for the sum of \$723.62. From it Brown has obtained the present appeal.

The appeal is resisted on the ground that the decree is for costs only, as to which no appeal lies. The appellate jurisdiction of this court in cases pecuniary in their nature is limited by the Constitution to those in which the matter in controversy, exclusive of costs, is of greater value or amount than \$100. Const. art. 8, § 3. This expressly excludes the addition of costs to the value or amount in controversy for the purpose of making it more than \$100. It does not prevent costs, when a subject of independent adjudication, from reaching the appellate court. *Taney v. Woodmansee*, 23 W. Va. 709, in which an appeal was entertained from a decree overruling a motion to quash an execution, although the amount in controversy was composed wholly of costs. It only inhibits addition of costs to the matter in controversy on the merits, in order to bring the amount up to the jurisdictional point, a sum in excess of \$100, and has nothing to do with the question whether an appeal from a decree for costs only may be entertained. In this view of the constitutional limitation my associates do not concur. However, the general rule is, and always has been, both in England and in this country, that, independently of any constitutional limitation, a decree for costs only is not ordinarily appealable. *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 702, 32 S. E. 245; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Smith v. Shaffer*, 50 Md. 132; *Lake v. Shumate*, 20 S. C. 23; *Temple v. Lawson*, 19 Ark. 148; *Howe v. Hutchison*, 105 Ill. 501; *Shields v. Bogliolo*, 7 Mo. 136; *Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58; *Glendale Elastic Fabrics Co. v. Smith*, 100 U. S. 110, 25 L. ed. 547; *Wood v. Weimar*, 104 U. S. 786, 26 L. ed. 779; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Paper-Bag Cases*, 105 U. S. 766, 26 L. ed. 959; *Internal Improvement Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Burns v. Rosenstein*, 135 U. S. 449, 34 L. ed. 193, 10 Sup. Ct. Rep. 817; *Du Bois v. Kirk*, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729; *City Nat. Bank v. Hunter*, 162 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup.

Ct. Rep. 89; *Kittredge v. Race*, 92 U. S. 116, 23 L. ed. 488; *Canter v. American Ins. Co.* 3 Pet. 307, 7 L. ed. 688; 3 English Ruling Cases, 243; 5 Enc. Pl. & Pr. p. 319. This is true, however, of those cases only in which the awarding of costs is in the discretion of the court below. In refusing to take jurisdiction, the courts all say the reason for declining is that the case is one in which the trial court has discretion to award or refuse costs. In 3 English Ruling Cases, 243, the rule on the subject is stated as follows: "It was the general rule of the court of chancery—which is now confirmed and made absolute by the judicature act 1873, § 49, so far as relates to costs which are in the discretion of the court—that no appeal can be entertained upon a mere question of costs." This is the old rule of equity practice, simply declared or confirmed by statute. The reason given by the authorities in this country, where the judiciary act governing the present English practice has no application, is the discretionary power of the court below. "Whether costs shall be decreed by a court of equity is a question always addressing itself to the sound discretion of the chancellor, and the authority of an appellate court to correct his decrees is not without doubt." 5 Enc. Pl. & Pr. p. 218 (*Cowles v. Whitman*, *Sanborn v. Kittredge*, *Howe v. Hutchison*, *Lake v. Shumate*, *Smith v. Shaffer*, and *Temple v. Lawson*, all cited); *Joslyn v. Parlin*, 54 Vt. 670; *Bixby v. La Moille Valley R. Co.* 57 Vt. 548; *Hastings v. Perry*, 20 Vt. 272. The opinion in *Temple v. Lawson*, *supra*, seems to have been very carefully prepared, and makes the clearest and most exhaustive presentation of the authorities to be found among the American decisions; and the conclusion announced is that costs are not always in the discretion of the chancellor, but that such costs as are in his discretion cannot be the subject of appeal. His conclusion is expressed in the following language: "The discretion which we have said resides in the court to award or give costs must be understood to relate only to those costs in a suit which are denominated 'general,' or properly 'costs in the cause,' and not such as may be said to be extraordinary, such as directing the costs of the suit to be paid out of a particular fund, or where the court, under special circumstances and a particular state of facts, developed by a proper course of pleading and demanded at the proper time, will direct counsel fees to be paid by a party either generally or out of a particular fund." The principle thus laid down is fully sustained by the English decisions from which the rule in this country was originally deduced, but in the specification of instances

it stops short of many of the precedents. The tendency by the courts of this country is to limit, rather than extend, the exception to the general rule; in other words, it is to allow but one exception, namely, a decree for payment of costs out of the fund, on the theory that it is the only exception recognized in the old English practice. Thus, Mr. Justice Bradley, in *Internal Improvement Fund v. Greenough*, *supra*, said: "But it was held by Lord Cottenham in *Angell v. Davis*, 4 Myl. & C. 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund." Lord Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed, and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval, and in the case of *Taylor v. Dowlen*, L. R. 4 Ch. 697, the court declared that they were not disposed to extend the case of *Angell v. Davis*, and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund." In *Taylor v. Dowlen*, referred to by Mr. Justice Bradley as repudiating the suggestion made by Lord Cottenham in *Angell v. Davis*, the court said: "As to another exception, namely, where the facts distinctly appear upon the face of the proceedings, so that the question can be decided without going into the merits, it must be taken to refer to cases where there is some inconsistency in the decree, as there was in *Angell v. Davis*, where the costs of a trustee who had committed a breach of trust were given out of the trust fund." Hence, that decision seems to depend, not alone upon the fact that the costs were decreed out of the trust fund, but also upon the lack of discretion in the court to allow costs to a trustee who had committed a breach of trust; such allowance being contrary to a well-settled principle of equity, not a mere rule relating to costs. In *Taylor v. Dowlen* the appeal was sought by a trustee from a decree requiring him to pay the costs of the suit, and the court refused to entertain it, because the act of the chancellor was discretionary. But a number of illustrations of want of such discretion is found in the English decisions. In *Taylor v. Southgate*, 4 Myl. & C. 203, a decree which involved principles of equity relating to the payment of costs was ap-

pealed from on the sole question of costs. *Chappell v. Gregory*, 2 De G. J. & S. 111, states the general rule to be that there cannot be a rehearing for costs alone, unless some principle is involved in the mode of dealing with them. *Rochester v. Lee*, 2 De G. M. & G. 427, is a case in which the appeal was for costs alone, arising upon two or more trials of an issue out of chancery, and the court entertained it, and reversed the decree, because the error of the chancellor appeared upon the face of the record. In *Chitty's Equity Index*, 4th ed. 4481, the rule is stated as follows: "The court of appeal refuses to inquire into the various causes which may have influenced the decision of the court below in awarding costs, and therefore an appeal for costs will not generally be entertained; but, where the judge of the court below placed on record on the face of the decree the reason why he ordered the party to pay the costs, and such reason was founded on the determination of a question of law, the court of appeal allowed the question of law to be argued on the appeal, that it might determine whether the reason embodied in the decree by the judge below was well founded. *Walker v. French*, 21 Week. Rep. 493." The case cited as authority is not found in our library. Where a tenant by elegit had received rents and profits beyond the debt, and he was required to account for the excess and costs decreed against him, he was allowed to appeal as to the costs only. *Owen v. Griffith*, 1 Ves. Sr. 249. A decree for costs against an officer of the Crown is against law, and an appeal from such a decree was allowed in *Lord Advocate v. Dunglas*, 9 Clark & F. 173. The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge, although he may be deprived of them for misconduct. Therefore, the costs of a trustee are not within § 49 of the judicature act of 1873, and an appeal lies from a decision respecting them. *Cotterell v. Stratton*, L. R. 8 Ch. 295; *Farrow v. Austin*, L. R. 18 Ch. Div. 58; *Turner v. Hancock*, L. R. 20 Ch. Div. 303; *Hill v. Spurgeon*, L. R. 29 Ch. Div. 348. Whether trustees have been guilty of such unreasonable conduct as to deprive them of costs is a question which the court of appeal will entertain. *Re Knight*, L. R. 26 Ch. Div. 82. Where the jurisdiction of the judge to order costs depends on the existence of a breach of an injunction or misconduct, an appeal lies against his finding that there has been such breach, although he inflicts costs only. *Stevens v. Metropolitan District R. Co.* L. R. 20 Ch. Div. 60; *Witt v. Corcoran*, L. R. 2 Ch. Div. 69.

For the most part, cases in this country illustrating the principle upon which ap-
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peals from decrees for costs are entertained are those in which there has been a decree of payment out of a fund in court. Thus, in *Temple v. Lawson* the plaintiff, in an interpleader suit, had obtained a decree for \$200 as counsel fees to be taxed as part of his costs, and the court, on appeal from that part of the decree alone, reversed the action of the lower court. In *Internal Improvement Fund v. Greenough*, 105 U. S. 528, 26 L. ed. 1158, the appeal was from an allowance of more than \$60,000 to an agent out of a trust fund, which had been secured and preserved for the benefit of the parties who were entitled to it by his labor and expenditures. In *Stuart v. Boulware*, 133 U. S. 78, 33 L. ed. 568, 10 Sup. Ct. Rep. 242, an appeal was entertained from a decree allowing a receiver, for his services and counsel fees paid by him, \$6,500. In *Grant v. Los Angeles & P. R. Co.* 116 Cal. 71, 47 Pac. 872, an order fixing the compensation of a receiver, and taxing it as costs in the action against all the parties, and directing him to apply toward its payment the balance of the fund remaining in his hands as such receiver, was held to be appealable; the court saying it was, in legal effect, a final judgment upon a collateral matter, arising out of the action, and appealable by any party interested in the fund. The same principle had been declared in the case of *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604. In *People ex rel. Port Huron & G. R. Co. v. Jones*, 33 Mich. 303, an appeal from a decree refusing compensation was allowed to a receiver. The decree from which the appeal was taken was affirmed, but the case nevertheless shows an assertion of jurisdiction by the appellate court. It entertained the case, and affirmed the order of the lower court, refusing compensation.

It is perfectly apparent that cases of this class involve something more than discretion. What is awarded consists not of fees and ordinary court expenses, easily ascertainable by reference to mere rules concerning costs; it involves judicial investigation and determination. The allowance to a receiver for his services, or to an attorney or agent who has a lien upon a fund in court, is to be determined by the value of his services and the amount of his expenses. His right is a strong equity, analogous to an obligation founded upon an implied contract, and is not dependent upon the mere arbitrary discretion of the court, if his appointment was regular, and his conduct has been free from exception; and the ascertainment of the value of his services and the amount of expenses is the exercise of judicial power. To deny him compensation and expenses from some source, would be as unjust and indefensible on principle as to refuse to en-

force a contract or to give damages for its breach. There may be discretion as to the mode of compensation, as to how it shall be paid, and as to the amount, but clearly none as to whether any shall be paid. Here another apt English rule, not stated by our courts, but invariably observed by them, sustains this view. When the conduct of the trustee is brought in question in determining whether any compensation shall be allowed him, and the doubt is resolved in his favor and an allowance made, no appeal can be allowed; for if there was no misconduct, the decree is right, and if there was, the court has discretion to allow him costs. *Charles v. Jones*, L. R. 33 Ch. Div. 80. The import of this is that, when there is no fault in the trustee, he cannot be deprived of his compensation. This is illustrative of the view that, where the appellate court can see that some principle has been violated in the allowance of costs, the decree is held to be not within the discretion of the court. Where an action is dismissed for total want of jurisdiction, the decisions say there is no power in the court to decree costs to the defendant. "When a circuit court dismisses a bill for want of jurisdiction it is without power to decree the payment of costs and penalties." *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject, the matter was as much *coram non jure* as anything else could be, and the award of costs and execution was consequently void." *Nashville v. Cooper*, 6 Wall. 247, 18 L. ed. 851. While no case has been found in which an appeal from a decree for costs under such circumstances was taken, it is apprehended that in such case the court would have to say such award was not in the discretion of the court below, because violative of law; and, if in any other case the record should disclose an error in legal principle in the awarding of costs, an appeal ought to lie. Just at this point *Hamilton v. Du Pre*, 103 Ga. 795, 30 S. E. 248, is applicable. The plaintiff in certain proceedings in which a receiver had been appointed had utterly failed on the merits, but the trial court had decreed payment of all her costs, including the receiver's expenses and compensation, out of the proceeds of the plaintiff's property in the hands of the receiver, and the supreme court held the decree appealable, and reversed it, on the ground of an abuse of discretion on the part of the court below, which can only mean that the decree rendered was not a discretionary one. As the reason for immunity from appellate review and control is the discretion vested in the trial court, such im-

munity must cease when the reason ceases. When costs are not discretionary, an appeal lies. Therefore, it seems clear that, in the statement of the general rule on the subject by practically all of our authorities, the exception is ignored, though observed in the exercise of the jurisdiction. Accurately stated, it is that no appeal lies from a decree for such costs as are in the discretion of the chancellor. Ordinarily, the costs in equity are in his discretion.

What is here said respecting the want of discretion to disallow compensation to a receiver or trustee when his title is free from infirmity and his conduct from reproach, and he has performed his duties and accounted for the fund, is not to be taken to mean that the chancellor acts wholly without discretion in such cases. As to the amount of such compensation, he is not bound by the strict rules governing contract obligations. It is to be determined upon equitable, not legal, principles. Much latitude is allowed him in the adoption of the rule by which it shall be fixed. It may be by a commission on the amount of the fund, a lump sum, or a salary. Many cases say compensation to a receiver is in the sound discretion of the court, and therefore subject to review. Among them is a decision of this court in the case of *Crumlish v. Shenandoah Valley R. Co.* 40 W. Va. 627, 22 S. E. 90, holding as follows: "There is no fixed rule in this state as to the mode of allowing compensation to a special receiver, whether by way of commission or a fixed sum. Usually when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal." In the same case the court comes to the same conclusion as to the allowance to a receiver of counsel fees. The principle adopted and applied in that case fully sustains the position here taken as to the discretionary power of the court in such cases. It denies to the trial court the arbitrary discretion allowed in the case of ordinary costs, by saying the allowance is in all such cases subject to review. In that case the parties obtained in this court, upon other grounds than a decree for costs, a *locus standi*, and so much of the decree as related to costs and allowances came up incidentally; in other words, it was not an appeal from a decree for costs only, but the principles applied in the disposition of the questions relating to costs clearly deny to the trial court that broad discretion, from the exercise of which there is no appeal, and make it clear that in such cases an appeal may be entertained. The uniform practice of giving the parties a hearing in fixing the

amount of compensation and expenses sustains the view that it is a collateral, rather than an incidental, exercise of judicial power; and the freedom with which appeals respecting such allowances are allowed speaks louder as to the nature of the function than the casual observations made by the courts in disposing of the questions raised.

As to the power of the court to decree the extraordinary costs in favor of one party against another (not the ordinary costs usually incident to litigation and the basis of its exercise), but little authority has been found. Practically all the cases reported deal with the propriety of the allowance to the receiver, trustee, or agent out of the fund. As to these parties, as has been indicated, there is little room for the exercise of discretion, such as to prevent appellate review. The appellate courts deal with them freely. Some observations made in *Cutter v. Pollock*, 4 N. D. 205, 25 L. R. A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, are to the effect that a decree of such costs from one party to another may be made; but it may be doubted whether what is said there is to be considered as an adjudication, since the decree was reversed because the court failed to adjudicate anything in respect to such costs. The language referred to is as follows: "If the receiver is allowed to pay and reimburse himself out of the moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for this invasion of his property. Ordinarily, it would seem to us (but we do not decide the point) that the receiver should be protected by being permitted to look to the funds in his hands to save him against loss. This appears to have been done in this case. Such rule may, however, work great hardship in particular cases; and in some instances the receiver has, on this account, been compelled to look for indemnity to the party at whose instance he was appointed. See *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 31 Iowa, 428; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438. Certainly, if the court, in such a case, allows him to pay himself out of the funds, it should compel the other party to the action to make good the loss thus occasioned to the successful litigant. It is impossible for a court to make an intelligent decree when property is in the hands of a receiver, and is to be disposed of by the decree, without settling in advance the rights of the receiver with respect to compensation and expenditures, and whether he shall be allowed to pay himself out of the funds in his hands."

Concerning provisional allowance out of the fund, 2 Dan. Ch. Pr. p. 1410, says: "Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in court, or by one of the parties, to the proceedings, 'without prejudice to the question how the same are ultimately to be borne.' The absence, however, of these words, or words of a like meaning, from an order directing payment of costs out of a fund in court, does not necessarily imply that the court has decided that the fund out of which the costs are paid is that which must ultimately bear them; and costs paid out of a fund, under an order from which those words are omitted, may be directed to be recouped out of another fund, which is primarily liable for that purpose." The substance of this is that the court may make a provisional allowance out of the fund, without losing its power to place the burden ultimately upon the party who ought to bear it. It affords no certain indication as to whether the power to award costs between parties or between one fund and another (which is substantially the same thing as between party and party) is so far within the discretion of the chancellor as to preclude review, and, if so, whether such discretion extends to all costs.

Abundant authority sustains the position that, under circumstances making it just and equitable to do so, the compensation of the receiver may be decreed against the plaintiff. In *French v. Gifford*, *supra*, the appellate court, modifying the decree of the lower court, gave the receiver by way of compensation, \$1,000 out of the fund and a decree against the plaintiff for \$2,000, the balance of his compensation. In *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. 604, the defendants demanded that two thirds of the receiver's compensation be charged to the plaintiff, and the court, admitting the power to do so under proper circumstances, upon an examination of the record, held that the circumstances were not such as to make it equitable to do so. In *Cutter v. Pollock*, 7 N. D. 631, 76 N. W. 235, on the second appeal, the court affirmed a decree in favor of the defendants against the plaintiffs for three fifths of the amount which the receiver had retained out of the funds which had been adjudged to belong to the defendants; the receiver having been appointed at the instance of the plaintiffs, who had failed at the hearing on the merits. In *Cassidy v. Harrelson*, 1 Colo. App. 438, 29 Pac. 525, the court held as follows: "A receiver having been appointed by the court, on application of the interveners in a cause wherein they were not entitled to intervene, the costs

incident to the appointment were properly adjudged against them." In *Highley v. Deane*, 64 Ill. App. 389, the court held that "where a party, without probable cause, obtains the appointment of a receiver, he should be made to pay the entire expense thus by him created;" and the decision was affirmed in 168 Ill. 266, 48 N. E. 50. In *Kerr v. Hill*, 27 W. Va. 576, 616, the receiver's compensation and expenses were allowed out of the fund, to the prejudice of the defendants, who were subsequent lienors, entitled to the surplus, although the appointment was illegal, because without notice, and made at the instance of the plaintiff. In *French v. Gifford*, cited, the court said: "In cases like the one under consideration, we may adjudge the costs to one or either of the parties, or apportion them."

What principle, respecting the nature of the power to decree such costs as between parties, is deducible from these or other precedents cited? Has the chancellor irrevocable discretion? The many instances in which appeals have been entertained from decrees for such costs, turning on the sole question of who should pay them, answer the question in the negative. Although costs, when ascertained and fixed as to amount, they are not costs in the discretion of the chancellor. The title to such costs, as between parties, must be determined judicially upon equitable principles; else there is, in the language of the American authorities, an abuse of discretion, or, in the language of the English authorities, a lack of discretion to award them. In such cases, therefore, an appeal lies.

The decree appealed from gives costs to the prevailing party, in the absence of any attempt on the part of the defendant to show any reason why the general rule should be varied or departed from. The litigation was occasioned by an act of fraud on his part in the procurement of the deed, which made it necessary for the plaintiff to bring this suit in order to obtain what belonged to her. The case is not one involving the administration of a fund, such as a trust estate, a decedent's estate, an estate of an insolvent person or corporation, in which both plaintiff and defendant have an interest, and out of which the costs must be taken, for the reason that they cannot be obtained from any other source. The controversy was one over the title to property. There was no middle ground,—no community of interest. The whole fund belonged to one or the other. Upon obtaining it, the prevailing party was entitled to have along with it the necessary costs of the prosecution of the suit. No reason is perceived why, under such circumstances, any necessary costs of the litigation should be paid 1 L.R.A. (N.S.)

out of the property or funds of the successful party. The appointment of the receiver was without notice, it is true, but the defendants acquiesced in it by their failure to move for his discharge; and, had they procured his discharge on such ground, he would have been immediately reappointed, if the case was such, in its nature and circumstances, as to warrant the appointment of a receiver. The property he was to receive was not real estate, or the rents, issues, and profits thereof, but personal property; and in such case the statute does not forbid the appointment of a receiver in vacation without notice, and such appointment is voidable only, not void. *High, Receivers*, §§ 111 et seq. The defendants recognized the authority of the receiver, moved for an increased bond, acquiesced in his appointment by not asking for his discharge. Failure to give notice cannot afford any ground for withholding costs, for it was a mere irregularity, which has been waived. "No one, whether a party to the suit or not, who has recognized the authority of a receiver in any way, can attack the validity of the order appointing him for mere irregularities." 17 Enc. Pl. & Pr. p. 757, citing many authorities.

The ability of the defendants to make restitution of the value of the property is advanced as a substantial reason why no receiver should have been appointed. In many cases insolvency of the defendant must be alleged, but they are usually cases in which questions of title are not involved. Here, title alone is the bone of contention. It was not a claim for money, but to the title to oil,—the royalty oil, and the bill alleged that the defendants' claim thereto was founded upon an act of fraud. It further appeared that, for the full and adequate protection of plaintiff's interest, the oil should be sold at such times during the pendency of the suit as the market might be favorable; and the discretion to say when such sales should be made should not be left to her adversaries. Our statutes and our decisions import that the title and rightful control of property must be adequately protected, and discountenance the view that no injury results if the owner may obtain its value in damages. The courts should protect his property from misappropriation, and preserve his title to it, so that he may use, retain, or sell it, and determine the time of sale, purchaser, terms, and the price; and when legal remedies are inadequate for such protection, equity supplies the defect. *Peterson v. Hall* (W. Va.) 50 S. E. 603; dissenting opinion in *Zinn v. Zinn*, 54 W. Va. 483, 46 S. E. 202. An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in

equity, against injury from the sale, removal or concealment of such property. Code 1899, chap. 133, § 1. The same chapter, at § 28, provides for the appointment of a receiver in any proper case pending in a court of equity in which the property of a corporation, firm, or person is involved, and there is danger of the loss or misappropriation of the same, or a material part thereof. Both remedies are extraordinary, and seem to be given for substantially the same purposes. Our opinion, therefore, is that there was not such want of cause as made the appointment useless and unjustifiable.

One other contention must be disposed of. Henry R. Smith and Gertrude Duncan were codefendants of Brown, and resisted the demand of the plaintiff by their joint answer, and by uniting in the second appeal. They claimed a one-fifth interest in the royalty oil. Though they were not parties to the original transaction under which Brown claimed, and subsequently obtained their interest from or through him, they claimed the benefit of his act. But the former decree gave general costs against all three, whereby these claimants of a one-fifth interest were made to pay two thirds of said costs. The undue proportion thereof may, for aught that can be ascertained from the record, amount to one fifth of the extraordinary costs. We have no taxation of it. In view of this, we see no reason for disturbing the decree, and it will therefore be affirmed.

Brannon, P., dissenting:

I cannot see that Brown should pay the receiver's compensation. The general rule is that such compensation is paid out of the fund. *Elk Fork Oil & Gas Co. v. Foster*, 39 C. C. A. 615, 99 Fed. 495; *Kerr v. Hill*, 27 W. Va. 616. There is no need of this large extra expenditure, because there is no danger of loss or suggestion of insolvency. It was only a conflict of title to oil. *Freer v. Davis*, 52 W. Va. 37, 94 Am. St. Rep. 910, 43 S. E. 172. If the plaintiff, having no legal ground for a receiver, chose to ask one, she should pay for his services. There was no emergency calling for the appointment of a receiver without notice. Notice is required before a receiver can be appointed in vacation. *Batson v. Findley*, 52 W. Va. 343, 43 S. E. 142; *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5; *Smith, Receiver-ships*, 14. But that was error only, and did not make the appointment void, so as to refuse commission. *Alderson, Receivers*, 157, 168. But can we not consider the fact that notice was not given, and that there was no need of a receiver, in exercising discretion as to piling the costs on Brown? Though the appointment was reversible for 1 L.R.A. (N.S.)

want of notice and good ground, we cannot reverse it, because appeal from that order is barred. I do not think there can be an appeal or writ of error resting alone on error as to costs. The Constitution (article 8, § 3) excludes costs, both as to sole ground of appeal, or as going to make up the sum for appeal. But what are costs under that clause? I think it means general costs, taxable under the statute, not special or extraordinary allowances, such as pay of a receiver. I think appeal lies as to such allowances. *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. 662. My reason is that they are not "costs" under said clause. Therefore, an appeal lies in this case.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

WILLIAM B. BONBRIGHT, Trustee for Sarah Long et al., Plff., in Err.,
v.

AUGUST A. SCHOETTLER.

(127 Fed. 320.)

1. Fire escape—certificate of approval.

Under a provision in a statute requiring the placing of fire escapes on buildings, that it shall be the duty of certain officers to test escapes, and, if they prove satisfactory, to give a certificate of approval, such certificate, when properly issued, must be taken as conclusive evidence of compliance with the law.

2. Same—statutory relief from liability.

The provision of a statute requiring fire escapes on buildings, that a certificate by the proper official approving a particular fire escape shall relieve the owner of the building from liability for the penalty provided for noncompliance with the statute, without

Case Note.—The conclusiveness of an official certificate approving fire escapes is, in the last analysis, a question of statutory construction. That the determination of the officer or board having authority to pass on the sufficiency of the compliance with statutory requirements, when regularly made and within the scope of such delegated authority, is valid, and cannot be questioned collaterally, needs no further citation of authorities than may be found in *BONBRIGHT v. SCHOETTLER*. It remains to ascertain the extent of the authority delegated, the solution of the question depending upon the construction of the statute.

In the case in hand the district court took the view that the only effect of the certificate of approval was to protect against the penalty, basing its decision on the ground that, since the act of 1879, under which the certificate was issued, did not provide in terms what its effect should be, such act

any mention of civil liability, does not prevent it also relieving him from the latter.

3. Same—certificate—successors in title.

A certificate of approval of a fire escape granted to the owner of a building operates in favor of his successor in title.

4. Same—exception of approved escapes.

A provision in an act amending a statute requiring the placing of fire escapes on buildings, that nothing in the act shall interfere with fire escapes now in use, approved by the proper authorities, saves from the operation of the statute fire escapes which had been officially approved under the former statute.

(December 30, 1903.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's neglect to comply with the statute requiring the construction of fire escapes. Reversed.

The facts are stated in the opinion.

Argued before Acheson, Dallas, and Gray, Circuit Judges.

Messrs. W. B. Bodine, Jr., and George Wharton Pepper, for plaintiff in error:

The act is in derogation of the common law, and it should be strictly construed.

Keely v. O'Conner, 106 Pa. 321.

The certificate was a complete defense.

Com. v. Emsley, 5 Pa. Co. Ct. 476.

Messrs. Walter T. Fahy and Thomas A. Fahy, for defendant in error:

The statute does not say the certificate is conclusive, and the court has no power to add that provision.

Smith v. State, 66 Md. 215, 7 Atl. 49; Woodbury v. Berry, 18 Ohio St. 456; Bradbury v. Wagenhorst, 54 Pa. 180; Pittsburgh v. Kalchthaler, 114 Pa. 547, 19 W. N. C. 17, 7 Atl. 921.

A certificate issued to James Long in 1883 could not relieve the present owner in 1902.

The question whether or not appellant had erected two safe, permanent, external, ef-

ficient fire escapes, he having no certificate of approval issued under the act of 1885, was for the jury.

Sewell v. Moore, 166 Pa. 570, 31 Atl. 370. Mr. D. Webster Dougherty also for defendant in error.

Acheson, Circuit Judge, delivered the opinion of the court:

August A. Schoettler brought suit in the court below to recover damages, under the Pennsylvania fire escape legislation, for personal injuries which he sustained in a fire which destroyed a factory building which the defendant below, William P. Bonbright, owned in his capacity of trustee for Sarah Long and Jane Nelson Bonbright. The factory building was occupied at the time of the fire by a tenant for whom the plaintiff worked. The fire occurred on June 13, 1902. Upon the trial the jury rendered a verdict in the sum of \$2,600 for the plaintiff, subject to the opinion of the court upon a question of law reserved. Subsequently the court entered judgment upon the verdict in favor of the plaintiff, and the defendant took this writ of error. As the case comes to us, it involves no disputed matter of fact, but solely a question of law.

On June 11, 1879, the legislature of Pennsylvania passed an act (P. L. 128), the 1st section of which, *inter alia*, enacts that every building used as a factory in which operatives are usually employed in the third or any higher story "shall be provided with a permanent, safe, external means of escape therefrom in case of fire;" and it shall be the duty of the owner "to provide and cause to be affixed to every such building such permanent fire escape." By the 2d section of the act it is enacted that "it shall be the duty of the board of fire commissioners, in conjunction with the fire marshal of the district where such commissioners and fire marshal are elected or appointed, to first examine and test such fire escape or escapes, and after, upon trial, said fire escape or escapes should prove . . . [satisfactory], then the said fire marshal, in con-

should not be regarded as impliedly making the certificate conclusive evidence of compliance; and the more so because the later act of 1885 expressly prescribed the effect of the certificate. 123 Fed. 817.

It was also said, *obiter*, in Com. v. Emsley, 5 Pa. Co. Ct. 476, that apparently the only effect of the certificate of approval, under the act of 1879, was to protect against the statutory penalty.

Where the statute provides that the certificate of approval "shall relieve from the liabilities of fines, damages, and imprisonment imposed by this act," such certificate is conclusive evidence of nonliability. Sewell v. Moore, 166 Pa. 570, 31 Atl. 370. 1 L.R.A. (N.S.)

In Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999, an action for damages for the death of plaintiff's intestate because of the alleged failure of defendant to maintain proper fire escapes, it was held that the approval of the public officer appointed for that purpose shows a performance of the duty created and measured by the statute.

An analogous question is presented with respect to the effect of approval of building plans and specifications by a board of public works, which, it has been held, is conclusive as to third persons. See Hawke v. Brown, 28 App. Div. 37, 50 N. Y. Supp. 1032.

nection with the fire commissioners, or a majority of them, shall grant a certificate approving said fire escape." The 3d section enacts that every person whose duty it is by the 1st section of the act to provide and cause to be affixed to any building such external fire escape shall "be liable in an action for damages in case of death or personal injury sustained in consequence of fire breaking out in any such building," and of the absence of such efficient fire escape; and that all persons failing to comply with the provisions of this act shall be liable to a penalty not exceeding (\$300.00) three hundred dollars, to be collected as fines and forfeitures are now by law collectible.

On December 11, 1883, the board of fire commissioners, in conjunction with the fire marshal of the district, having first examined and tested, and upon trial having found to be satisfactory, an external fire escape which James Long, the then owner of the factory building here in question, had provided and caused to be affixed to said factory building, issued to Mr. Long the following certificate of approval:

No. 588. Fire Escape Inspection.

Certificate of Approval.

This certifies that the undersigned have examined and tested the Fire Escape erected on the five-stories building, now standing upon the lot of ground situate S. E. cor. Second and Oxford Streets, that the said Fire Escape proves satisfactory, and that they therefore approve the same.

Witness their hands hereto set this 11th day of December, A. D. 1883.

Board of Fire Escapes.

Jacob Laudenslager, Fire Commissioner.

Wm. Judge, Fire Commissioner.

Sam'l Gilpin, Fire Commissioner.

Edward Furlong, Fire Commissioner.

W. F. McCully, Fire Commissioner.

Joseph S. Robinson, Fire Commissioner.

Charles W. Wood, Fire Marshal.

Thereafter this external fire escape was maintained on the building in the same condition as when approved, and it was there at the time of the fire. The defendant, William P. Bonbright, acquired title to this property as trustee under foreclosure of a mortgage given by James Long to Mr. Bonbright as trustee for Mr. Long's two daughters, named above. After he thus acquired title, Mr. Bonbright leased the property to a tenant, who was in possession at the time of the fire.

The jury specifically found that the defendant had discharged his duty with regard to ropes and chains required by the sup-

plementary act approved June 1, 1883 (P. L. 50). By an act approved June 3, 1885 (P. L. 68), the above-recited act of June 11, 1879, was amended in several particulars. The 1st section of the amended act directs "such escape to consist of outside, open, iron stairway, of not more than 45° slant, with steps not less than 6 inches in width and 24 inches in length," and that "all of said buildings capable of accommodating from 100 to 500 or more persons as operatives, guests, or inmates, shall be provided with two such stairways, and more than two stairways, if such be necessary to secure the speedy and safe escape of said inmates;" but it is provided in and by this section "that nothing herein contained shall prohibit any person whose duty it is under this act to erect fire escapes from selecting and erecting any other and different device, design, or instrument, being a permanent, safe, external means of escape, subject to the inspection and approval of the constituted authorities for that purpose." The 2d section of the act of 1885 declares that the certificate of approval granted by the fire commissioners and fire marshal shall relieve the party or parties to whom such certificate is issued "from the liabilities of fines, damages, and imprisonment imposed by this act." The 3d and last section of the act of 1885, after prescribing punishment by fine and imprisonment for neglect or refusal to comply with the requirements of the 1st section of the act, further enacts that "in case of fire occurring in any of said buildings in the absence of such fire escape or escapes, approved by certificate of said officials, the said person or corporations shall be liable in an action for damages in case of death or personal injuries sustained in consequence of such fire breaking out in said building, and shall also be deemed guilty of a misdemeanor punishable by imprisonment for not less than six months, nor more than twelve months." This amended act of 1885, however, contains at the end thereof the following proviso: "Provided, that nothing in this act shall interfere with fire escapes now in use, approved by the proper authorities."

The defendant's fire escape did not conform to the particular specifications mentioned in the 1st section of the act of 1885, and no certificate approving his fire escape had issued under that act. The defendant relied upon the certificate of approval above set forth, issued to his predecessor in title, James Long.

The controlling question in the case is whether the official certificate approving the fire escape which was granted under the act of 1879 protected the defendant against the

plaintiff's demand. In considering this question, we note at the outset that the plaintiff's demand is founded on a statute which is of a penal nature. Upon the facts appearing, the defendant was under no common-law liability to the plaintiff. *Schott v. Harvey*, 105 Pa. 222, 227, 51 Am. Rep. 201; *Keely v. O'Conner*, 106 Pa. 321. Speaking of the act of 1879, the supreme court of Pennsylvania, in *Schott v. Harvey*, said: "It is certainly a highly penal statute. It imposes a duty unknown to the common law, and punishes a neglect of that duty in the manner above stated." Bearing in mind the character of this legislation as thus defined by the supreme court of the state, let us first examine the primary act of June 11, 1879. What effect is to be given to a certificate approving an external fire escape, granted by the fire marshal and fire commissioners under the provisions of that act? The act does not in express terms declare the effect of the certificate, but it seems to us that, upon well-settled principles, such certificate, when properly issued in accordance with the terms of the act, must be taken as conclusive evidence of compliance with the law. It is an indisputable proposition that where power or jurisdiction over a subject-matter, involving the exercise of discretion and judgment, is vested by law in a public officer or a special tribunal, the determination of such officer or tribunal as to such matter, when regularly made and within the scope of the delegated authority, is valid and binding, and cannot be questioned collaterally. *United States v. Arredondo*, 6 Pet. 691, 729, 8 L. ed. 547, 561; *Belcher v. Linn*, 24 How. 508, 522, 16 L. ed. 754, 757. The Supreme Court of the United States in the former of the last-cited cases said: "It is an universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (*Marbury v. Madison*, 1 Cranch, 170, 171, 2 L. ed. 71), legislative (*M'Culloch v. Maryland*, 4 Wheat. 423, 4 L. ed. 605; *Satterlee v. Matthewson*, 2 Pet. 412, 7 L. ed. 469; *Providence Bank v. Billings*, 4 Pet. 503, 7 L. ed. 956), judicial (*Perkins v. Fairfield*, 11 Mass. 227; *M'Pherson v. Cunniff*, 1 L.R.A. (N.S.)

liff, 11 Serg. & R. 429, 14 Am. Dec. 642, adopted in *Thompson v. Tolmie*, 2 Pet. 167, 168, 7 L. ed. 385), or special (*Rogers v. Bradshaw*, 20 Johns. 739, 740; 2 Dow, P. C. 521, etc.), unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."

The manifest intent of the act of 1879, we think, was to give security to one to whom an official certificate approving his fire escape had been duly granted. If the statutory certificate is not conclusive evidence of compliance with the law, there is no certain criterion available, for a verdict of approval by one jury is not binding upon another jury. It is not to be believed that the legislature intended to expose to the risk of suits for damages and of criminal prosecutions one who in good faith has affixed to his building a fire escape approved by the proper officials, and to whom these officials have duly granted a certificate of approval. We are of opinion that the action of the constituted board of experts, within their jurisdiction, in the absence of any fraud, cannot be set aside by the verdict of a jury. The fact that the act of 1885 expressly provides that the certificate of approval shall relieve the party to whom it is issued from the liabilities of fines, damages, and imprisonment imposed by that act does not militate against the view that a certificate of approval granted under the act of 1879 is conclusive. The act of 1885 only expresses what is clearly implied in the act of 1879.

The suggestion that a certificate of approval granted under the act of 1879 was available only to the then owner of the building, and is not available to a succeeding owner, does not strike us with favor. The fire escape is a permanent fixture. The approval is based upon an official examination and test of the structure itself. The certificate is not of a personal nature, but concerns the *res*. To hold that the official certificate of the sufficiency of the affixed fire escape is annulled or its effect impaired by a mere transfer or devolution of the title to the property would be most unreasonable. Both the letter and the spirit of the statute are against such view.

We are now to inquire whether the certificate upon which the defendant below relied was vitiated or affected by the act of June 3, 1885. The final proviso of that act, we think, furnishes a negative answer to that inquiry. That proviso broadly declares "that nothing in this act shall interfere with fire escapes now in use approved by the proper authorities." This language, it seems to us, was intended to conserve and did save from the operation of the new act then existing fire escapes which had been officially approved under the act of

1879. If this was not the purpose of the proviso, it was very misleading. As the act of 1885 is highly penal, it is not, in view of its proviso, to be construed as embracing persons who had complied with, or were under the protection of, the previous act. It will be perceived that even a departure from the particular construction specified in the act of 1885 is permissible, if approved by the constituted authorities. Evidently the legislature considered the approving judgment of these authorities as worthy of all acceptance. Hence the emphatic declaration of the final proviso "that nothing in this act shall interfere with fire escapes now in use, approved by the proper authorities." Under this sweeping language, existing and duly approved fire escapes were in no wise interfered with by anything contained in the act. The defendant's fire escape came squarely within the terms of this proviso. It therefore continued to be a legally sufficient structure, and the official certificate of its approval protected the defendant from the plaintiff's demand. We are of opinion that the court below should have entered judgment for the defendant on the reserved question.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court, with direction to enter a judgment in favor of the defendant below *non obstante veredicto*.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

STANDARD MARINE INSURANCE COMPANY, LIMITED, of Liverpool, England,
Plff. in Err.,

v.

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY.

(67 C. C. A. 602, 133 Fed. 636.)

x. Marine insurance—constructive total loss.

The owner of property covered by a marine insurance policy cannot claim a recovery as for a constructive total loss, although the property was in a situation where it might have been lawfully abandoned to the underwriter, if no attempt was made to abandon it, but it was sold as the property of the insured.

Subject Note.—Effect of voluntary exposure to peril upon liability on marine insurance policy.

- I. Scope, 1095.
 - II. Omission to employ pilot, 1095.
 - III. Voluntary stranding, 1097.
 - IV. Running into danger of capture, 1097.
 - V. When peril incurred is prohibited by statute, 1098.
 - VI. When peril is incurred in obeying governmental command, 1098.
 - VII. When peril incurred was not proximate cause, 1098.
 - VIII. Barratrous conduct, 1098.
 - IX. Miscellaneous cases, 1098.
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ery as for a constructive total loss, although the property was in a situation where it might have been lawfully abandoned to the underwriter, if no attempt was made to abandon it, but it was sold as the property of the insured.

2. Same—forced sale as peril.

To recover under a marine policy covering partial loss if it amounts to 50 per cent of the property covered, such loss must be shown to have resulted from a peril of the sea, and cannot be created by a forced sale.

3. Revenue cutter—judicial powers of captain.

The captain of a United States revenue cutter has no authority, even in a port where no court is sitting, to determine a question of salvage, unless the matter is submitted to him, by the parties, as arbitrator.

4. Marine insurance—salvage claims.

Rightful consumption of property covered by a marine insurance policy in salvage claims constitutes a total loss for which the insurer is liable.

5. Same—duty to minimize loss—jury.

Whether or not insured has made the effort required by a marine insurance policy to minimize the loss is a question for the jury.

6. Same—"sum at risk."

The "sum at risk," in a marine insurance policy, is the valuation placed upon the property by the policy itself.

7. Same—salvage of boats.

The cost of getting boats which are part of a vessel's cargo from the point where she is wrecked to a place of safety may be recovered under a marine insurance policy upon them, although they are not injured by the disaster, where the policy requires insured to labor to secure the property insured, and binds the insurer to contribute to the expense thereof in proportion as the sum insured is to the whole sum at risk, while the policy covers the whole value of the property.

8. Same—assumption of risk by insured.

A marine underwriter is not liable for a loss occurring through the deliberate act of the master of the vessel, who represents the insured, in pushing through dangerous ice

I. Scope.

This note does not include decisions as to the duty of an owner or master to make repairs, since they form a branch of the law as to the duty to maintain the ship in a seaworthy condition.

II. Omission to employ pilot.

It may be stated as a general rule that the failure to employ a pilot upon entering a port where pilots may be had, and where it is the custom to employ them, precludes a recovery upon a marine insurance policy for a loss resulting from such an omission.

for the purpose of reaching his destination quickly, and thus realizing the object of his principal's undertaking.

(November 7, 1904.)

ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a marine insurance policy. Reversed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Messrs. Van Ness & Redman, for plaintiff in error:

A loss resulting from a sale by salvors,

Thus, the underwriters are discharged from liability for a loss by striking on breakers, resulting from the failure of a master to employ a competent pilot in entering a river where it is the custom to employ pilots. *Whitney v. Ocean Ins. Co.* 14 La. 485, 33 Am. Dec. 595.

So, if a master attempts to enter port without a pilot, where pilots are to be had, or steers negligently or rashly on approaching ground where it is unsafe to navigate without a pilot, and damages ensue, the underwriters are not responsible. *Bolton v. American Ins. Co.* (N. Y. Super. Ct.; 1835) reported in 3 Kent, Com. 176, note.

And so, the neglect of the master to take a pilot upon entering the mouth of a river wherein there was a shifting bar precludes recovery upon the policy for loss caused by stranding upon the bar. *McDowell v. General Mut. Ins. Co.* 7 La. Ann. 684, 56 Am. Dec. 619.

A captain took on a pilot in going up the River Thames, but dropped him at a point up the river, and afterwards, and before reaching her moorings, the vessel received an injury from which she subsequently sank. The underwriters were held relieved from liability because there was no pilot on board at the time the accident happened, which was held gross negligence upon the part of the captain. *Law v. Hollingsworth*, 7 T. R. 160.

If, however, the master uses due diligence to secure a pilot, and none respond, the underwriters are not discharged from liability for a loss resulting from his attempt to go in without one.

Thus, a ship arrived off Sierra Leone, where there was a regular establishment of pilots, about 3 o'clock, and signaled for a pilot, but none responded, and, after waiting until 10, the captain attempted to enter the river, and in so doing the vessel struck the ground and was lost. The underwriters were held liable. It is said in one opinion: "It seems to me that, if the master of a vessel arriving off a port use due diligence to obtain a pilot, he does all that can be required by law. . . . It seems to 1 L.R.A. (N.S.)

either at the port of destination or an intermediate port, is not one resulting from a peril of the sea.

De Mattos v. Saunders, L. R. 7 C. P. 570; *Barber, Ins.* 328.

Where "the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed where it is evident from the facts of the case that no danger of a total loss existed."

Barber, Ins. p. 370; *Great Indian Peninsula R. Co. v. Saunders*, 1 Best & S. 41, 2 Best & S. 266; *Booth v. Gair*, 15 C. B. N. S. 291; *Kidston v. Empire Marine Ins. Co.* L. R. 1 C. P. 535, L. R. 2 C. P. 357.

The failure of insured to arrange with the salvors for a proper salvage payment violat-

me that, upon the evidence, the master did use due diligence to obtain a pilot, and, having so done, it was competent to him to exercise his discretion, whether it were better to run the risk of entering the harbor without one, or to wait till the following day for a pilot. Here, acting to the best of his judgment, he attempted to enter the harbor without one, and in so doing the vessel was lost; and I think that the underwriters are liable for a loss happening under these circumstances." *Phillips v. Headlam*, 2 Barn. & Ad. 380, 9 L. J. K. R. 238.

Especially, when the need of the ship to enter port is imperative on account of weather or other conditions, is the insured protected, if the master, after using due diligence to obtain a pilot, goes in without one, thereby sustaining a loss.

Thus, where a schooner arrived at the mouth of Mobile bay in threatening weather, and the master, being unable to secure a pilot, followed a pilot boat up the bay, upon being advised by the master of that boat that he might do so in safety, but in so doing the schooner grounded, it was held that the master adopted the most safe and judicious course in his power, under all the circumstances in which he was placed, and that any accident or loss which occurred in the execution of his attempt to enter the port could not be imputed to his fault or misconduct. *Van Syckel v. The Thomas Ewing*, *Crabbe*, 405, Fed. Cas. No. 16,877.

It not appearing to the satisfaction of the court from the evidence that the weather conditions and other causes were sufficient to have justified the master of a vessel in adventuring over a bar without waiting a reasonable time for a pilot, it was held that the insured was not entitled to a contribution in general average, in *De Pau v. Jones*, 1 Brev. 437.

The doctrine is advanced in one instance that the duty to employ a pilot upon leaving port is even stronger than upon entering, as in *Phillips v. Headlam*, 2 Barn. & Ad. 380, 9 L. J. K. B. 238, where it is said: "It may be conceded that a vessel coming

ed a material condition of the contract of insurance, and avoided the policy.

Rosetto v. Gurney, 11 C. B. 188.

The injury was the result of a risk voluntarily assumed; and for loss from such a risk plaintiff in error is not liable.

Williams v. New England Mut. M. Ins. Co. 3 Cliff. 250, Fed. Cas. No. 17,731; *Thompson v. Hopper*, 6 El. & Bl. 944; *Marsh, Ins.* 376; *American Ins. Co. v. Ogden*, 20 Wend. 305; *Bell v. Carstairs*, 14 East, 374; *Cleveland v. Union Ins. Co.* 8 Mass. 308; *Chandler v. Worcester Mut. F. Ins. Co.* 3 Cush. 328; 1 *Parsons, Marine Ins. p.* 532; 1 *Phillips, Ins.* § 1046; *Grim v. Phoenix Ins. Co.* 13 Johns. 451.

Mr. Nathan H. Frank, for defendant in error:

out of a harbor must have a pilot, because the captain has it in his power always to procure one."

In *M'Millan v. Union Ins. Co.* Rice, L. 248, 33 Am. Dec. 112, the court conceded that, if a vessel without a pilot, sustains injury in leaving a harbor where it is customary to have a pilot, such injury does not come within the perils insured against, since it is not a peril of the sea but a loss from the bad navigation of the vessel, and is to be set down to the fault of the master; and consequently the owner would be liable for it.

But, if the reasons for departure are sufficiently imperative, it may be that failure to employ a pilot, even upon leaving port, will not preclude a recovery for a loss ensuing.

Thus, where a consul advised a master who was waiting for his clearance to make his way out without further delay, because the place was threatened with an embargo, and the master immediately ran out without taking a pilot, but struck on a rock and was lost; and where it appeared that the vessels remaining were put under an embargo soon after the wrecked ship sailed,—it was held that, the act of the master being bona fide to avoid threatened danger, the insurers must respond for the loss. *Pillans v. Dalgarno*, Faculty Dec. 1808 to 1810, p. 1. (1 *Sansum & Berryman Ins. Dig.* p. 947.)

III. Voluntary stranding.

After the stranding of a steamboat by inevitable accident, resulting in opening her seams and causing her to leak dangerously, the act of the master and pilot, done in good faith, in voluntarily beaching her upon a sand bar to prevent her sinking, is justifiable, and not a negligent act on the part of the master. *The Natchez*, 42 Fed. 169.

The underwriters were held liable on the policy in *Redman v. Wilson*, 14 Mees. & W. 476, 14 L. J. Exch. N. S. 333, 9 Jur. 714, as for a peril of the sea, where the ship was voluntarily stranded to avoid sinking.

It appears from the facts that there was 1 L.R.A. (N.S.)

The policy being an insurance against constructive total loss, a 50 per cent damage, with abandonment, creates a total loss.

London Assur. Co. v. Companhia de Moagens do Barreiro, 187 U. S. 165, 42 L. ed. 122, 17 Sup. Ct. Rep. 785; *La Fonciere Compagnie D'Assurances v. Koons*, 21 C. C. A. 249, 44 U. S. App. 550, 75 Fed. 111.

If the property passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot recover the possession except by disproportionate exertions, expense, or hazard.

Monroe v. British & F. Marine Ins. Co. 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. 789.

The action of the salvors was a peril of the sea within the meaning of the policy.

a voluntary stranding of a steamer on the shore of an island on account of peril from a severe storm, in *Northwestern Transp. Co. v. Thames & M. Ins. Co.* 59 Mich. 214, 26 N. W. 336, which does not seem to have been advanced as a reason for nonrecovery under the marine policy. The question at issue was whether an acceptance of abandonment as a constructive total loss was shown.

In *Northwestern Transp. Co. v. Continental Ins. Co.* 24 Fed. 171, where there was a voluntary stranding to save a vessel from certain destruction, the underwriters were held to have accepted an abandonment of the ship, and were compelled to make complete repairs.

But in *Bowring v. Elmslie*, 7 T. R. 216, note, an action to recover a partial average loss upon fish which formed part of the cargo, a verdict was rendered for the insurance company upon the ground that the ship was fraudulently stranded.

IV. Running into danger of capture.

The illegal threat of a foreign government to seize a vessel bound for certain islands on a sailing voyage, if the voyage was persisted in, is not a sufficient reason to compel the master to abandon the voyage or forfeit his rights under a policy on the ground of gross misconduct. *Williams v. Suffolk Ins. Co.* 3 Sumn. 270, Fed. Cas. No. 17,738. The court declared that, if the loss was occasioned by the illegal act of a foreign government, it was a loss within the perils of the policy, even though it might have been avoided by the master by a different course of conduct, if his actual conduct was bona fide in furtherance of the objects of the voyage, and in pursuance of his duty to his owners.

But the assured cannot claim from the underwriter an indemnity for a loss caused by capture on account of failure to have the ship properly documented. *Bell v. Carstairs*, 14 East, 374. Lord Ellenborough, who wrote the opinion, says that the indemnity stipulated, on the part of the

Bondrett v. Hentigg, Holt, N. P. 149; Arnould, Ins. 7th ed. p. 1184; 1 Phillips, Ins. § 1107.

This salvor's lien was a direct loss under the term "perils of the sea" as used in the policy.

1 Arnould, Ins. 7th ed. § 863; Peters v. Warren Ins. Co. 14 Pet. 110, 10 L. ed. 377; International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. 313; 2 Parsons, Marine Ins. 151, note 1.

Where vessel or property is justifiably sold after damage by perils insured against and condemnation, it is a total loss without abandonment.

Gordon v. Massachusetts F. & M. Ins. Co. 2 Pick. 261.

The damaged value is to be ascertained by a sale on arrival.

assured, is only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect on the part of the assured himself, producing the loss of the property insured.

V. When peril incurred is prohibited by statute.

Where it appeared that a master, who was the insured, was running a race with another steamboat, and, for the purpose of securing more steam, had a barrel of turpentine brought out of the hold and used to feed the furnace, with the result that the vessel caught fire and was destroyed, it was held that he could not recover under the policy, since his act in using the turpentine was in direct disobedience of a statute providing that turpentine, etc. must be kept in metal-lined compartments at a secure distance from any fire on board ship. The court intimated that the fact that the master was running a race would have precluded any recovery by him under the policy; but the decision was placed upon the ground first above stated. *Citizens' Ins. Co. v. Marsh*, 41 Pa. 386.

VI. When peril is incurred in obeying governmental command.

A steamship chartered to the service of the United States was ordered by a general in command of an expedition in which it was employed, to cross a bar upon which the draught of water was not deep enough for the steamer, which fact was well known to the master of the tug delivering the command and directed to pilot the steamer in, and also to the steamer's master. The result of the attempt to obey the command was the complete destruction of the steamer. Under these facts, a recovery upon the owner's marine policy was held precluded on the ground that such an attempt, if made by the owner, would have been an unjustifiable, rash, and hazardous act of navigation. *L.R.A. (N.S.)*

International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. 317; London Assur. Co. v. Companhia de Moagens do Barreiro, 167 U. S. 171, 42 L. ed. 124, 17 Sup. Ct. Rep. 785.

This is a valued policy, and the valuation is conclusive between the parties for all purposes.

1 Arnould, Ins. 7th ed. p. 411; North of England Iron S. S. Ins. Asso. v. Armstrong, L. R. 5 Q. B. 248; The Potomac (The Potomac v. Cannon) 105 U. S. 630, 26 L. ed. 1194; Providence & S. S. S. Co. v. Phoenix Ins. Co. 89 N. Y. 565; The St. Johns, 101 Fed. 474.

Where an abandonment has been made to the underwriters, the agents of the assured are answerable to the insurer for their defaults, if any exist in this respect; and the rights of the assured are not affected.

tion, such as no prudent or skilful navigator would have undertaken, and such as to prevent him from recovering insurance for any resulting loss; and that the United States were the charterers of the steamship, and, viewed in that light, must be regarded as the agents of the owners; and, therefore, that the question is, whether the owners, if they had given the order to cross the bar, and the steamship had been lost, would have been entitled to recover. *Williams v. New England Mut. M. Ins. Co.* 3 Cliff. 250, Fed. Cas. No. 17,731.

A vessel was chartered to the government under the agreement that the war risks were to be borne by the United States and the marine risks by the owner. Upon a quartermaster's order to convey men and horses at a specified time from Washington to a point stated, the master, considering the order a military one, undertook to execute it, although the Potomac river at the time was frozen over, and he considered it unsafe to leave the wharf, but said nothing to that effect, and, in the course of the undertaking, the hull of the vessel was crushed by heavy pieces of ice, and she filled and sank. Admitting that the ship's master was subject to the orders of the quartermaster, the court said that this nevertheless did not require him to sail out of port under such conditions as would necessarily jeopardize the safety of his boat,—that he should have explained the danger,—and that the loss was not a war, but a marine, risk. The liability of the marine underwriters, however, was not in issue. *Reybold v. United States*, 15 Wall. 202, 21 L. ed. 57. Affirming 5 Ct. Cl. 277.

VII. When peril incurred was not proximate cause.

In *Thompson v. Hopper*, 6 El. & Bl. 944, after a vessel had been loaded with a cargo of coal, during which it was necessary to cast loose some of the rigging, she was, with the owners' knowledge, and before the rigging was made fast, passed over a bar

Gardere v. Columbian Ins. Co. 7 Johns. 520; *Walden v. Phoenix Ins. Co.* 5 Johns. 324, 4 Am. Dec. 359; *Center v. American Ins. Co.* 7 Cow. 564; *The Sarah Ann*, 2 Sumn. 210, Fed. Cas. No. 12,342; *Dickey v. American Ins. Co.* 3 Wend. 658, 20 Am. Dec. 766.

The ice was one of the risks assumed by the policy.

Williams v. Suffolk Ins. Co. 3 Sumn. 276, Fed. Cas. No. 17,738; *Catlin v. Springfield F. Ins. Co.* 1 Sumn. 434, Fed. Cas. No. 2,522.

The "wilful act" excepted is not a "wilful act" generally, but the "wilful act of the insured," and does not include the wilful act of "the persons who were agents in the act."

Barber, Ins. p. 123; *McKenzie v. Scot-*

tish Union & Nat. Ins. Co. 112 Cal. 557, 44 Pac. 922; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68; *The Barnstable*, 84 Fed. 901.

On petition for rehearing.

Marine policies usually cover fraudulent or dishonest acts of the master.

1 *Phillips, Ins.* § 1062; *Earle v. Rowcroft*, 8 East, 126; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 7 L. ed. 659; *Chandler v. Worcester Mut. F. Ins. Co.* 3 Cush. 328; *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102, 4 Am. Dec. 92; *Lawton v. Sun Mut. Ins. Co.* 2 Cush. 511; *Meyer v. Great Western Ins. Co.* 104 Cal. 381, 38 Pac. 82; *Atkinson v. Great Western Ins. Co.* 65 N. Y. 531; *Compania de Navigacion v. Brauer*, 168 U. S. 124, 42 L. ed. 398, 18 Sup. Ct. Rep. 12.

into an open roadstead, exposed to the east, and there anchored in order that her equipment might be made complete, in doing which men were immediately put to work. It was not unusual for vessels to do this in order to take advantage of high water in crossing the bar. Soon after being thus stationed an east gale arose, and, by reason of the anchor chains being entangled, the vessel was driven upon the rocks and wrecked. It was held that, although the proximate cause of the loss was the condition of the chains, the loss would not have occurred if the boat had been seaworthy when she was sent to sea, since, when the gale was observed coming up, she could have set sail and proceeded upon her voyage, and if she had done so the accident from the dragging of the cable never would have occurred. A new trial was granted on the ground that the misconduct of the owners occasioned the loss, although it was not the immediate cause of it.

But in *M'Millan v. Union Ins. Co. Rice*, L. 248, 33 Am. Dec. 112, where a master engaged a pilot to take his ship to sea, but on the day of sailing the weather was so threatening that the pilot refused to go, whereupon the master, believing that the force of the storm had become exhausted, and anxious to profit by the direction of the wind then blowing, sailed without the pilot, with the result that the vessel was wrecked, the evidence tended to prove that the ship was not injured while crossing the bar, but was capsized in the gale, at a point beyond which the services of a pilot were deemed necessary. In view of this fact, it was held that, since the injury was not the direct consequence of the failure to employ a pilot, the underwriters were not discharged.

VIII. Barratrous conduct.

If barratry of the master and crew is insured against in the policy, then the voluntary exposure of the ship to peril by the master in such a way as amounts to barratry of course compels the underwriters to 1 L.R.A. (N.S.)

respond for the loss ensuing. The liability depends upon the determination whether the act in question amounts to barratry.

Fraudulently running a vessel on shore, causing survey, condemnation, and sale, constitutes a barratry of the master which furnishes a ground for abandonment of the vessel as a total loss, when barratry of the master was one of the things insured against. *Clark v. Washington Ins. Co.* 100 Mass. 509, 1 Am. Rep. 135.

But the act of a master, who was temporarily insane from want of sleep and nourishment and from the effects of medicine, in sailing his vessel straight for a dangerous shore and onto a bar of sand in full view, resulting in the stranding of the brig, was held not barratrous; and a verdict in favor of the insured in an action upon the policy was sustained. *Hutchins v. Ford*, 82 Me. 363, 19 Atl. 832.

Lord Ellenborough, in *Heyman v. Parish*, 2 Campb. 149, stated that, notwithstanding Justice Buller had once held that, if an insured declared upon a loss by peril of the seas, and the defense was misconduct of those on board amounting to barratry, there could be no recovery, he could see no reason for that doctrine, and was of the opinion that, while a plaintiff declaring for a loss by peril of the seas could not recover upon a fraudulent sale, he could recover for a loss proved as laid, although it was caused by barratrous conduct.

The statement is made in 1 *Parsons, Marine Ins.* 568, that, "if a master undergoes any extraordinary and evitable peril, from no necessity whatever, but in the belief that it may be advantageous to his owner, a loss arising from this risk will be a loss by barratry." No cases are cited in support of this statement.

IX. Miscellaneous cases.

Where a policy of insurance upon a wharf-boat "lying at the wharf of the city of Evansville," insured it against perils of "seas, lakes, rivers, canals, fires," etc., the

Ross, Circuit Judge, delivered the opinion of the court:

This writ of error brings up for review a judgment against the Standard Marine Insurance Company, Limited, based upon a policy covering certain articles laden on the barkentine Catherine Sudden for a voyage from the port of San Francisco to Nome, Alaska, whereby the insurance company insured certain merchandise of the defendant in error, laden below deck, in the sum of \$5,250, and a lighterage plant,

also belonging to the defendant in error, laden on deck, in the sum of \$3,000, against "perils of the seas, pirates, assailing thieves, jettisons, barratry of the master or mariners, and all other losses and misfortunes that have or shall come to the hurt, damage, or detriment of the said property, or to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy."

The policy provided that the risk there-

owner was under no obligation to have the boat towed into an ice harbor during the season of danger from floating ice, notwithstanding a more or less prevailing custom to that effect; and his action in permitting the wharf-boat to remain at the place at which it was insured, although he knew of the danger from floating ice, was not wrongful or negligent upon his part so as to preclude him from recovering upon the policy. Evidence as to the custom above referred to is inadmissible in an action to recover upon the policy. *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78.

Where a master, being apprehensive that the pilot had been drinking, and that the ship was being run too close to shore, nevertheless did not come to anchor or resist the pilot openly, it was held an error of judgment upon his part, rather than misconduct, in *Earnmoor S. S. Co. v. Union Ins. Co.* 44 Fed. 374. The court says: "Even if it appeared that the circumstances were such that the most prudent course was to come to anchor, and that the master should be held to some extent negligent in going on, the case is certainly not one of wilful misconduct, nor of such gross negligence as alone would absolve the insurers from their contract."

It appearing that fire was expressly mentioned in the policy of insurance on a ship as one of the perils insured against, the underwriters were held liable although the ship was fired by the master himself in order to prevent her from falling into the hands of a French privateer of greatly superior strength, which was rapidly gaining on her. The court says: "If the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, subjects of the King, or by the captain and crew acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy." *Gordon v. Rimmington*. 1 Campb. 123.

The question in *Sadler v. Dixon*, 8 Mees. & W. 895, 11 L. J. Exch. N. S. 435, was whether throwing the ballast overboard, by the master and crew (which the court conceded was a voluntary act, as well as an improper and negligent act), whereby the ship became unseaworthy, excused the underwriter. In deciding that it did not, 1 L.R.A. (N.S.)

the court said that it was obvious that such an act, all unlawful motive concededly being absent, might be attributable to an error or defect in judgment; and that, where the loss can be laid to mistake of judgment, or an act of carelessness or negligence in the ordinary navigation of the vessel, the loss falls within the meaning of perils of the sea.

The decision most similar to *STANDARD MARINE INS. CO. v. NOME BEACH LIGHTERAGE & TRANSP. CO.*, and the one which supports it most nearly, is one where the complaint was dismissed in an action to recover upon a marine policy insuring the master of a steam tug against loss resulting from "any accident caused by collision" to vessels for which the steam-tug owners might be legally liable, when the evidence showed that the injury occurred to a canal boat while being towed at night by the steam tug through the midst of a floe of ice in New York harbor, a fragment thereof striking the canal boat in such a manner as to make a hole in her bow causing her to sink. It was held that the contact causing the injury was not a collision within the meaning of the term as employed in the insurance policy. The court declares that, when the master of a vessel insured designedly takes the chance of running into a perfectly apparent obstruction, although with the hope and expectation that the vessel will successfully meet the encounter, the contact is not a collision within the meaning of the insurance contract; and illustrates further by saying that "if, after the river had been closed for months by ice, the owner of the boat should conclude that the ice had been so far weakened by the rays of the sun that the boat could break its way through, and the result of the attempt should be an injury to the boat, no adjudication can be found holding that contact between the ice and boat under such circumstances would constitute a collision within the meaning of the term as it is employed in this contract. The injury in such case would be due, not to an unintended contact with a floating, foreign substance but to a deliberate attempt to break through a known barrier, the resisting power of which had been miscalculated." *Newtown Creek Towing Co. v. Aetna Ins. Co.* 163 N. Y. 114, 57 N. E. 302, Reversing 23 App. Div. 152, 48 N. Y. Supp. 927. M. M. M.

under should "cease at ship's tackle or thirty days after arrival at destination;" and, in accepting it, the defendant in error engaged for itself, its factors, servants, and assigns; "to sue, labor, and travel, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof, and also to use all proper and legal means to recover, through general average or otherwise, from the parties interested in vessel, freight, or cargo, either or all, any sums due the property insured or its owners, on account of sacrifices, losses, or expenses incurred for the general safety or the common good, to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk."

None of the articles in question were covered by the memorandum clause of the policy, which provided that all articles not excepted under that clause were "warranted by the insured free from particular average and partial loss unless occasioned by stranding, sinking, fire, collision, or other extraordinary peril hereby insured against, and amounting to 50 per cent or more on the sound value of the whole shipment at the port of delivery; and all such loss shall be settled on the principles of salvage loss, with benefit of salvage to the insurers."

The policy contained the further stipulation "that the provisions of the Civil Code of California shall be conclusive and binding, as regarding the warranty of seaworthiness, liability of insurers in case of prior, subsequent, or simultaneous insurance, and such other questions as are therein legislated upon and not otherwise provided for in this policy."

The complaint alleges that, while the vessel was proceeding upon her voyage, the whole of the insured merchandise and lighterage plant were lost by perils of the sea, to the damage of the defendant in error in the full sum insured. Among the defenses interposed by the insurance company were the following: That The Sudden, with its cargo, including the articles here involved, sailed from San Francisco for Nome April 28, 1900, and on or about the 28th day of May, 1900, in passing through and out of Unimak pass into Bering sea, met drift ice, and within twenty-four hours thereafter met with large fields of ice; and within forty-eight hours thereafter ran into and was surrounded with heavy ice, and thereafter, and on or about the 3d day of June, 1900, was struck by ice on her port bow, which was thereby stove in; that by reason of the injury the vessel was so crippled that she was compelled to seek and obtain assistance from other vessels then in the vicinity. That the property insured

by the defendant to the action, and then on board The Sudden, consisted of miscellaneous merchandise stowed below deck, and a lighterage plant, consisting of a launch, scow, and surf boat or boats, loaded upon her deck. That in the vicinity of The Sudden at the time were the sailing vessels Pitcairn and Rube Richardson and the steamer Corwin. That considerable portions of the merchandise so insured by the defendant to the action were taken from The Sudden by the Pitcairn, Rube Richardson, and Corwin. That the plaintiff to the action then and there arranged with the captain of The Corwin to tow The Sudden and the launch, scow, and surf boat or boats to Nome, Alaska, agreeing to pay as salvage for towing the launch, scow, and surf boat or boats the sum of \$2,500; and that in pursuance of that agreement The Corwin did tow the launch, scow, and surf boat or boats and The Sudden, with so much of the insured cargo thereon as had not been taken from her by The Corwin, Pitcairn, and Rube Richardson, to Nome. That the plaintiff to the action sailed The Sudden into the ice, knowing full well that so to do endangered the safety of that vessel, and that so to do was not consistent with good seamanship, or with due and proper care; but that plaintiff, when ice was encountered, in the exercise of due and proper care, should have changed the course of the vessel, and have sought open water or a port of safety until the danger from ice had passed. That upon the arrival of The Sudden and the launch, scow, and surf boat or boats at Nome in tow of The Corwin, the launch, scow, and surf boat or boats were delivered to the plaintiff to the action, and upon the suggestion of its agent at Nome a survey was held upon the vessel and cargo, resulting in the condemnation of both vessel and cargo, and a recommendation that they be sold; whereupon the vessel and cargo were sold at public auction. That the sale of the cargo was by manifest lots, without inspection or opportunity to inspect by the purchasers thereof. That at the sale the merchandise here in question was sold for \$530, which was at the time of a value greatly in excess of that amount. That with the lighterage plant the insured merchandise could have been landed at Nome. That the plaintiff to the action did not in any way seek to arrange with The Corwin, or with any of its officers, agents, or servants, for the landing or delivery to the plaintiff of the insured merchandise, or any part thereof, nor to secure from The Corwin, or any of its officers, agents, or servants, nor from The Pitcairn or Rube Richardson, the return or delivery to the plaintiff of any of

the merchandise taken from *The Sudden*, nor any compensation therefor, and did not in any way seek, and has not in any way sought, to arrange or agree with *The Corwin*, or with any of its officers, agents, or servants, for the amount to be allowed or paid to it by way of salvage for the insured merchandise in question, and did not in any way seek, by the purchase of such merchandise at such sale or otherwise, or at all, to recover the insured merchandise, or otherwise to reduce the loss to the plaintiff or to the defendant to the action. That, had the plaintiff sought to secure the delivery to it of the insured merchandise, or bid in the same at the auction sale, it could and would have greatly lessened the loss to plaintiff on such merchandise. That upon the arrival of *The Sudden* at Nome the weather was calm, and that the insured merchandise could have been safely landed and delivered to the plaintiff, and would have been so delivered if plaintiff had sought to secure the delivery thereof.

It appears from the record that *The Sudden* left San Francisco in command of Captain John L. Panno, on the 28th day of April, 1900, and proceeded on her voyage, sailing through the Unimak pass into Bering sea about the 1st of June. We extract from the testimony of Captain Panno:

"We sailed from San Francisco on the 28th day of April. The vessel was not down in the water more than usual. She was properly loaded. As a mariner I considered it a late date to start for Nome beach. Vessels had gone ahead of us; *The Thrasher* and *The Pitcairn*, and several others. I cannot remember the names. Most all the steam vessels had gone ahead of us. *The Thrasher* was a steamer, and *The Pitcairn* was a sailing vessel. *The Rube Richardson* was a sailing vessel. *The Pitcairn* left some time in January or February. We overtook her on the way up. She had two or three months the start of us. I found her in the ice. The Unimak pass is located at the entrance to the Bering sea. We passed through Unimak pass into Bering sea. We went through the pass about the 1st of June. We did not come in sight of ice until after we got to Unimak island. I think that was about two and a half or three days from Unimak pass. The ice was about 5 miles away when I first sighted it. It was about 5 o'clock in the afternoon then. It was on the lee beam. It was to the left of us. The ice was in small pieces, as big as this room and bigger. They were floating pieces, broken ice. Some of them were about level with the water, and some of them 8 or 10 feet high. It is generally understood that 1 L.R.A. (N.S.)

the largest part of a chunk of ice is that below the surface of the water. I had no idea how far below it extended. Some of these small chunks that I noticed floating about were $\frac{1}{4}$ of a mile, a mile, and 5 miles apart. They were not very numerous. I sailed right on, and did not turn around and go back. My object was to get through it. When I got to the ice itself I found leads once in a while. Perhaps to-night I would be all inclosed with ice,—ice all round us, so we could not move any way; but during the night that ice would move, and perhaps in the morning at 8 or 9 o'clock we would have a lead of 4 or 5 miles that we could sail through. But around these leads, on each side and forward, it was full of ice. The ice got thicker as I proceeded. I sighted a lot of vessels at about the time I first struck this ice in Bering sea. They were all in the same position that I was; some steamers and some sailing vessels. *The Pitcairn* and *The Rube Richardson* were sailing vessels, both bound for Nome, with the same kind of cargo that I had. We were all trying to get there as soon as we could, as early as we could get there. We wanted to market our goods. The next morning after sighting the ice it was broken, but rather larger; larger in proportion. I do not know whether it was any thicker. It was about the same height out of the water. It was thicker as to the pieces being closer together. I kept on sailing through it all that day and all the next night. On the third day we could not get through it. We got in a lead, and we could not get through. I tacked ship and stood back again, and found a lead, I suppose 10 or 15 miles. I went right into it, still fighting to get up to Nome. I did not get through that lead. I got up about 10 miles and fell in with *The Portland* and another steamer. I fell in with two steamers and stopped in the ice with them; made fast to the ice and lay there two days. They were stuck in the ice. We lay there until we got a lead, and kept working up through it. We continued four or five hours after we got out of the last pack before we were stopped again. In the next lead I was in the company of two steamers, and the steamers left about 4 o'clock in the morning ahead of me through that lead and went on through out of sight. I got under way about 8 o'clock in the morning and started after them, and at about 11 o'clock, or 10 o'clock I hit a piece of ice. The ice did not hit me. I hit it. My vessel ran into the ice. She hit it, and knocked her bow in, something like that desk there [indicating]. There was a piece of ice which I supposed I would go clear of, and down under water it stuck

out like that desk, and hit her bow down under water. The ice was a great deal harder underneath than it would have been on top. It looked like fresh-water ice. The moment I struck the ice there was a hole in my bow. As soon as I felt her hit it, I put her bow on a cake of ice, so as to catch her there, so as she would not go down. I put my colors down, put the Union down in distress. When they sighted me they came down and stopped; that is The Richardson and The Pitcairn. They were coming down the lead astern of me, and they came up and made fast with me; one a little further off than the other. I signaled them for help. Some of the people from The Richardson and The Pitcairn got off their vessels and got on mine. They lay by me until I got towed away by the steamer. The people from The Rube Richardson and The Pitcairn took some of the goods off The Sudden. They were out stores from between decks, mostly flour and lard, and such things as that, and I gave them leave to take them. I found the vessel was filling full of water, and it would be spoiled, and I gave them leave to take them. These stores were put away on The Sudden in the between-decks. The Sudden had two decks. Below that was the hold of the vessel. These stores and provisions were on the second deck. There was nothing on the upper deck in the way of provisions. I made no distinction, as between the provisions or stores belonging to the Nome Beach Lighterage & Transportation Company and those that belonged to other shippers, in giving them permission to go on board and take provisions. The men that had the other stores, their goods were all marked. They took perhaps altogether 10 tons. Most of these belonged to the Nome Beach Lighterage & Transportation Company. I told The Rube Richardson people to take these goods, after they had taken them, to Cape Nome, and what salvage there was on them we would pay it. The Pitcairn people—all of our crew and everybody was board The Pitcairn. I did not say anything to him, because I thought they would eat them all up, as we would be there four or five days. The Corwin came in sight next day, and pumped the water out of my ship, and took it in tow, and carried us to Nome. I made an arrangement at that time with The Corwin people with regard to the lighterage plant that was on board. There was a written agreement signed at that time, as between myself and the captain of The Corwin, or the agent, or whoever he was. I think Captain West was captain. This was signed on board of The Corwin before they started. It was drawn up and written after I had talked with The Corwin about the terms on

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which the lighterage plant was to be taken to Nome. I made no arrangement with the captain of The Corwin as to what he would charge for taking the hull of The Sudden to Nome. I made no arrangement with him at that time as to what he would charge for taking the cargo belonging to the Nome Beach Lighterage & Transportation Company to Nome. I did not enter into any arrangement with the captain of The Corwin at that time, or with anybody else on board of The Corwin at that time, as to what should be charged for saving anything, except the lighterage plant. I did not expect, and they did not expect, to save anything when they commenced on it. So I could not make any arrangement. I made no arrangement with them as to what the salvage service should be, or what the payment for it should be. The written agreement was signed before the water was pumped out of The Sudden and they started to Nome. After they got her up so that she could be towed, between that time and the time that we got to Nome. I did not enter into any arrangement with anybody on board of The Corwin looking to an arrangement of the charge they should make for salvage services for saving the goods on board of that ship."

At Nome the only anchorage is the open roadstead, and there The Sudden was anchored. It appears from the evidence that the weather was at the time good, and as a matter of fact continued good for a good many weeks; but it also appears that storms are liable to occur there at almost any time. The cargo had been wet with salt water for seven or eight days, and, so far as it consisted of groceries and canned goods, was greatly damaged. But the 150 tons of coal belonging to the defendant in error, and included within the property covered by the policy in question, was not much, if at all, damaged.

The defendant in error had sent to Nome as its agent one Morine, and given in his charge \$3,000 of its money. Previous to the arrival of The Sudden, Morine had disposed of most of that money and had become seriously ill. Because of his illness and his consequent inability to look after the interests of the defendant in error, he appointed Captain Omar J. Humphrey in his stead to take charge of The Sudden and her cargo, and to represent the defendant in error in respect thereto. Morine had no express authority to make such appointment, but it appears that his action in that regard was ratified by the company by letter of date July 2, 1900. Humphrey accepted the appointment, and, upon the arrival of The Sudden, in tow of The Corwin, assumed the responsibility of the defendant

in error in respect to the business in question. He arranged for the payment of the \$2,500 stipulated to be paid for the salvage of the lighterage plant, and took possession of the same, which was first used—in accordance with the salvage agreement between the masters of The Sudden and The Corwin—in discharging the cargo of the latter. There is testimony to the effect that the reasonable value of the services of the lighter was \$400 for ten hours' work, and for the launch \$50 a round trip of not exceeding one hour for each tow of the lighter.

It appears that at the time in question there were from 20,000 to 25,000 people at Nome, attracted there by the wonderful discoveries of gold. There were no courts nor regularly established government of any kind at the place; but the United States revenue cutter Bear, with its officers and men, was there. With the consent and approval of Humphrey a survey, composed of the ship carpenter of The Bear, the president of the chamber of commerce, of Nome, and an experienced shipmaster, was held upon The Sudden, and she and her cargo condemned. It was by them recommended that the vessel be sold, which was done. Upon the demand of the captain of The Corwin, and with the consent of Humphrey, the miscellaneous cargo of The Sudden was put up and sold. The auction was held in Nome, and the sale was made by manifest lots, the goods remaining in the hold of the vessel anchored off the beach, without examination by any buyer as to quantity, quality, or condition, and without any opportunity of such examination. The portion of the cargo owned by the defendant in error and covered by the policy in suit, sold at such sale, consisted of 150 tons of coal and 6,000 feet of lumber sawed, fitted, and ready to be put together as a house, and all of the insured merchandise, except the small lots taken by The Pitcairn, Rube Richardson, and Corwin, and was sold for the aggregate sum of \$530, which amount was turned over to The Corwin. The evidence tends to show that neither Humphrey, nor Captain Panno, nor any other person connected with the defendant in error, took any step, or made any effort, to secure an agreement with the salvors fixing a proper salvage charge, or to secure the unloading or delivery of the goods of the defendant in error subject to a salvage lien in favor of the salvors, or the unloading of those goods prior to the sale in order that the most advantageous prices might be obtained therefor at the sale, or with the view to the buying in of the goods in the event that there should not be buyers thereof at fair prices; in short, that no steps were taken, and nothing whatever was done
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by the defendant in error, nor by anyone for or on its behalf, to minimize the loss. On the contrary, there is much evidence in the record tending to show that the sale was not made in good faith, but in furtherance of a design to dispose of the property in question at prices far below its real value. One pregnant circumstance tending to show this is testimony to the effect that of the 150 tons of coal belonging to the defendant in error 100 tons were bought by Humphrey for \$4 a ton, the cost of lightering which from ship to shore was at the time only \$18 a ton; whereas, it appears in the testimony that coal was at the time worth at Nome from \$30 to \$90 a ton, and that as a matter of fact Humphrey shortly thereafter sold a part of the same coal for \$60 a ton. It is true that the sale was advertised in a paper published at Nome, and that during its progress it was interrupted by one Gollin, who announced himself as the agent of the San Francisco Board of Marine Underwriters (of which board the plaintiff in error is a member), and that at Gollin's request the sale was adjourned to enable him to make an investigation, and that he thereafter consented, as agent of the San Francisco Board of Underwriters, that the sale should continue. It is also true that Gollin testified on the trial of this case that the sale was "fair and square," and also that the general manager of the plaintiff in error testified that he thought the company should pay the loss as claimed by the insured. But it further appears that his company is reinsured for all but \$1,000 of such loss, and that those reinsurers seriously object to such payment.

It will be thus seen that all of the insured articles in question, with the exception of such portions thereof as were taken on board The Corwin, Pitcairn, and Rube Richardson, arrived *in specie* at destination, and that the loss for which defendant in error sues (except as respects the lighterage plant) arose out of their sale at Nome under the circumstances indicated. The terms of the policy have been stated, under which it is clear that, in a case where the facts warrant it, a recovery may be had for a total loss, either actual or constructive, and for a partial loss, provided such loss be occasioned by stranding, sinking, fire, collision, or from any extraordinary peril insured against, and amounting to 50 per cent on the sound value of the whole shipment at the port of delivery. A constructive total loss is one upon the happening of which the insured may abandon the subject-matter of the insurance. Unless there remains something of value to pass to the underwriter, there is, as a matter of course, nothing to abandon, and no case for the operation

of the doctrine of abandonment. 1 Am. & Eng. Enc. Law, pp. 5-13, and authorities there cited; Cal. Civ. Code, §§ 2705, 2717.

It is said for the defendant in error that the merchandise cargo was a constructive total loss, for the reason that when it reached the roadstead at Nome it was still in peril, because of the constant danger of The Sudden going ashore. "Hence," argues counsel, "the cargo was, at the time of the sale, by reason of a peril insured against, in danger of absolute destruction, and then and there the subject of abandonment." Undoubtedly so; but the trouble with counsel's point is that, so far as the evidence shows, the insured did not then, nor at any other time when the property was the subject of abandonment, undertake to abandon it. It is plain, therefore, that, in so far as concerns the merchandise portion of the cargo in question, there could, under the evidence, be no such thing as a constructive total loss; for long prior to the attempted abandonment all that portion of the cargo had absolutely passed from the insured. It had nothing to abandon, and there was, therefore, in respect to it, an absolute total loss, or there was no such loss at all. Whether the case showed a loss amounting to 50 per cent or more caused by sinking, and recoverable under the provision of the policy relating to that matter, is another question.

It is further contended for the defendant in error that there was a constructive total loss, for the reason that the danger of The Sudden going ashore at Nome rendered a sale of both vessel and cargo justifiable, and that, "where vessel or property is justifiably sold after damage by peril insured against and condemnation, it is a total loss without abandonment," within the rule declared in *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249. In that case the vessel insured, having received damage from the perils insured against, put into the harbor of St. Domingo. A survey was called, and the surveyors reported that she could not be repaired there, by reason of the want of materials and the extraordinary expense of making repairs at the place, without incurring an expense exceeding her value, and they therefore condemned her to be sold for the interest of whom it might concern, which was done. The purchaser afterwards refitted her for sea. It was held that the survey was not conclusive evidence of the necessity of the sale; that, if the sale were necessary, it would constitute a total loss without an abandonment, and in such a case the plaintiff could recover for a total loss; but that in case of a constructive total loss he could recover only as for a partial loss, inasmuch as by 1 L.R.A. (N.S.)

the transfer he had put it out of his power to make an abandonment. The facts of that case were quite unlike those of the present one. Here the vessel, with her cargo, was anchored at Nome, in good weather, which continued for weeks, and with a lighterage plant owned by the insured capable of discharging the cargo. There was no sale by the master of vessel or cargo for the benefit of whom it might concern, but a sale by the salvors to satisfy their lien. It is not doubted that a salvage service is a loss by a peril of the sea, and that, when it is found to equal or exceed half the value of the insured property, the insured may, under such a policy as that in suit, prior to a sale ordered to satisfy the lien of the salvors, abandon and claim as for a total loss. But in the present case there is neither a showing as to the amount of the damage to the cargo, nor that the value of the salvage services was ever ascertained. Unless the loss was at least equal to 50 per cent of the sound value of the cargo at the port of delivery, there was, under the terms of the policy, no liability of the insured, and, as a matter of course, no forced sale of any kind could create one.

It is further contended on the part of the defendant in error, and was so contended in the court below, that the retention by The Piteairn, Rube Richardson, and Corwin of such portions of the cargo in question as were taken on board those vessels (in quantity, according to the testimony, about 10 tons; value not stated), and the sale by The Corwin of the balance of the merchandise cargo, constituted a total loss from a peril of the sea. The correctness of that proposition was and is controverted by the plaintiff in error. Upon the point the court below instructed the jury: "The accident to the vessel, by which a hole was stove in her bow and she was almost submerged, was a peril of the sea from which the cargo under deck would have been lost, but for the intervention of the salvors who applied themselves to the rescue. In this way the vessel and cargo came rightfully into the possession of the salvors, who thereupon, after arriving at Nome with the vessel and cargo, claimed the whole of such cargo under deck for salvage service, and so claiming, permanently deprived the owners of said property. There were no tribunals at Nome authorized to determine the question of salvage, and no recognized authority in that behalf, other than the captain of the revenue cutter then at that place, and who acting as arbiter in the matter, gave such cargo to the salvors, by whom it was sold, and thereby became and was a total loss to plaintiff within the meaning of the

law, and for this loss the defendant is liable, unless the plaintiff might, with reasonable effort on its part, have arranged with the salvors for an adjustment of the salvage claim and the delivery to it of the said cargo."

We are of opinion that that instruction of the court was substantially correct (*Monroe v. British & F. Marine Ins. Co.* 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. 787, 789), except so far as it stated that the captain of the revenue cutter then at Nome was a recognized authority for the determination of the question of salvage. The evidence did not justify the statement that the question of salvage was submitted to the captain of *The Bear* by the parties in interest as arbitrator; and it is perfectly clear that, otherwise, he had no power in the premises; the question of salvage being a judicial one, of which a court of admiralty only has jurisdiction. There is a good deal of force in the claim on the part of the plaintiff in error that it was entitled to the peremptory instruction requested by it, on the ground that there was no evidence tending to show any effort on the part of the insured to adjust the salvage or otherwise minimize the loss; but, in view of all of the circumstances of the case, we conclude that that question of fact was properly one for the determination of the jury.

In respect to the lighterage plant, the plaintiff in error requested the court below to instruct the jury that the plaintiff to the action could not recover any of the consideration paid by it to the salvors for the salvage of that plant, or any portion of the value of such services, if in fact the plant or any material portion of it was not at the time of the salvage agreement in danger of being lost by reason of the injury to *The Sudden*. That request was refused, and, instead, the court instructed the jury as follows: "It does not appear that any injury or damage resulted to the lighterage plant from the accident to *The Catherine Sudden*, or that the plaintiff suffered any loss or damage, as to said plant, within the protection of the policy, except in so far as plaintiff was compelled to pay salvage for the towing of said lighterage plant from the place of the accident to Nome. As to such loss, the stipulation of the policy is to the effect that, in case of loss or misfortune resulting from any peril insured against, the insured is to sue, labor, and travel, and use all reasonable and proper means for the security, preservation, and recovery of the property insured, for the expense of which the insurer will contribute in proportion as the sum insured is to the whole sum at risk. The extent of the defendant's liability

under this clause, as to the lighterage plant, is such proportion of the cost of saving the plant as the amount for which the plant was insured bore to its valuation, as stated in the policy, which valuation is \$3,000. And with respect to said plant if you find that *The Catherine Sudden* was seaworthy for the voyage, the plaintiff is entitled to recover the \$2,500 paid for its salvage, plus the reasonable value of the services rendered by the launch and barge in the discharge of *The Corwin* at Nome."

The claim of the plaintiff in error that the court was in error in refusing the peremptory instruction requested is based upon the rule laid down by Mr. Barber: "Where the insurance is against total loss only, a claim for expenses incurred under the suing and laboring clause will be disallowed, where it is evident from the facts of the case that no danger of a total loss existed." *Barber, Ins. p. 370.*

The reason for the rule, as stated by Barber and in the cases cited by him, is that the insurer, being liable only for a total loss, is not interested in the prevention of anything less than a total loss, and cannot properly be called upon to contribute to an expense incurred to prevent a loss in which it is not concerned. But in the present case, as has been seen, the insurance was not against total loss only, but against actual and constructive total loss, and against partial loss, if occasioned by stranding, sinking, fire, collision, or other extraordinary peril insured against and amounting to 50 per cent or more on the sound value of the whole shipment at the port of delivery. The valuation fixed in the policy is conclusive between the parties.

In *Arnould on Insurance*, 7th ed. p. 411, it is said: "There is by English law no exception to the rule under discussion. As long as the contract of insurance remains unimpeached, the valuation in the policy can under no circumstances be opened; or, to use the words of Cockburn, Ch. J., 'where the value is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then in respect of all rights and obligations which arise upon the policy of insurance the parties are estopped' from disputing the value stated."

In *The Potomac* (*The Potomac v. Cannon*) 105 U. S. 630, 26 L. ed. 1194, the Supreme Court said, concerning such valuation: "That valuation is conclusive in respect of all rights and obligations arising upon the policy of insurance."

In § 2736 of the Civil Code of California the law is thus declared: "A valuation in a policy of marine insurance is conclusive

between the parties thereto in the adjustment of either a partial or a total loss, if the insured has some interest at risk."

We think the court below rightly held the "sum at risk" to be fixed by the terms of the policy. The circumstance that that sum happens, in the case in hand, to equal the sum insured, thereby obligating the insurer to pay the whole, instead of a part, of the expenses incurred under the "sue and labor" clause of the policy, does not change the binding character of the valuation. We are of opinion that the instruction under discussion was correct.

It appears, however, from the testimony of the master himself, that he well knew of the existence of the ice and of the risk incurred in endeavoring to push through it; and that he well knew all of this in ample time to have avoided it. Can it be properly held that it was not his duty to have avoided the danger,—that he did not commit a wrongful act when he deliberately, wilfully, undertook to "fight" his way, as he himself expressed it, through the ice, for the purpose of arriving quickly at Nome, and thus secure for his principals a better price for the merchandise, and that they might the sooner realize the profits expected to accrue from the lighterage plant that he carried? We think this must be answered in the negative. Taking the captain's testimony to be true, it is not, in our opinion, a case of negligence at all, whether simple or gross, but one of a deliberate and reckless assumption of a well-known danger, which the law made it the master's duty to have avoided. It was both a wilful omission to perform his legal duty, and an intentional commission of a wrongful act, resulting in the loss in question, for which, both upon principle and authority, the insurer, in our opinion, is not liable. In the first place, we think the liability asserted does not exist because of that provision of the Civil Code of California expressly made a part of the policy in suit, declaring that "an insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents, or others." Civil Code, § 2629.

Speaking of that statutory provision, the supreme court of the state said, in the case of *McKenzie v. Scottish Union & Nat. Ins. Co.* 112 Cal. 548, 557, 44 Pac. 922: "The ordinary negligence of the insured and his agents has long been held as a part of the risk which the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability. But wilful exposure, gross negligence, negligence amounting to misconduct, etc., have often

been held to release the insurer from such liability. To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose was the object of the framers of our Civil Code. Under § 2629 of the Civil Code, the nice distinctions often made necessary are dispensed with, and the general proposition is established that no form of negligence on the part of the insured, or his agents or others, leading to a loss, avoids the policy, unless it amounts to a wilful act on the part of the insured. The Code thereby sets at rest a fruitful cause of litigation. This section was not intended, however, to absolve the insured from the performance of those acts which he has expressly covenanted to perform. To do this would be, not to measure his conduct and obligations under the contract, but to abrogate it. When the insured in the present case warranted, in case the mill was idle and not in use, to have a watchman on duty constantly day and night, in and immediately about the buildings or works, he bound himself to the performance of specific acts, from the performance of which no negligence could exonerate him."

But while, under the statute cited, negligence on the part of the insured, whatever the degree, does not exonerate the insurer, he is relieved of responsibility for loss occasioned by "the wilful act of the assured." The court below instructed the jury that by this latter provision "is not meant an act intentionally or negligently done, resulting in the loss of the insured property, even though the negligence be gross; but the act must be one concurred [in] by the insured with the corrupt design of destroying the property."

It is, in our opinion, impossible to sustain that construction of the California statute. "Negligence and wilfulness are the opposites of each other. They indicate radically different mental states. . . . Negligence is also to be carefully distinguished from fraud; the distinction arising in this case, as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or constructively; negligence is never so." 16 Am. & Eng. Enc. Law, pp. 395, 396, and cases there cited. In negligence, as said by Beardsley, J., in *Gardner v. Heartt*, 3 Denio, 232, "whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty." But an intent to do a wrongful act or to omit the performance of a duty is necessarily wilful. Such wilfulness may fall short of fraud, against which, on the part of the assured, the policy in suit insured; for it covered barratry of the master and mariners. The distinction was

very clearly pointed out by Chief Justice Shaw in the case of *Chandler v. Worcester Mut. F. Ins. Co.* 3 Cush. 328. That was an action upon a fire insurance policy, in which the defendants admitted the making of the contract, the loss within the time, and all the facts necessary to constitute a *prima facie* case for the plaintiff. They also admitted that there was no fraudulent design to set fire to the building insured, and declared that no evidence of that sort would be offered. The defendants proposed to show, and as matter of defense rely on proof of, the gross negligence and carelessness and the gross misconduct of the plaintiff as the cause of the loss. On the offer of this evidence the trial judge ruled that proof of the gross negligence and carelessness and of the gross misconduct of the assured, as the cause of the destruction of the building by fire, would constitute no defense to the action, and thereupon rejected the evidence. The court, speaking through Chief Justice Shaw, said: "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitute no defense. Whether the same rule will apply equally to a case where a loss has occurred by means which the assured by ordinary care could have prevented is a different question. Some of the cases countenance this distinction. *Lyon v. Mella*, 5 East, 428; *Pipon v. Cope*, 1 Campb. 434. But it is not necessary to decide this question. The defendants offered to prove gross misconduct on the part of the assured. How this misconduct was to be shown, and in what acts it consisted, is not stated. The question, then, is whether there can be any misconduct, however gross, not amounting to a fraudulent intent to burn the building, which will deprive the assured of his right to recover. We think there may be. By an intent to burn the building we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, but not including a mere nonfeasance. Suppose the assured, in his own house, sees the burning coals in the fireplace roll down onto the wooden floor, and does not brush them up. This would be mere nonfeasance. It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. Suppose the premises insured should take fire, and the flame begin to kindle in a small spot, which a cup of water would put out, and the assured has the water at hand, but neglects to put it on. This is mere nonfeasance; yet no one would doubt that it is culpable negligence, in violation of the maxim, *Sic utere tuo ut alienum non lœdas*. To what extent such negligence must go, 1 L.R.A. (N.S.)

in order to amount to gross misconduct, it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that *crassa negligentia* was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury. Whether the facts relied on to show gross negligence and gross misconduct, of which evidence was offered, would have proved any one of these supposed cases, or any like case, we have no means of knowing; but, as they might have done so, the court are of opinion that the proof should have been admitted, and proper instructions given in reference to it. The terms 'slight negligence,' 'want of ordinary care,' and 'gross negligence' are useful in their way; but they are not precise and exact enough, without a statement of the facts designated by them, to enable a court to judge of the rights of parties thereby affected. The proper business of jurisprudence seems to be to take a series of facts and circumstances, conceded or proved, and to declare what are the rights of the parties arising out of them."

In the case of *Williams v. New England Mut. M. Ins. Co.* 3 Cliff. 244, Fed. Cas. No. 17,731, the owners of an insured vessel attempted to put her across the bar at Hatteras inlet. She struck on the bar and was wrecked. The master knew that the depth of water on the bar was such as to make the attempted passage dangerous. Judge Clifford held that, under the circumstances, the loss was not within the protection of the policy, saying: "Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur; but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act or by that of any agent for whose conduct he was responsible," citing *Thompson v. Hopper*, 6 El. & Bl. 944; *Marsh, Ins.* 376; *American Ins. Co. v. Og-*

den, 20 Wend. 305; Bell v. Carstairs, 14 East, 374; Cleveland v. Union Ins. Co. 8 Mass. 308.

The case of Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68, was, like the present, an action to recover on a policy of marine insurance. The insured sued as for a total loss arising from one of the perils specified in the policy. The insurance company pleaded *non assumpsit* and payment, with leave to give in evidence the matters set forth in its affidavit of defense, which was adopted as a special plea. According to the bill of exceptions in the case, there was evidence in behalf of the plaintiffs tending to show that, without wilfulness or design on the part of her captain, the vessel was carried, April 28, 1880, before the expiration of the policy, over the falls of the Ohio river, at Louisville, Kentucky, and sunk, receiving damage in a sum equal to 50 per cent of her agreed value, and that on the 18th of May, 1880, it being apparently impracticable to float her off and repair her, the vessel was abandoned as a total loss, and the sum due under the policy demanded. The evidence introduced by the company tended to establish, among other things, these facts: The master of The Alice (the vessel in question) was C. F. Adams, one of the assured, and a son of the other plaintiff. Before the sailing of the vessel he had the reputation of being a "drinking" man, and of that fact his father was informed. On her arrival at Louisville, on the morning of April 28, 1880, the master gave the usual signal (which was transmitted to the engineer) that he had no present need of the engines. The joint of the mud valve was out of order, threatening damage to the freight, and making repairs necessary. The steam was thereupon blown off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud valve connected with the boiler needed repairs. The work of repairing made it necessary to blow off steam. The captain subsequently went on deck, and, without making inquiry of the engineer as to the condition of the steam, or receiving any notice from him that steam was ready, tapped his bell at about 8:30 A. M. as a signal to let go the boat. At that time there was not sufficient steam to propel the vessel. It is the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam, and await his reply that the steam is ready before giving the order to let go. Upon being let go she was carried by the current down the river and over the falls, and, striking a pier, was badly damaged, in consequence of which she sunk soon

1 L.R.A. (N.S.)

thereafter below the bridge in about 18 feet of water. The plaintiffs thereafter offered, among other things, evidence tending to show that "it was the custom of the river that the engineer should give notice to the captain before exhausting steam, and that it was not the custom for the captain to have notice from the engineer that steam was ready before giving the order to let go." The court, at the request of the plaintiffs and against the objections of the company, instructed the jury that "where a loss under a policy of insurance, such as the one in suit, happens from the perils of the river, it is not a defense to the insurance company that the remote cause of loss was the negligence of the insured or his agents," and that "the mere fault or negligence of the captain of the vessel, by which The Alice was drifted into the current and drawn over the falls, will not constitute a defense for the company, unless the jury should be satisfied that the captain acted fraudulently or wilfully, with design in so doing." The theory of the defense was disclosed by the request to instruct the jury that, if they "are satisfied from the evidence that the accident and loss was caused by the misconduct of Captain Charles F. Adams, then the plaintiff cannot recover." This request was denied, but the court said to the jury: "This is true, if the jury is satisfied that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the vessel to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but, if the proximate cause of the loss was the stranding of the vessel, this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employees." The Supreme Court said: "We do not perceive anything in these instructions of which the insurance company can rightfully complain. The court proceeded upon the ground that, if the efficient, and therefore proximate, cause of the loss was a peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling." And, after referring to various cases, the Supreme Court further said: "But it is insisted that the court should have granted the request of the company to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the

master. Had that request been granted in the form asked, the jury might have supposed that the company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence, as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy."

Thereby was recognized the distinction above pointed out between negligence, fraud, and a wilful exposure to known dangers.

The doctrine of *respondet superior* being applicable to the case (1 Phillips, Ins. § 1056; Orient Mut. Ins. Co. v. Adams, *supra*; American Ins. Co. v. Insley, 7 Pa. 223, 47 Am. Dec. 500), it follows that, if Captain Panno did, with knowledge of the dangers to be encountered and with ample time to have avoided them, designedly undertake to force The Sudden through the ice in order to reach Nome quickly, that his principals might gain pecuniary advantage, he was guilty of the wilfulness which the California statute declares relieves the insurer of liability, and the jury should have been so instructed by the court below. This construction of the California statute is, as shown above, in accord with the general law upon the subject.

For the reasons stated, the judgment is reversed, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

Petition for rehearing denied.

Petition for certiorari dismissed by Supreme Court of United States January 2, 1906.

WISCONSIN SUPREME COURT.

THOMAS BOYLE et al., Respts.,
v.

NORTHWESTERN NATIONAL BANK OF
SUPERIOR, Impleaded, etc., Appt.

(.... Wis.)

1. Bank deposit—trust fund—application.

Money received by a commission merchant for produce sent him for sale, and deposited

by him in his general account in bank, belongs to the owners of the produce, and cannot be applied by the bank to the obligations of the merchant.

2. Same—suit to reach fund.

Persons who have shipped grain to a commission merchant for sale, the proceeds of which he has deposited in his bank account, cannot, as equitable owners, reach the proceeds of property belonging to other consignors, which the merchant had transferred to the bank in payment of his own obligation prior to the receipt of the property of the complaining consignors.

On Rehearing.

3. Same—rights between beneficiaries.

A consignor, the proceeds of whose property have been deposited by a broker in his general bank account and checked against, can hold the bank liable only for the lowest amount remaining in the account at any time when he was the sole equitable owner of the account, as against the rights of other consignors, the proceeds of whose property subsequently swelled the account.

4. Same.

Where funds belonging to several consignors are deposited by the broker in his general bank account, which is checked against, and thereby reduced below the aggregate amount of the claims, the claim represented by the last deposit which remains intact, except as to charges properly made against it at the time the fund is brought into court for distribution, is entitled to payment of its net balance in full.

5. Same—ratable distribution.

Funds in a bank account belonging to several beneficiaries, which were deposited by a trustee who reduced the account below the aggregate of the claims, will, except as to such deposits as remain intact, be distributed ratably.

(June 23, 1905.)

APPPEAL by defendant Northwestern National Bank from a judgment of the Superior Court for Douglas County in favor of plaintiff and interveners in an action brought to impose a trust on a bank deposit. Modified and affirmed.

Statement by Cassoday, Ch. J.:

This action was brought by the plaintiff and the five interveners to recover from the defendant banks, or one of them, moneys realized as the proceeds of grain and flax

Case Note.—On the general question of the right of a bank to apply to its own debt a deposit made by a fiduciary or representative, the cases are treated at length in a note in 52 L. R. A. 790. On the specific question involved in the above case, of the rights of a bank in respect to moneys deposited by a commission merchant in the course of his business, the cases directly in point are but few. The most important one is

that of Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118, from which the opinion of the court in the above case makes a pertinent quotation, to the effect that the bank, under the circumstances of the case, must have known that the moneys were the proceeds of property of the factors' principal. The court in that case says that the factors were known to the bank to be in

sold for them, or some of them, on commission by E. Schwedler, between September 6, 1901, and February 10, 1902, and by him deposited in the Northwestern National Bank of Superior, and which bank sold and transferred all its assets to the First National Bank of Superior, which assumed all liabilities September 22, 1902. The facts are undisputed, or found by the court, and are to the effect that the Schwedler Grain Company was incorporated and commenced doing the business of buying and selling grain and flax on commission in Superior in 1898, and continued doing such business until 1901; that during that time it did its banking business with the Northwestern National Bank, and became largely indebted to that bank, and at all times since 1900 such indebtedness was and now is \$4,000, evidenced by the three notes in the record; that in the spring of 1901, on account of such indebtedness and other things, the Schwedler Grain Company became embarrassed, and passed into the hands of one F. R. Crumpton, trustee, who conducted the business for two or three months with the aid of Mr. Schwedler, who had been president of the corporation, but ceased to do such business in August, 1901, with such indebtedness still unpaid, and the same con-

tinued; that thereafter, and on or about September 1, 1901, Mr. Schwedler furnished the necessary capital and opened and continued such commission business on his own account, but in the name of the Schwedler Grain Company, and in that name opened an account with the Northwestern National Bank, and all moneys received by him as proceeds of sales of grain and flax in such business, either individually or in the name of the Schwedler Grain Company, were deposited in that bank in that account, but that the Schwedler Grain Company had no interest in said business so carried on, on and after September 6, 1901; that the money deposited in that bank in the name of the Schwedler Grain Company was all of it received as the proceeds of the sale of grain and flax by Mr. Schwedler, and belonged to the customers or persons for whom he sold the grain and flax, except one half of 1 per cent by way of commission earned by him, which was deposited with such other proceeds; that between September 6, 1901, and February 10, 1902, Mr. Schwedler received from various and divers persons shipments of grain and flax, and sold the same on commission, and deposited the proceeds of the sales from day to day in that bank in that account,—in many cases the freight being

the commission business; "they were not buyers and sellers, but factors,—agents to sell. Presumably, therefore, moneys deposited by them were the proceeds of cattle consigned to them for sale. Their business being known to the bank, such presumption goes with their deposits; and, while not of itself notice, is a circumstance to compel inquiry on the part of the bank in respect to any particular deposit." The court proceeds to say that it does not mean to be understood to imply that the bank receiving deposits from one whom it knows to be in the commission business receives every deposit in trust for some unknown principal; but says: "It is only when there gather around any deposit or line of deposits circumstances of a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, that it is debarred from treating the deposit as that of moneys belonging absolutely to the depositor." The court goes on to say that the bank knew that the factors were failing, and also knew from a draft received that a shipment had been made to them. Under all the circumstances, the court concludes that the bank had notice that the deposits made were the proceeds of property sent on commission.

Another case closely similar was that of *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728. The decision there was also that the bank knew that the moneys collected and deposited by a factor, though in his own name, were the proceeds of sales of stock consigned on commission, and that the

bank was bound to know that it had no right to apply these moneys in payment of its own demands against the commission merchants.

Still another case of the same kind is that of *Union Stock Yards Nat. Bank v. Moore*, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705. This also was a case of deposits in a bank, made by a live-stock commission agent and factor when it was indebted to the bank, and the court held that the action depended upon the litigated questions of fact, whether the consignors who claimed the funds were, in equity, the owners of the money when it was deposited in the bank, "and whether the officers of said bank, when it received such deposit, knew, or had reason to believe, that the deposit consisted of, or contained, moneys not belonging to said company [the factor], but to the appellees or to others for whom the company was but the agent or factor." The court found that the money belonged to the consignors, and that the bank knew, or had reason to believe, that this was the case. It therefore denied the right of the bank to apply the money on the factor's indebtedness to it.

These cases by no means establish a rule that a bank is in all cases bound to take notice that deposits by a factor or commission merchant belong to an undisclosed consignor; but leave it to be established by the circumstances of each case, that the bank knew, or ought to have known, that such was the fact.

paid by the purchasers, and in other cases the gross proceeds of the sales were so deposited, and then the freight bills, the inspection, and other charges not paid by the purchasers, were promptly paid by Mr. Schwedler's checks upon such account in that bank; that the credit in such bank account did not at any time after September 6, 1901, exceed the amount actually due to such customers as the proceeds of such sales; that Mr. Schwedler from time to time drew out from such account, for his own use, his commissions, and all moneys due him personally, and at no time was there in said account more than from \$100 to \$200 belonging to him, and that none of the money received in said account at the time of the trial belonged to or is claimed by Mr. Schwedler personally, or to anyone else other than the parties to this action; that October 8, 1901, Mr. Schwedler, upon the demand and urgent request of that bank, through its president, drew and delivered to such president his check for \$500, to be applied on the old indebtedness of the old company to said bank, at the same time notifying said president that the moneys so on deposit in said bank account did not belong to Mr. Schwedler nor to the old company, but did belong to such consignors of Mr. Schwedler; that the bank accepted the check with full knowledge of the facts stated, and charged it to said account under date of October 9, 1901, and issued a cashier's check in favor of itself, but did not indorse or in any way apply any money or said check upon such indebtedness, but, on the contrary, credited the amount of the said check to its cashier's account, which was only, in effect, a method of bookkeeping; that December 1, 1901, the plaintiff Boyle shipped a car load of flax to Mr. Schwedler, which he sold on commission, and the proceeds were deposited by him in the account in that bank,—\$500 December 14, 1901, and \$661.43 December 18, 1901,—and that said moneys belonged to the said Boyle; that the intervener Anderson shipped a car load of grain to Mr. Schwedler, which he sold on commission, and the proceeds of such sale were deposited in such bank to the credit of said account January 24, 1902, and that the net amount of such proceeds after deducting commission, freight, inspection, and other charges was \$430.38, and the same belonged to said Anderson; that the intervener McNeil shipped a car load of grain to Mr. Schwedler, which he sold on commission, and the proceeds of such sale, after taking out moneys advanced and commissions to the amount of \$147.35, belonged to McNeil, and the same was deposited to the credit of said account in said bank January 30, 1902; that the intervener Brown shipped a car load of grain to Mr. Schwedler, which he sold on commission, and, after deducting advancements made thereon, the net proceeds thereof belonging to Brown, to the amount of \$165.20, were deposited to the credit of said account January 31, 1902; that the intervener Wibe shipped a car load of grain to Mr. Schwedler, which he sold on commission, and in January, 1902, the proceeds thereof, amounting to \$520.11, were deposited in said bank to the credit of said account, and, after paying commissions, freight, inspection, and other charges, the balance of \$426.92 belonged to Wibe; that the intervener Larson shipped a car load of grain to Mr. Schwedler, which he sold on commission, and the proceeds thereof, amounting to \$527.78, were deposited in said bank February 4 and 8, 1902, to the credit of said account, and, after paying commissions, freight, inspection, and other charges, the balance of \$439.08 belonged to said Larson; that neither the plaintiff nor any of the interveners were informed of, or knew or consented to, the deposit of such proceeds of sales, or any part thereof, in said account or said bank, and each of them was entitled to have the net proceeds of his car load at once transmitted to him in the regular course of business; that the officers of that bank, and particularly the president, had notice and knowledge that the moneys so deposited were the proceeds of sales of grain shipped to and sold by Mr. Schwedler on commission, and belonged to such shippers, although the names were not disclosed to the bank; that Mr. Schwedler had no authority to make any of such deposits; that the plaintiff and the said five interveners were all the trust creditors of Mr. Schwedler, and all the unpaid persons whose moneys were deposited in said account; that the moneys so deposited in said account were mixed with the other moneys of the bank, and checks of Mr. Schwedler drawn thereon as usual, and none were special deposits during any of the time from September 6, 1901, to February 10, 1902; that after the deposits of the proceeds of Larson's grain, as mentioned, the only checks drawn upon or paid from said account were three, to wit, one for \$4.20, one for \$30, and the other for \$75, making in all \$109.20; that February 10, 1902, that bank, without the knowledge or consent of Mr. Schwedler, or the plaintiff, or any of said interveners, charged said account with \$648, and credited the same to its cashier's account, claiming the right to apply it, as it had the \$500, on the old indebtedness of the grain company, but did not in fact apply or indorse the same thereon; that such moneys of the plaintiff and each

uary 30, 1902; that the intervener Brown shipped a car load of grain to Mr. Schwedler, which he sold on commission, and, after deducting advancements made thereon, the net proceeds thereof belonging to Brown, to the amount of \$165.20, were deposited to the credit of said account January 31, 1902; that the intervener Wibe shipped a car load of grain to Mr. Schwedler, which he sold on commission, and in January, 1902, the proceeds thereof, amounting to \$520.11, were deposited in said bank to the credit of said account, and, after paying commissions, freight, inspection, and other charges, the balance of \$426.92 belonged to Wibe; that the intervener Larson shipped a car load of grain to Mr. Schwedler, which he sold on commission, and the proceeds thereof, amounting to \$527.78, were deposited in said bank February 4 and 8, 1902, to the credit of said account, and, after paying commissions, freight, inspection, and other charges, the balance of \$439.08 belonged to said Larson; that neither the plaintiff nor any of the interveners were informed of, or knew or consented to, the deposit of such proceeds of sales, or any part thereof, in said account or said bank, and each of them was entitled to have the net proceeds of his car load at once transmitted to him in the regular course of business; that the officers of that bank, and particularly the president, had notice and knowledge that the moneys so deposited were the proceeds of sales of grain shipped to and sold by Mr. Schwedler on commission, and belonged to such shippers, although the names were not disclosed to the bank; that Mr. Schwedler had no authority to make any of such deposits; that the plaintiff and the said five interveners were all the trust creditors of Mr. Schwedler, and all the unpaid persons whose moneys were deposited in said account; that the moneys so deposited in said account were mixed with the other moneys of the bank, and checks of Mr. Schwedler drawn thereon as usual, and none were special deposits during any of the time from September 6, 1901, to February 10, 1902; that after the deposits of the proceeds of Larson's grain, as mentioned, the only checks drawn upon or paid from said account were three, to wit, one for \$4.20, one for \$30, and the other for \$75, making in all \$109.20; that February 10, 1902, that bank, without the knowledge or consent of Mr. Schwedler, or the plaintiff, or any of said interveners, charged said account with \$648, and credited the same to its cashier's account, claiming the right to apply it, as it had the \$500, on the old indebtedness of the grain company, but did not in fact apply or indorse the same thereon; that such moneys of the plaintiff and each

and all of the several interveners so deposited were placed in the general funds of the bank, and there kept, except as so drawn out on the checks of Mr. Schwedler, until September 22, 1902, and during that time such general fund never ran below \$2,000; that on the day and year last mentioned such general fund and all the assets of that bank, including not less than \$40,000 in cash, were turned over and transferred to the First National Bank of Superior, pursuant to a contract of purchase thereof, and the last-named bank then assumed and agreed to pay to each and all of the depositors the money due them out of the funds and assets so received, and the same were sufficient to meet all liabilities so assumed, including the amount standing to the credit of said account and the amount represented or charged by reason of such cashier's checks; that the funds of said banks, respectively, during the times named, were increased and enriched to the extent of such deposits, less the amounts so drawn out on checks of Mr. Schwedler, and that each of said banks has been at all times entirely solvent; that from September 6, 1901, to September 22, 1902, the account so kept in the Northwestern National Bank showed the following balances: On February 16, 1902, and from that time to September 22, 1902, to the credit thereof, 13 cents; that whether such balance should be increased by adding thereto the \$648 so charged to the account, February 10, 1902, and the \$500 so charged to the account October 9, 1901, or either of them, depended upon the determination of the court to be made therein; that, if the charge of \$500 should be allowed to stand, the lowest balance between December 9, 1901, and February 10, 1902, was \$153.50, January 2, 1902, and, if the \$500 should be canceled, then the lowest balance would be \$653.50, January 2, 1902.

As conclusions of law the court found, in effect, that the issuing of the cashier's check of \$500 and the crediting the same to the cashier's account October 9, 1901, was improper and ineffectual, and did not in any wise affect the fund in the bank to the credit of said account; that the charge of \$648 against said account and the crediting the same to the cashier's account and issuing a cashier's unsigned check therefor, February 10, 1902, was improper, illegal, and in no way affected the funds to the credit of said account; that the Northwestern National Bank had no right to appropriate the money so deposited in said account to apply upon its old claim against the grain company, and had no right to offset the same; that Mr. Schwedler's checks upon said account, so far as drawn in favor of his respective custom-

ers, must be presumed to have been drawn against funds of such customer, so far as he had any to meet the same; that checks drawn by him for his own use must be presumed to have been drawn out of his own funds, so far as he had any in the bank, and when he had none, or when the customers in whose favor a check was drawn had none, or an insufficient amount, then the moneys paid out thereon, so far as there was a deficiency, should be deducted *pro rata* from the moneys of all other customers in said fund; that after annulling the two charges, \$500 and \$648, as mentioned, there was in the Northwestern National Bank to the credit of the account kept as aforesaid until September 22, 1902, \$1,148.13, which funds were at that time transferred by that bank to the First National Bank, and are now held by it; that the plaintiff and the intervening creditors were entitled to recover said moneys in the following amounts: Boyle \$258.72, Wibe \$169.01, Anderson \$170.38, McNeil \$58.35, Brown \$65.40, Larson \$426.27; that the First National Bank pay into the court the \$1,148.13 and take the clerk's receipt therefor; that the cashier's check of October 9, 1901, and the unsigned check of February 10, 1902, be canceled, and that such payment, being made, would be a full discharge; that out of the moneys so paid in the clerk shall pay over to the plaintiff and the intervening creditors, respectively, the sums mentioned in the above conclusion of law; that the plaintiff and interveners recover from the Northwestern National Bank costs and disbursements as therein mentioned; and that the plaintiff Boyle is entitled to recover as damages of the Northwestern National Bank interest upon his share of the sum mentioned from February 5, 1903, amounting to \$21.99. The interveners do not claim interest, and so none is allowed to them. And the court thereupon ordered judgment to be entered according to such findings. From the judgment so entered the Northwestern National Bank brings this appeal.

Mr. Solon L. Perrin, for appellant:

The whole theory of constructive trusts rests on equitable ownership of the beneficiary seeking to enforce the trusts, either as the prior holder of the legal title of the thing sought to be impressed with the trust, or one standing in the shoes of such prior holder of such legal title.

10 Am. & Eng. Enc. Law, p. 5, note 2, p. 62, note 1; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Atkinson v. Rochester Printing Co. 114 N. Y. 168, 21 N. E. 178; Holmes v. Gilman, 138 N. Y. 376, 20 L. R. A. 566, 34 Am. St. Rep. 463.

34 N. E. 205; *Bromley v. Cleveland*, C. C. & St. L. R. Co. 103 Wis. 562, 79 N. W. 741.

When trust money becomes so mixed up with trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases.

Nonotuck Silk Co. v. Flanders, and *Bromley v. Cleveland*, C. C. & St. L. R. Co. *supra*; *Hyland v. Roe*, 111 Wis. 361, 87 Am. St. Rep. 873, 87 N. W. 252; 16 Am. & Eng. Enc. Law, 2d ed. p. 693, note 2; 5 Cyc. Law & Proc. p. 568, note 81; *Bank Comrs. v. Security Trust Co.* 70 N. H. 536, 49 Atl. 113; *Dowie v. Humphrey*, 91 Wis. 98, 64 N. W. 315; *Burnham v. Barth*, 89 Wis. 367, 62 N. W. 96.

The right to follow and reclaim a trust fund is always based upon the right of property, and is never based upon the theory of preference by reason of an unlawful conversion.

Bromley v. Cleveland, C. C. & St. L. R. Co. *supra*.

Mr. H. D. Bailey also for appellant.

Messrs. John Brennan, E. C. Kennedy, and Luse, Powell, DeForest, & Luse for respondents.

Cassoday, Ch. J., delivered the opinion of the court:

Under the findings of the court and the evidence, the commission business in which Mr. Schwedler was engaged from September 6, 1901, to February 10, 1902, must be regarded as his personal business, and not a continuation of the business of the old grain corporation of which he had previously been the president, and which corporation was indebted to the bank during the time mentioned in the sum of \$4,000. It appears from the findings, and is undisputed, that the moneys received from time to time by Mr. Schwedler on the sale of grain and flax on commission during the period mentioned were deposited by him in the bank, and that he drew checks thereon, as stated. It also appears, and is undisputed, that the last deposit so made by him was on February 8, 1902, the same being proceeds of the sale of Larson's grain; that, after making that deposit, Mr. Schwedler only gave three checks drawn on that account, amounting in the aggregate to \$109.20; and that after deducting that amount from the amount standing to his credit on the books of the bank there remained a balance to his credit on the morning of February 10, 1902, of only \$648.13, notwithstanding Mr. Schwedler had deposited in the bank to the credit of that account between December 1, 1901, and February 10, 1902, \$2,770.38, being the proceeds of sales of grain and flax belonging to the 1 L.R.A. (N.S.)

plaintiff and the five interveners, respectively, and none of which had been paid to them or any of them. On February 10, 1902, the bank, without the knowledge or consent of Mr. Schwedler, or the plaintiff, or any of the interveners, and upon an unsigned check or memorandum drawn by itself, as found, charged said account with \$648, and credited the same amount to its cashier's account; and by virtue of such charge and credit so made the bank claims the right to withhold said \$648 from the plaintiff and the five interveners, and any of them, and apply the same upon the debt which the grain corporation owed the bank. The trial court held that such claim was without foundation, and that such charge and credit so made were improper, illegal, and in no way affected or diminished the amount of \$648.13 so standing to the credit of Mr. Schwedler on the morning of February 10, 1902. One of the important questions in the case is whether such ruling of the trial court is correct. It is to be observed that Mr. Schwedler makes no claim to any part of the money so on deposit. It is also found that the plaintiff and the five interveners are the only persons whose moneys were so deposited in said account, and who have not been paid.

The question recurs whether, in equity, the money so on deposit should be paid to the owners of the produce from which it was realized, or to the bank, to be applied on its old claim against the grain corporation. It is very evident that whenever Mr. Schwedler sold a car load of grain or flax on commission, and received pay for the same, such proceeds, after deducting commissions, freight, inspection, and other charges, were held by him for the owner of the grain or flax so sold. The contention seems to be that by depositing such proceeds in the bank to the credit of such account the same became mixed with the funds of the bank generally, and that by reason of such mixture it became impossible to trace and identify the particular money so deposited as entering into any specific fund or property so sought to be charged. In support of such contention counsel cite *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 241, 242, 58 N. W. 383; *Burnham v. Barth*, 89 Wis. 362, 366-370, 62 N. W. 96; *Dowie v. Humphrey*, 91 Wis. 98, 102-104, 64 N. W. 315; *Bromley v. Cleveland*, C. C. & St. L. R. Co. 103 Wis. 562, 568, 569, 79 N. W. 741; *Hyland v. Roe*, 111 Wis. 361, 366, 367, 87 Am. St. Rep. 873, 87 N. W. 252. These cases do not, in our judgment, go to the extent claimed. On the contrary, "the more recent rule in England," followed in these cases, is that, "If money held by a person in a fiduciary character,

though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands." *Re Hallett*, L. R. 13 Ch. Div. 696. The reasons for the rule are so fully stated by the learned master of the rolls in that case as to render it unnecessary to add to such reasoning here. At least two of the cases cited by counsel for the defendant expressly sanction the rule thus quoted, and the others, in a general way, approve of the decision from which they are quoted. There is no purpose here of renewing a discussion which is so fully covered upon reason and authority by our own cases. Nevertheless we venture to quote from two decisions in the Supreme Court of the United States what seems to be peculiarly applicable to the case at bar: "Although the relation between the bank and its depositor is that merely of debtor and creditor, the money which he deposits, if held by him in a fiduciary capacity, does not change its character by being placed to his credit in his bank account. The bank contracts that it will pay the money on his checks, and when they are drawn in proper form it is bound to presume, in case the account is kept with him as a trustee, or as acting in some other fiduciary character, that he is in the course of lawfully performing his duty, and to honor them accordingly; but when against such an account it seeks to assert its lien for an obligation which it knows was incurred for his private benefit, it must be held as having notice that the fund is not his individual property, if it is shown to consist, in whole or in part, of money which he held in a trust relation." *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693. "A bank receiving on deposit from a factor, under the circumstances set forth in this case, moneys which it must have known were the proceeds of property of the factor's principal, consigned to him by the principal for sale on the principal's account, of which moneys the principal was the beneficial owner, cannot, as against the latter, appropriate the deposits to the payment of a general balance due to the bank from the factor; and if it attempts to do so the remedy of the principal against the bank is in equity, and not at law." *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118. Upon the strength of these authorities, and many others which might be cited, it is manifest that the \$648.13 standing to the credit of Mr. Schwedler on the books of the bank on the morning of February 10, 1902, was, in equity, the property of the owners of the net produce from which the same was realized, and 1 L.R.A. (N.S.)

should be paid to such owners according to their proportionate shares thereof in equity.

2. The right to the \$500 mentioned is governed by a different principle. The trial court held, in effect, that the check given by Mr. Schwedler on said account to the president of the bank October 8, 1901, for \$500, and charging of the same to said account, and issuing the cashier's check therefor, and crediting the amount of the check to the cashier's account, was only, in effect, a method of bookkeeping, and was improper and ineffectual, and did not in any wise affect the fund in the bank to the credit of said account. Assuming such findings and ruling to be correct, the question recurs whether the trial court properly held that the \$500 thereafter remained to the credit of Mr. Schwedler's account, and was, in equity, the property of the plaintiff and the interveners and subject to be charged as such in this action. The nature of the action seems to have been lost sight of. This is not a proceeding by attachment or garnishment. The question is not whether the bank wrongfully induced Mr. Schwedler to give the check on the fund in the bank, which, in equity, belonged to his consignors; but whether such fund belonged to the plaintiff and the interveners, or some of them, at the time the check was so given. As stated in some of the adjudications cited, the right of action to trace the moneys and charge the fund has its basis in the right of property, but never upon the theory of perference by reason of an unlawful conversion. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 242, 58 N. W. 383. So, as stated by Mr. Justice Pinney, in one of the cases cited, and reiterated in others: "When the trust fund cannot be identified or traced into some specific estate or substituted property, and the means of ascertainment fail, the trust wholly fails, and the party can only prove as a general creditor. . . . As the right to trace his trust fund is founded on the right of property, and not on the ground of compensation for its loss, he must be able to point out the particular property into which the fund has been converted. When he is unable to do this, the trust fails and his claim becomes one for compensation only, for the loss of the fund, and stands on the same basis as the claims of general creditors. . . . Where the trust fund . . . cannot be traced, and the substituted property into which it has entered specifically identified, the trust fund must be regarded as dissipated, within the meaning of the authorities,—scattered, dispersed, and, as such, destroyed." *Burnham v. Barth*, 89 Wis. 367, 369, 370, 62 N. W. 96; *Dowie v. Humphrey*, 91 Wis. 103, 64 N. W. 315. Mr. Schwedler's check for \$500 was

given to the bank nearly two months prior to the time when the plaintiff or any of the interveners shipped any grain to Mr. Schwedler, and more than two months prior to the time when any money belonging to the plaintiff or any of the interveners was so deposited in the bank. This being so, it is very obvious that such check was not drawn upon any fund in which the plaintiff or any of the interveners had any interest. If, as found by the court, Mr. Schwedler, at the time of giving that check, notified the president of the bank that the money then in the bank to his credit in said account did not belong to him, nor to the grain corporation, but did belong to those who had previously made consignments to him, still that could give no right of action in favor of the plaintiff or any of the interveners, in equity, to charge the fund then in the bank. In other words, the plaintiff and the interveners can only recover in this form of action by showing that they, or some of them, are the equitable owners of the fund sought to be charged, and not by showing that some stranger to the action had such right of action. We must hold that the trial court improperly held the bank liable for the fund of \$500, covered by Mr. Schwedler's check of October 8, 1901.

The judgment of the Superior Court for Douglas County is hereby modified by reducing the amount of the recovery from the First National Bank to \$648.13, and that the same be divided between the parties equitably entitled, as indicated in this opinion, and that, as so modified, the judgment is affirmed, with costs in favor of the appellant.

A petition for rehearing having been filed, Cassoday, Ch. J., on October 3, 1905, handed down the following response:

The motion for a rehearing presents no ground for holding the bank liable in this action for the \$500 for which Mr. Schwedler gave his check more than a month prior to the time when any money belonging to the plaintiff or to any of the interveners was deposited in the bank. The reason for this ruling is sufficiently stated in the opinion filed. *Boyle v. North Western Nat. Bank* (Wis.) 103 N. W. 1123, 1127, 1128. So, for the reasons there given (pp. 1126, 1127), we adhere to the ruling there made "that the \$648.13 standing to the credit of Mr. Schwedler on the books of the bank on the morning of February 10, 1902, was, in equity, the property of the owners of the net produce from which the same was realized, and should be paid to such owners according to their proportionate shares thereof in equity." We are now asked to

fully determine the rights of the parties

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upon the facts here presented. While the principles upon which those rights are to be determined are stated in the opinion on file, yet the rights of the respective parties are not there stated in detail.

The question is as to the proper distribution to be made of the \$648.13 to the credit of Schwedler in the bank on the morning of February 10, 1902. As stated in that opinion, \$1,161.43, belonging to the plaintiff, Boyle, was deposited in the bank to the credit of Schwedler December 14 and 18, 1901. Upon the theory that there was only \$648.13 to be distributed, it was found by the trial court, and is undisputed, that the lowest balance to the credit of Schwedler between December 9, 1901, and February 10, 1902, was \$153.50, on January 2, 1902. Since no money belonging to any of the interveners went into the bank prior to the day and year last mentioned, it is manifest that the \$153.50 so to the credit of Schwedler January 2, 1902, was in equity the property of Boyle. It is also manifest, upon the principles stated, that the moneys belonging to Boyle which had been drawn from the bank on the checks of Schwedler prior to January 2, 1902, cannot be reached by him in this action. It appears from the findings, and is undisputed, that after January 2, 1902, and during that month, there were deposited in the bank to the credit of Schwedler moneys belonging to the following interveners, respectively, in the amounts stated, to wit: Wibe, \$426.92; Anderson, \$430.38; McNeil, \$147.35; and Brown, \$165.20,—making in the aggregate, with the amount so belonging to Boyle, \$1,323.35. It also appears from the findings, and is undisputed, that the intervener Larson shipped to Schwedler a car load of grain, which he sold on commission, and the proceeds thereof, amounting to \$527.78, were deposited in the bank to the credit of Schwedler February 4 and 8, 1902, and that after paying therefrom the freight, inspection, and other charges, including commissions, the balance thereof, amounting to \$439.08, belonged to Larson, and that after such deposit of the proceeds of Larson's grain "the only checks drawn or paid upon said account were three in number, . . . amounting in the aggregate to \$109.20." Assuming that this amount was all paid from the proceeds of Larson's grain, then, by deducting this amount from the \$527.78, the proceeds of Larson's grain so deposited, there remains a balance of at least \$418.58 as belonging to Larson, and which must have been in the bank to the credit of Schwedler on the morning of February 10, 1902. We perceive no reason why Larson is not entitled to that amount in the judgment to be entered in this action. Deducting the \$418.58 from

the \$648.13 standing to the credit of Schwedler on the morning of February 10, 1902, and it leaves a balance of \$229.55 to be distributed to Boyle and the four interveners whose moneys went into the bank to the credit of Schwedler in the month of January, 1902, as stated, according to their proportionate shares thereof in equity; that is to say, to Boyle \$26.63, to Wibe \$74.05, to Anderson \$74.65, to McNeil \$25.56, and to Brown \$28.66, making a total of \$229.55. This gives to each a little over 17½ per cent on the amount of his claim for his money so on deposit in January, 1902. The division thus to be made is in accordance with the principles stated in the opinion on file.

The judgment of the Superior Court for Douglas County is hereby modified by reducing the amount of the recovery from the First National Bank to \$648.13, and that the same be divided between the parties equitably entitled, as indicated in the opinion on file, and as stated in this opinion, and that, as so modified, the judgment is affirmed, with costs in this court in favor of the appellant.

Denied without costs.

OHIO SUPREME COURT.

JOHN F. McNEAL, Exr., etc., of William P. Hazen, Deceased, Plff. in Err.,
v.

C. M. PIERCE, Admr., etc., of Mary Pierce, Deceased.

(.... Ohio)

1. Legacy—acknowledgment of outlawed debt.

A legacy reciting that it is "in consideration of her care for my invalid mother many years preceding her death, and also her care of my infant son," does not imply a debt, but a bounty. It is not an acknowledgment of a legal obligation, and, when pleaded in an action barred by the statute of limitations to recover for such services, does not remove the bar of the statute.

Headnotes by the COURT.

Case Note.—Whether a devise or legacy reciting a consideration will constitute such an acknowledgment of a legal obligation therefor as to remove the bar of the statute of limitations seems to depend, as in cases of acknowledgments in other ways, upon the peculiar wording of the acknowledgment. In *Stewart v. McFarland*, 84 Iowa, 55, 50 N. W. 221, the court says that an admission in a will, though designed to become operative after the testator's death instead of during his lifetime, will, if otherwise sufficient, be effectual to revive the cause of action to which it refers.

In order to have such effect, however, the will must be so executed as to be valid; for a direction in a writing in a private account book purporting to be a will, that the writer's wife shall pay all his just debts, including a debt of a specified amount due his 1 L.R.A. (N.S.)

edgment of a legal obligation, and, when pleaded in an action barred by the statute of limitations to recover for such services, does not remove the bar of the statute.

2. Same—in payment of debt—lapse.

A legacy given in payment of a debt by the express terms of the will does not lapse by the death of the legatee before the testator; but when, by the terms of the will, it appears that the intention of the testator was to confer a bounty, it is not competent to show a different intent, and to prevent a lapse by proof that the legacy was given in payment of a debt.

(October 31, 1905.)

ERROR to the Circuit Court for Marion County to review a judgment reversing a judgment of the Court of Common Pleas which sustained a demurrer to a petition filed to compel payment of a legacy. Reversed.

Statement by Summers, J.:

The tenth item of the will of William P. Hazen, executed in 1896, is as follows: "Tenth. I give and bequeath to my niece, Miss Mary Pierce, daughter of my sister, Emily Pierce, of Middlefield, Geauga county, Ohio, \$5,000, the same being in consideration of her care of my invalid mother many years preceding her death and also her care of my infant son, Martin L. Hazen, after the death of his mother." The legatee died without issue in the lifetime of the testator. Suit was brought by the administrator of the legatee against the executor to recover the amount of the legacy. It is averred in the petition that in 1858 the testator was indebted to the legatee for services then and theretofore rendered by her at his request in the care of his invalid mother and of his infant son, which were of the value of \$5,000. The tenth item of the will is then set out as an acknowledgment of the debt in writing, and signed by the party to be

mother, will not have any such effect where it is not attested, and is retained by him among his papers until after his death. *Allen v. Collier*, 70 Mo. 138, 35 Am. Rep. 416.

A case in which, as in *McNEAL v. PIERCE*, the recital was held insufficient to remove the bar, is *Stansbury v. Stansbury*, 20 W. Va. 23, which holds that a devise to the testator's son of certain land valued at \$8,800, being "\$3,000 for his services rendered, leaving a balance of \$5,800," with a provision, after several other specific legacies, that the above-specified legacies are to be in proportion, does not contain such an acknowledgment as will remove the bar of the statute of limitations from the claim for services, where the devisee renounces the satisfaction of the claim provided by the testator.

And a bequest to a physician, as a mark

charged, to remove the bar of the statute of limitations. The court of common pleas sustained a general demurrer to the petition. The circuit court reversed.

Messrs. J. F. McNeal and L. B. McNeal, for plaintiff in error:

The language used is insufficient to constitute an acknowledgment.

Webster v. Newbold, 41 Pa. 482, 82 Am. Dec. 487; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Harlan v. Bernie, 22 Ark. 219, 76 Am. Dec. 428; Manchester v. Braedner, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405; Macrum v. Marshall, 129 Pa. 506, 15 Am. St. Rep. 730, 18 Atl. 640; Ward v. Jack, 172 Pa. 416, 51 Am. St. Rep. 744, 33 Atl. 577.

No recovery of the legacy as a legacy can be had because it lapsed.

Earnft v. Winans, 3 Ohio, 135.

Messrs. Crissinger & Guthery, for defendant in error:

The fact of rendition of services raises the implied obligation to pay.

Linn v. Ross, 10 Ohio, 412, 36 Am. Dec. 95; Harrison v. Gotlieb, 3 Ohio C. C. 191; Dunn v. Dunn, 23 Ohio L. J. 328; 1 Beach, Modern Law of Contracts, § 650; 17 Am. & Eng. Enc. Law, pp. 348-351.

The acknowledgment was sufficient.

Allen v. Collier, 70 Mo. 138, 35 Am. Rep.

416; Bachman v. Roller, 9 Baxt. 409, 40 Am. Rep. 97; De Freest v. Warner, 98 N. Y. 217, 50 Am. Rep. 657; Whitney v. Bigelow, 4 Pick. 110; 2 Redf. Wills, 161.

A legacy given in payment of a debt will not lapse because of the death of the legatee before the testator.

Page, Wills, § 739; 18 Am. & Eng. Enc. Law, 2d ed. p. 749 note; Ward v. Bush, 59 N. J. Eq. 144, 45 Atl. 534.

Mr. N. H. Bostwick also for defendant in error.

Summers, J., delivered the opinion of the court:

Two questions are presented: First, whether the will removed the bar of the statute of limitations, and, second, whether the legacy lapsed.

The claim for services is barred, unless the will is an acknowledgment. The natural and ordinary meaning of the words "in consideration of," in the connection used, is not compensation, but a mark or token of affection or appreciation. The testator does not acknowledge that there ever was any liability, debt, or claim. He acknowledges merely the fact that his niece did care for his invalid mother and for his infant son, and, feeling grateful therefor, in recognition or consideration of the fact he gives her \$5,000. The services may have been paid for or ren-

of the testatrix's esteem and appreciation of his fidelity to her as a physician, of a specified amount which is to be in addition to his fees against her for services, refers only to services rendered during the two or three years previous to the execution of the will, for which the physician had not been paid, and does not remove the bar of the statute as to services for which no bills had ever been presented, extending through a period of nearly twenty years and ending nearly nine years before the execution of the will, for several years after which annual bills were rendered and paid. Coles v. Martin, 99 Va. 223, 37 S. E. 907.

And Stewart v. McFarland, *supra*, holds that a bequest to the testator's wife of "\$1,000 in full payment of her note of \$600" against him did not remove the bar of the statute, so as to enable her to recover, on renouncing the will, a sum exceeding \$1,300, to which the note would have amounted at the time of the testator's death.

But Perkins v. Seigfried, 97 Va. 444, 34 S. E. 64, holds that a codicil stating that the testator mentions a debt of a specified amount which he owes a designated church and wishes paid without interest after the death of a specified sister, and that he did not mention such debt in his will because he had hoped to pay it during his life, is such a direct acknowledgment of the debt as to prevent the running of the statute of limitations thereon until after the sister's death, 1 L.R.A. (N.S.)

although there is no proof of the existence of such debt outside of the codicil.

And a statement, after a direction to pay the just debts of the testatrix, that at the date of the will she owes specified amounts to designated persons, followed by small pecuniary legacies, and a provision for purchase of a burial lot, with a specified disposition of the residuary estate "after paying debts, legacies, expenses, and charges as above set forth," prevents the running of the statute of limitations as to such debts until the death of the testatrix. Re Pillion, 15 Pa. Co. Ct. 8, 3 Pa. Dist. R. 383.

And a devise of one fifth of the testator's estate after payment of specific debts to be divided ratably among specified creditors named in the schedule to his will, all of whose claims were barred by limitation before the execution of the will, removes the bar of the statute as to all of them, the devise being to the creditors strictly as such, instead of to them as legatees. Williamson v. Naylor, 3 Younge & C. Exch. 208.

And a bequest of a specified amount in full satisfaction of all money due from the testator to a specified person, whose claim, the remedy on which was barred by the statute of limitations, amounted to twice the amount of such bequest, removes the bar of the statute, and entitles the legatee to payment of the entire debt, where, by another provision of the will, the real estate is subjected to the payment of debts. Goffon v. Mill, 2 Vern. 141.

dered gratuitously. He acknowledges a debt of gratitude,—not a legal obligation; and he does not direct the payment of a debt, but confers a bounty. In *Duncan v. Franklin Twp.* 43 N. J. Eq. 143, 10 Atl. 546, where the item of the will under consideration read as follows: "I give and bequeath to Henry Benson Duncan, for his services in assisting me at different times, the sum of \$2,000,"—it is said in the opinion (p. 145 of 43 N. J. Eq., p. 547 of 10 Atl.): "The expression 'for his services in assisting me at different times' does not, standing alone, import an indebtedness from her to the legatee for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy may have been given in grateful recognition of them."

The second question is whether the facts set out in the petition state a cause of action for the recovery of the legacy. It is conceded that the general rule is that a legacy lapses when the legatee dies before the testator, and that § 5971, Rev. Stat. 1892, enacted to prevent mischief from the operation of the rule, does not apply; but it is contended that a legacy does not lapse when it is given to pay a debt; citing *Ward v. Bush*, 59 N. J. Eq. 144, 45 Atl. 534. The cases that hold that a legacy given in payment of a debt does not lapse do so for the reason that such is the manifest intention of the testator. That is the ground of the decision in *Williamson v. Naylor*, 3 Younge & C. Exch. 208. There it is held that certain creditors, whose claims were barred, but who were named in the will, which provided that a certain part of the estate should be divided among them, should not be considered as legatees, but rather as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. In the note to that case it appears that Lord Lyndhurst, C. B., in disposing of the matter when it was before him, said: "I cannot consider this as a mere voluntary bounty on the part of the testator, but I must consider that the testator meant this money to be applied in satisfaction, or part satisfaction, of an obligation in reduction of those debts, which, though they could not be enforced against him at law, were, nevertheless, subsisting debts. . . . In this case the testator has manifested an anxious desire to fulfil his just obligations; and it was plainly his intention, not to make a gift to the persons named in the schedule, but to waive the legal bar to the recovery of his debts." In *Philips v. Philips*, 3 Hare, 281, where the testator gave the residue of his estate to trustees, upon trust, to divide the same among certain creditors, it is 1 L.R.A. (N.S.)

held that "the shares attributed to the debts of creditors who died in the lifetime of the testator did not lapse by their death." Again, "that the trust must be considered as proceeding upon a mixed principle of bounty and obligation; and that the will must be read as, to some extent, directing payment of debts." The vice chancellor says (p. 292): "In coming to the conclusion that the representatives of the creditors who died in the testator's lifetime are entitled to claim, I consider that I follow the case of *Williamson v. Naylor*, that I am giving effect to the trusts of the will, and that I am doing that which the conscience of the testator led him to do,—discharging *pro tanto* his obligations to his creditors, notwithstanding the bar of the statute. If that were his intention, which, on the face of the will and on the authority of *Williamson v. Naylor*, I will assume, I cannot suppose that the testator contemplated depriving of the benefit given by the will those creditors who might happen to die between the date of his will and his death." Again (p. 300): "Another observation strongly in favor of *Williamson v. Naylor* is this: If the claimants had been treated as legatees, and not as creditors, the rights of a creditor to the benefit of the trust might have lapsed by his death in the lifetime of the testator. This could not have been in accordance with the intention of the debtor." In *Turner v. Martin*, 7 De G. M. & G. 429, 432, the lord chancellor says: "The object of the testator was to do that which was honest and just, namely, to pay those creditors in full who had proved against the joint estate of his father and himself. That object could not have been attained if his intended bounty was to be limited to those creditors only who might happen to survive him; he having lived twenty-nine years after the debts were proved."

In the present case the claim is barred. The testator does not acknowledge it. In law it is no debt, and it cannot be said that the intention of the testator was to discharge an obligation, and not to confer a bounty. The intention of the testator must be given effect according to what appears upon the face of the will. There is no ambiguity, and evidence to prove an intention different than that implied in the terms of the will would be incompetent. *Comfort v. Mather*, 2 Watts & S. 450, 37 Am. Dec. 523.

The judgment of the Circuit Court is reversed, and that of the Common Pleas is affirmed.

Davis, Ch. J., and Shauck and Crew, JJ., concur.

NEW MEXICO SUPREME COURT.

ANTHONY JOSEPH, Plff. in Err.,

v.

THOMAS B. CATRON.

(.... N. M.)

1. Confirmation of land grant.

On November 22, 1873, J. signed a written agreement as follows: "Upon the confirmation by the Congress of the United States of a certain land grant known as the Cañon de Chama, otherwise called San Joaquin del Rio de Chama grant, I promise to pay E. or order the sum of five hundred dollars in current funds of the United States." Held, first, that a confirmation by the court of private land claims created by act of Congress approved March 3, 1891, chap. 539 (26 Stat. at L. 854, U. S. Comp. Stat. 1901, p. 765), was a "confirmation by the Congress of the United States," within the terms of said agreement; second, that a confirmation of the grant for the allotments merely (the claims as to the outlying pasture lands being rejected) was none the less a "confirmation," within the meaning of said agreement.

2. Note—maturity.

To constitute a negotiable instrument the fact of the maturity of the instrument at some time must be morally certain.

3. Same—certainty of event.

Tested by this rule, the instrument above Headnotes by POPE, J.

Case Note.—This is but another, though unusual, illustration of the well-settled rule that commercial paper, to be negotiable, must be payable at a fixed time, or upon an event which must at all events happen. There must be certainty that the paper will mature sometime, though the exact date of maturity is not determinable. Under the negotiable instruments laws, specific provision is made that the instrument must be payable on demand, or at a fixed or determinable future time. Selover, Neg. Inst. § 70.

Illustrations of this rule are many, and the decisions upon practically the same facts conflicting. Non-negotiability has been asserted where payment is made contingent upon the arrival of a ship and the discharge of cargo (Grant v. Wood, 12 Gray, 220; The Lykus, 36 Fed. 919; Tucker v. Maxwell, 11 Mass. 143); termination of litigation (Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292; Shelton v. Bruce, 9 Yerg. 24); dissolution of partnership and settlement of accounts (Sackett v. Palmer, 25 Barb. 179); settlement of an estate (Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273); the return of a paper other than the negotiable instrument itself (Smilie v. Stevens, 39 Vt. 315); marriage (Beardsley v. Baldwin, 2 Strange, 1151; Pearson v. Garrett, 4 Mod. 242); "when in funds" (Gillespie v. Mather, 10 Pa. 28); when the money can be raised from any source (Nunez v. Dautel, 19 Wall. 560, 22 L. ed. 161); "as soon as my circumstances will permit" (Salinas v. Wright, 11 L.R.A. (N.S.)

quoted is not a negotiable instrument, since it was not certainly and at all events payable; it not being morally certain that the Cañon de Chama grant would ever be confirmed by Congress, or through its instrumentalities.

4. Same—actual happening.

The fact that the grant may, as a matter of fact, have been confirmed many years after the making of said instrument, does not alter the rule, since the certainty of maturity must be of the date of the instrument, and cannot derive support from any subsequent event.

5. Contract—not under seal—consideration.

A non-negotiable instrument not under seal, and containing no recital of a consideration, does not import such; and, to justify a recovery thereon, there must be the proper allegation and proof of a consideration.

6. Same—evidence.

An examination of the record fails to show any proof of a consideration for the instrument sued on. The judgment for the plaintiff was without proof to sustain it, and is accordingly reversed.

(June 28, 1905.)

ERROR to the District Court for Santa Fé County to review a judgment in favor of plaintiff in an action brought to enforce payment of an alleged promissory note. Reversed.

Tex. 572); "when my circumstances will admit without detriment to myself or family" (Ex parte Tootell, 4 Ves. Jr. 372); where a note secured by collateral contained a provision by which, in case of depreciation, the collateral could be sold, and action immediately brought for the deficiency, though the note was not yet due (Continental Nat. Bank v. McGeech, 73 Wis. 332, 41 N. W. 409).

On the other hand, a provision to pay "when convenient" has been construed to mean within a reasonable time, which is definite under the rule, and the instrument is therefore negotiable. Works v. Hershey, 35 Iowa, 340. So, "as soon as I possibly can," has been construed as equivalent to "on demand." Kincaid v. Higgins, 1 Bibb, 396. So, provision for payment as soon as specific funds are collected does not render the note so uncertain as to time of payment as to prevent negotiation. Ubsdell v. Cunningham, 22 Mo. 124; Vaughan v. Dean, 32 Ga. 502. And an instrument payable upon completion of the construction of a railroad or building under contract is negotiable. Rose v. San Antonio & M. G. R. Co. 31 Tex. 49; Stevens v. Blunt, 7 Mass. 240; Bristol v. Warner, 19 Conn. 7; Goodloe v. Taylor, 10 N. C. (3 Hawks) 458; Levally v. Harmon, 20 Iowa. 533. *Contra*, Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845. See, for further illustrations and citations, Dan. Neg. Inst. 5th ed. §§ 41 et seq.; Story, Promissory Notes, 7th ed § 27; Tiedeman, Com. Paper, § 25.

Statement by Pope, J.:

This is a suit instituted in the district court of Santa Fé county by defendant in error to recover the sum of \$500, with interest. The second amended complaint, upon which the cause went to trial, alleges the facts practically as follows: Some time prior to November 22, 1873 (being during the years 1870, 1871, or 1872), the defendant contracted, hired, and employed one Samuel Ellison, an attorney at law, to present before the surveyor general of New Mexico for approval a certain land grant known as the "Cañon de Chama," otherwise called "San Joaquin del Rio de Chama Grant," and under said employment to take proofs in behalf of said claim, and in general to initiate the proceedings requisite for the ultimate recognition of the said grant and its validity by the government of the United States of America; that thereupon said Ellison performed each and all of the things by him engaged to be done and performed in the premises; and that on November 22, 1873, in pursuance of said employment and contract, and in recognition of said services rendered, defendant did agree and promise to pay to said Ellison the sum of \$500, in current funds of the United States, upon the confirmation by the Congress of the United States of said land grant, said agreement being in writing, and being as follows, to wit:

Fernando de Taos, New Mexico,
November 22, 1873.

Upon the confirmation by the Congress of the United States of the certain land grant known as the Cañon de Chama, otherwise called San Joaquin del Rio de Chama Grant, I promise to pay Mr. Samuel Ellison or order the sum of Five Hundred Dollars in current funds of the United States.

Anthony Joseph.
Frederick Muller.

It is further alleged that the said Ellison did as aforesaid earn and become entitled to receive from the defendant the said sum of \$500 when it might thereafter result and happen that the said grant so by him advocated as aforesaid should be confirmed, and its validity established and recognized; that thereafter the said Ellison, before the maturity of said obligation and promise to pay, indorsed, assigned, transferred, and conveyed the said promise to pay, obligation, and note of said defendant to plaintiff or his order, and the plaintiff thereupon became and is the owner and holder thereof; that, after the making and delivery of said agreement by said defendant to said Ellison, the Congress of the United States enacted a statute of the United States creating and establishing a court known as the "United

States Court of Private Land Claims," and conferred upon said court full power and authority to investigate and determine the validity of all grants in the territory of New Mexico, including the said Cañon de Chama grant; that after the creation of said court, upon petition duly presented thereto, the said court on September 29, 1894, entered its decree confirming said grant; that thereupon petitioner prayed an appeal to the Supreme Court of the United States, and that upon the hearing of said appeal, at the October term, A. D. 1896, the said Supreme Court rendered a decision and judgment affirming the decree of confirmation previously entered by the court below; that thereafter, to wit, on December 11, 1900, a decree correcting and amending the original decree by defining the boundaries of said grant was entered by the court of private land claims, by which court it was ordered that said grant be surveyed with the boundaries as set forth and described, by means whereof the said grant became definitely confirmed by the decision of the said court of private land claims; and that thereby said written agreement and promise to pay became due and payable to plaintiff, as the assignee of said Ellison, with interest thereon from May 24, 1897, the date of the decision of the Supreme Court of the United States affirming the decision of the said court of private land claims, from which said last-named date plaintiff alleges that said agreement and promise to pay became due and payable. Plaintiff thereupon prays judgment upon the first count in the sum of \$500, with interest thereon at 6 per cent from May 24, 1897, making a total of \$695, and for damages in the sum of \$800 suffered and sustained by reason of the premises, and for interest and costs.

The defendant answered, admitting the execution and delivery of the instrument in question to Samuel Ellison, but denied that the said Ellison was an attorney at law, or was authorized to practise law in the courts of the territory, and in terms denied that the defendant at any time contracted with, hired, or employed, or engaged the services of said Ellison in and about said Cañon de Chama grant, either to present the same before the surveyor general for New Mexico for approval, or for any other purpose, or to take proofs or initiate proceedings as to the said grant. The answer further denies that, in pursuance of said alleged agreement, defendant agreed or promised to pay to said Ellison the sum of \$500, or any other sum whatsoever, for his services touching the presentation or taking of proofs concerning said grant before said surveyor general, and denies that said Ellison ever performed any services for him or on his

behalf before said surveyor general, or otherwise, in regard to the said Cañon de Chama grant, but alleges that any employment of said Ellison in and about that matter was some time prior to said November 22, 1873, by one Frank Pope and one John Ross and others, who, it is alleged, paid Ellison \$333 in cash in full for his services in all matters before the said surveyor general, for which said services said Ellison gave his receipt in full, which, however, has been lost. The answer further denies the assignment and indorsement of said note over to the plaintiff as alleged in the complaint. It admits the allegation of the complaint as to the creation and organization of the court of private land claims, but denies that said grant was confirmed as a whole or in part as a grant, but that only the allotments in said grant, aggregating about 1,480 acres, were confirmed by the court of private land claims, and subsequently, on appeal, by the Supreme Court of the United States. The answer further denies that, by reason of said alleged confirmation of said allotments, said alleged promissory note or agreement in writing became due and payable either on May 24, 1897, or on December 11, 1900, or at any other time, and alleges that neither the terms nor conditions mentioned in the face of said note, nor those agreed upon at or prior to the time of making the same, were ever fulfilled by said Ellison, or by plaintiff as assignee of said Ellison, or by any other person whomsoever, as to all of which said plaintiff had knowledge at and prior to the time said Ellison is alleged to have sold, assigned, and transferred said note to plaintiff. By way of new matter, defendant alleges in his defense that said promissory note was delivered by him and said Muller on or about November 22, 1873, to said Samuel Ellison, under the following circumstances, conditions, and considerations, to wit: That at said date last named, or a short time prior thereto, plaintiff had become interested in, and was the holder of certain interests in, said Cañon de Chama grant, both personally and as representing others, and was negotiating for the sale of said grant with one William Blackmore; that said Blackmore and others required as a condition precedent to the sale that the said grant should be confirmed by the Congress of the United States, and, to secure such confirmation of said grant, defendant and Frederick Muller, who signed said contract, with others who were interested in said grant, conferred with said Ellison as to the probabilities of securing its confirmation by Congress, and that said Ellison represented that he could secure such confirmation in a very short time through the efforts and influence of the then delegate in Con-

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gress from New Mexico, and thereupon, on or about said November 22, 1873, the said Ellison, this defendant, and the said Frederick Muller entered into a contract whereby said Ellison agreed to secure a confirmation of said grant as an entirety, and according to the exterior boundaries, which included 472,736.95 acres, and said Ellison thereupon agreed that he would secure the confirmation of said grant as aforesaid, during the term of office of said delegate in Congress, and within not to exceed two years from said November 22, 1873, upon the condition that the said defendant and said Muller would give him a note for \$500, payable to him or his order on the confirmation of the said grant within the two years aforesaid, and that it was distinctly understood and agreed between the said Ellison, the defendant, and the said Muller, prior to and at the time of the signing of the said note, and as a part of the same transaction and consideration thereof, that if said grant should not be confirmed according to the exterior boundaries aforesaid, and within two years from and after the said 22d day of November, 1873, the said Ellison should receive nothing on said supposed note, and that the same should become null and void and of no effect at the end of the said two years; and that, relying on said undertaking of the said Ellison, defendant and the said Muller signed said alleged note. It further alleges that said grant has never been confirmed in compliance with the said agreement, and that, by reason of the failure on the part of the said Ellison to do and perform his duties and agreements promised and undertaken by him in the manner above stated, the consideration for said note has wholly failed, and said alleged note has been ever since the expiration of the said two years null and void and of no force and effect.

By way of reply, plaintiff, while excepting to the legal sufficiency of any of the new matter set up in the answer as constituting a defense, alleges want of knowledge as to the truth of said allegations, and in terms denies the same, and demands strict proof thereof, if upon the hearing the court should deem such proof admissible.

The case coming on for hearing, the plaintiff, over objection, introduced in evidence the agreement set out in the pleadings. It was admitted that the signature of the defendant on said contract was genuine. The plaintiff testified that the signature of Samuel Ellison on the indorsement was genuine, having been written by said Ellison in the plaintiff's presence. Plaintiff testified that the document in question was originally, about the year 1880, turned over to him as collateral security for the sum of \$100.

and that thereafter plaintiff made said Ellison further advances, in consideration of which the said Ellison sold, and plaintiff purchased, said note in cancelation of the indebtedness, at which time plaintiff made the indorsement on said note over Ellison's signature, and in Ellison's presence, and said Ellison handed the note to plaintiff as his property, and that no part of said note has been paid. Testimony was further offered establishing the presentation of the Cañon de Chama grant to the court of private land claims, and its confirmation by that court, substantially as alleged in the complaint. Plaintiff also tendered in evidence the following letter by the defendant to plaintiff, and referring to the instrument sued on:

Ojo Caliente, New Mexico,
July 18, 1895.

Hon. T. B. Catron,
Santa Fé, N. M.

Dear Sir:—

Your favor of the 12th instant, in reply to mine of previous date, is at hand and its contents have been duly noted. I have consulted with the parties that were jointly interested with me in the confirmation of the Cañon de Chama grant, and who would have paid their due proportion of the note given to secure such confirmation, if the grant had been confirmed by Congress, before we sold it or within a reasonable time thereafter, and they concur with me in the opinion that the said note is not now valid, as the express condition on its face has never been fulfilled, so that we will be compelled to have litigation over it.

With regards, I am,

Yours, etc.,

Anthony Joseph.

Plaintiff, being recalled, testified that his impression at the time of his transaction with Ellison relating to the instrument in question was that the grant in question had not been confirmed by Congress, although plaintiff at that time understood that it had been approved by the surveyor general. With this testimony, plaintiff rested his case, and defendant thereupon moved the court for judgment in his favor upon the grounds, first, that plaintiff had failed to show any valid contract under which the defendant could be held liable; second, that the plaintiff had failed to show that any consideration was paid or delivered to the defendant, or moved in any way from the plaintiff or his alleged assignor, for the making of the alleged contract introduced in evidence; third, that plaintiff had failed to show that the contingency, to wit, the confirmation by Congress of the Cañon de Chama grant, has

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ever occurred. This motion being denied, defendant proceeded to his proof. Plaintiff, being called as a witness on behalf of the defendant, testified that the original petition for the approval of the Cañon de Chama grant by the surveyor general of New Mexico had been written by plaintiff, and the name of Ellison signed thereto by plaintiff upon Mr. Ellison's request, but not under any employment; and that the petition was drawn between the years 1869 and 1871. Defendant further tendered in evidence the decision of the surveyor general approving this grant, dated December 17, 1872, and transmitted to Congress January 29, 1873, and the supplemental report of the surveyor general dated June 28, 1886, and transmitted to Congress June 30, 1886, which documents were, upon objection of plaintiff, held to be immaterial and irrelevant. The defendant called as a witness testified that the document in question was given to Ellison in consideration of his securing the confirmation of the Cañon de Chama grant, as approved by the surveyor general, within the term of office of Mr. Elkins in Congress; that said Ellison represented that he could secure the confirmation of said grant, as thus approved, through Mr. Elkins, and within the term of the latter as delegate in Congress; and that, defendant having in the meantime entered into an agreement with one Henry Blackmore to secure the confirmation of this grant for a consideration, and being influenced by the representation of Ellison that he could secure the confirmation of this grant through Mr. Elkins, defendant gave Ellison this note or document, it being understood between them that the note was a conditional one upon the confirmation by Congress of this grant within the time stipulated; and, if not confirmed within that time, then this document was to be null and void. Defendant denies ever having employed Ellison at any time to appear on his behalf before the surveyor general for the approval of said grant, or that he ever had any conversation with Ellison to that effect, but that, on the contrary, defendant never had any interest whatever in said grant until the 16th day of December, 1873, up to which time Ellison had already rendered services in that matter, but for other parties, to wit, one Georgus Pope, commonly called Frank Pope; that said Frank Pope paid said Ellison for such services before the surveyor general in the approval of said grant the sum of \$333, said amount having been paid upon the sale of the property by defendant himself to Ellison pursuant to defendant's arrangement with said Georgus Pope, this payment being made about the year 1873 or 1874. Defendant further testified that he never at any time, either prior

or subsequent to November 22, 1873, agreed to pay Ellison anything or any sum of money for any services to be performed by him before the surveyor general with reference to the Cañon de Chama grant, except the sum of \$333, which was paid him out of money in the possession of the defendant received by him from William Blackmore for the interest in the grant that he transferred at that time, which money was due Georgus Pope, and was paid to Ellison on Pope's account. Defendant admitted on cross-examination having written the following letter to the widow of Samuel Ellison:

House of Representatives, Washington, D. C.,
Dec. 15, 1891.

Mrs. F. S. Ellison,
Santa Fé, N. M.

Dear Madam:—

I acknowledge the receipt of your very esteemed letter dated the 10th inst., and, advised of its contents, proceed to inform you: That, if you have the obligation mentioned, I will pay you the sum of two hundred dollars for it; but a receipt does not annul the original obligation; there has already happened to me one difficulty of this nature in the courts, and I do not wish to have it occur again. Get the obligation and it will be paid.

With great respect, I am your friend and servant,
A. Joseph.

Defendant explained that this letter was written, however, by way of compromise, although denying the liability, in order that he might secure and destroy the paper that was out against him, but that the amount mentioned in that letter was never paid for the reason that plaintiff, who had possession of the note, declined to give it up. Defendant also presented testimony showing that the area included in the Cañon de Chama grant, as finally confirmed by the court of private land claims, was 1,422.62 acres, and that said grant, so confirmed, was, about the year 1900, sold for \$625. There was also offered in evidence the complaint, answer, and decree in a certain proceeding in the district court affecting this grant, a recital of the contents of which does not seem here material. Defendant also tendered in evidence, in connection with his testimony, a receipt signed by Georgus Pope, dated September, 1873, in which it is stipulated that the defendant is "to pay to Mr. S. Ellison \$333.00;" also a statement of account relating to the sale of this grant about 1873, made by or in the presence of the defendant, whereon is an indorsement, "\$333.00 S. E. Fees," and which, it was ex-

plained, referred to the amount defendant was to pay, being the amount due him by Pope, and which defendant assumed under the receipt last referred to. Defendant also presented a letter written by said Blackmore, dated November 25, 1873, in which there is a direction to defendant to "obtain the release of Mr. Ellison's claim," and also an agreement of June 14, 1873, between defendant and William Blackmore, relating to the terms of the sale of said grant, which last, however, contains no reference to the Ellison matter. This was all the testimony presented on behalf of the defendant.

At the conclusion of the testimony, plaintiff moved to strike out all of the documentary evidence introduced by the defendant, as being immaterial, irrelevant, and incompetent, and as being *res inter alios acta* and hearsay, and also moved to strike out all the testimony of the defendant, as being irrelevant, incompetent, and improper, and as incapable of varying, modifying, or affecting the instrument sued on, and because the same is not corroborated, and because the same is offered against the assignee of a deceased person, and because the same seeks to vary the written instrument herein sued on; and plaintiff further moved to strike out all of the testimony presented on behalf of the defendant, as being likewise immaterial, irrelevant, and incompetent; which motions and objections were sustained. The effect of this holding of the court was to leave the case for determination upon the testimony presented by the plaintiff, as above outlined, and the court thereupon entered its findings in favor of the plaintiff, holding the instrument sued on to be a negotiable instrument in the hands of a bona fide purchaser for value, without notice of any defense which might have existed thereto in the hands of the said Ellison; that the same imported a consideration upon its face, and was made for a valuable consideration; that the period of maturity mentioned therein was morally certain to happen, and that said instrument was certain to mature; that the confirmation by the Congress of the United States of said grant was, within the meaning of said contract, a confirmation of the same by the court of private land claims created by Congress as its agency in the premises; and that by the confirmation of said grant on December 11, 1900, said obligation matured, the same being a confirmation, in law, by the Congress of the United States. A motion for new trial was made and overruled, and judgment was accordingly entered in favor of the plaintiff and against the defendant in the sum of \$615, whereupon defendant sued out a writ of error from this court.

Mr. N. B. Laughlin, for plaintiff in error:

A promissory note is a written promise for the payment of money absolutely and at all events.

3 Kent, Com. 74; Story, Bills, §§ 55, 56; Cushman v. Haynes, 20 Pick. 132; Dyer v. Homer, 22 Pick. 253; Salinas v. Wright, 11 Tex. 575; Ex parte Tootell, 4 Ves. Jr. 372; Nunez v. Dautel, 19 Wall. 560, 22 L. ed. 161.

The conditions appearing on the face of the instrument sued on do not come within any of the exceptions found in the books making conditional notes negotiable.

1 Dan. Neg. Inst. § 41; 4 Am. & Eng. Enc. Law, 2d ed. p. 82; Salmon v. The Lykus, 36 Fed. 919; Indiana ex rel. Stanton v. Glover, 155 U. S. 513, 39 L. ed. 243, 15 Sup. Ct. Rep. 186; Stanton v. Shipley, 27 Fed. 498; Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; Wilson v. Powers, 131 Mass. 539; Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601; Carnahan v. Pell, 4 Colo. 190; Eldred v. Malloy, 2 Colo. 320, 20 Am. Rep. 752; Kingsbury v. Wall, 68 Ill. 311; Baird v. Underwood, 74 Ill. 176; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; Harlow v. Boswell, 15 Ill. 56; McCarty v. Howell, 24 Ill. 341; Bilderback v. Burlingame, 27 Ill. 338; Houghton v. Francis, 29 Ill. 244; Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; Brooks v. Hargreaves, 21 Mich. 254; Cayuga County Nat. Bank v. Purdy, 56 Mich. 7, 22 N. W. 93; Gabb v. King, 38 Cal. 143; Altman v. Fowler, 70 Mich. 57. 37 N. W. 708; Altman v. Rittershofer, 68 Mich. 287, 13 Am. St. Rep. 341, 36 N. W. 74; Wright v. Traver, 73 Mich. 493, 3 L. R. A. 50, 41 N. W. 517; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Windsor Sav. Bank v. McMahon, 3 L. R. A. 192, 38 Fed. 283; Hegeler v. Comstock, 1 S. D. 138, 8 L. R. A. 393, 45 N. W. 331.

Messrs. Catron & Gortner, for defendant in error:

If the event upon which the note is to mature is morally certain to happen sometime, then it makes no difference how indefinite or uncertain that time may be,—the note is negotiable, and governed by the law merchant.

Colehan v. Cooke, Willes Rep. 393; Conn v. Thornton, 46 Ala. 587; Bristol v. Warner, 19 Conn. 9; Crider v. Shelby, 95 Fed. 212; Shaw v. Camp, 160 Ill. 428, 43 N. E. 608; Andrews v. Franklin, 1 Strange, 24; Evans v. Underwood, Wils. 262; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; Gaytes v. Hibbard, 5 Biss. 99, Fed. Cas. No. 5,287; Stillwell v. Craig, 58 Mo. 24; Riker v. Sprague Mfg. Co. 14 R. I. 402, 51 Am. 1 L.R.A.(N.S.)

Rep. 413; Mortee v. Edwards, 20 La. Ann. 236; Atcheson v. Scott, 51 Tex. 220; Knight v. McReynolds, 37 Tex. 208; Gaines v. Dorsett, 18 La. Ann. 563; Brewster v. Williams, 2 S. C. N. S. 455; Nelson v. Manning, 53 Ala. 550; Chapman v. Wacaser, 64 N. C. 533; Powers v. Manning, 154 Mass. 370, 13 L. R. A. 258, 28 N. E. 290; Curtis v. Horn, 58 N. H. 504; Cota v. Buck, 7 Met. 588, 41 Am. Dec. 464.

Pope, J., delivered the opinion of the court:

The assignments of error filed by the defendant set forth that the court erred in finding for the plaintiff on the testimony presented, and in sustaining the objection to the testimony presented for the defense, and also in its rulings upon the admissibility of the testimony presented on the hearing.

The first question which it becomes necessary to determine is whether, upon the testimony presented, plaintiff was entitled to recover; and this, in turn, involves a number of subsidiary questions,—among others, the construction of the contract here sued on. This contract is as follows:

Fernando de Taos, New Mexico,
November 22, 1873.

Upon the confirmation by the Congress of the United States of that certain land grant known as the Cañon de Chama, otherwise called San Joaquin del Rio de Chama Grant, I promise to pay Mr. Samuel Ellison or order the sum of Five Hundred Dollars in current funds of the United States.

Anthony Joseph.
Frederick Muller.

It is alleged on behalf of the defendant that the time of maturity upon which this contract is based has never arrived, for the reason, first, that that grant has never been confirmed by the court of private land claims, but that only certain allotments therein contained have been confirmed; and second, that, even if confirmed by the court of private land claims, such a confirmation was not a confirmation by the Congress of the United States, as provided in the instrument sued on. We are of the opinion that neither of these positions is well taken. As to the first, while it is true that the confirmation by the court of private land claims restricted the area of the grant to about 1,420 acres, composed of agricultural allotments, as against almost a half million acres claimed, composed of these allotments and a vast outlying tract suitable only for pasture and similar purposes, still the action of the court of private land claims, as embodied in its decree, was no less for that reason a

confirmation of the grant. The grant as confirmed by the court of private land claims must be assumed to be the grant as it always existed, and, even if confirmed by the court with an extremely reduced area, was none the less confirmed. We are of the opinion further that a confirmation by that court was within the terms of this contract, as being a confirmation by Congress. The United States has adopted at various times different methods of dealing with private land claims; in some instances, as in California, confiding the determination of such matters to a commission vested with more or less restricted powers; in other cases, as in the grant here under consideration, confiding the matter to a court vested, as was the court of private land claims with power to hear and determine cases upon the principles of equity; and in still other cases Congress dealt direct with the matter, confirming a claim by direct congressional act upon the report of its own committees, instead of by delegating that power to courts specially designated for that purpose. But, whether the one method or the other was adopted, the confirmation, after all, was by Congress, in that the power to deal with the subject-matter came directly by act of Congress, and without such act no power would have existed. The adjustment of these claims upon the national conscience was essentially a political act; and that Congress, in the performance of such act, may have enlisted the assistance of a judicial tribunal especially created by it for that purpose, cannot be taken as detracting to any extent from the fact that such a confirmation was due to the act of Congress, and directly flowed from such congressional action. The determination of such matters by the court of private land claims was simply a determination of the issues of law and fact which would otherwise have been dealt with and reported upon by proper committees of Congress; and after the determination of the matter by the court of private land claims the patent evidencing the quitclaim of the government was issued under the direction of the Land Department, just as in cases of congressional confirmation. We are of opinion that the fact that Congress may have been in some instances more liberal in dealing with these private land claims than commissions or courts created by it cannot be considered as a circumstance affecting the construction of this contract. It cannot be assumed that, in making this contract, the parties were stipulating to secure from Congress more than they were justly entitled to. It must be assumed that the decree of confirmation rendered by the court of private land claims, and affirmed by the

Supreme Court of the United States, gave the owners all they were justly entitled to. As presumably all the claimants sought was what was due them, and as presumably that is all they would have obtained, whether the matter was dealt with by Congress or by one of its courts, the difference in tribunal cannot be assumed to have entered into the making of the contract. We accordingly hold that the purpose of this contract was the payment of the amount named upon the confirmation of the grant, whether by act of Congress specially applicable to this grant, or by act of Congress providing for the submission of this and other grants to a competent tribunal, which after due investigation might grant a confirmation.

We come now to consider the third proposition, to which the briefs of counsel and the oral argument have been mainly directed. Is the instrument here sued on a negotiable instrument? If it is such an instrument, then it is presumed to have been given upon valuable consideration, and, having been acquired before maturity by a bona fide purchaser for value, could not be subject to any defenses existing between the original parties of which plaintiff had no notice. If, on the other hand, the instrument was not negotiable, very different questions supervene.

The rule is recognized by each of the parties that, in order to constitute a negotiable instrument, the fact of the maturity of the instrument at some time must be morally assured; it must be certain to accrue. It is contended by the defendant, on the one hand, that the wording of the instrument ("upon the confirmation by the Congress of the United States" of the grant in question) was plainly a condition which might or might not be attained, and that thus the maturity of the instrument in question was based upon a condition which might or might not finally accrue, and that thus, whatever may be the dignity of this instrument as a contract, it lacks an essential element of negotiability, to wit, certainty of maturity. On the other hand, it is contended by the plaintiff that the confirmation of this grant by Congress was morally certain, in that it depended upon the performance of a governmental duty, and that, while the time of such confirmation was indefinite, there was at the time of the making of this contract, and at every moment subsequent, a moral certainty that Congress would at some time perform this duty of confirming to one of its citizens the title to this grant. The cases bearing upon this precise point are not numerous, and those cited by the parties in their briefs are, as a rule, not in point. Thus the line of cases holding that notes payable "at the maker's death" are

negotiable are not in point, for the obvious reason that death is an absolute certainty, and a note contingent upon death is thus contingent upon something which is bound to occur. Equally as apart from this proposition are the cases relied upon by plaintiff known as the "Southern War Cases," involving questions as to the negotiability of notes payable within a certain time after the cessation of war between the Confederate states and the United States of America, or the establishment of peace between those then contending portions of our reunited nation. Such obligations were likewise contingent upon an event which was morally certain to happen. In human experience, no war has ever existed which has not come to an end, and none can be conceived of that will not have at some time a termination. The limitations of human endurance, physical and financial, absolutely negative the idea that there can be any war which shall not cease. In each of these two classes of cases cited by counsel there existed, therefore, a moral certainty of the maturity of notes. But does the confirmation of a land grant by Congress stand upon the same basis? It is urged by the plaintiff that it does, for the reason pointed out in one or two English cases of great antiquity. The first of these is the case of *Andrews v. Franklin*, 1 Strange, 24, wherein the condition of the note was "payable two months after a certain ship of His Majesty's service should be paid off." This note was objected to as depending upon a contingency which might never happen, but the court held otherwise upon the ground that the "paying off of a ship" is a thing of public nature. Also there is cited the case of *Evans v. Underwood*, Wils. 262, wherein a note was held negotiable, the terms of which were, "I promise to pay to George Pratt or order eight pounds, upon the receipt of his, the said George Pratt's, wages due from his Majesty's ship, the Suffolk." In that case the court contented itself with citing and following the case of *Andrews v. Franklin*. We have been referred to no American cases in which the doctrine of *Andrews v. Franklin* has been followed, or, indeed, countenanced. The case of *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 199, it is true, cites this case, but the question there involved was a very different one from that ruled in *Andrews v. Franklin*. On the other hand, wherever these two cases have been cited by the text writers or the Reports, it has been to question their soundness. Indeed, doubts have even been expressed as to whether *Andrews v. Franklin* was ever actually decided, and *Evans v. Underwood* has been particularly criticized up-
1 L.R.A. (N.S.)

on the ground that, while the paying off of a public ship may be a moral certainty, it is by no means to be considered equally certain that a particular person will receive wages therefor. For reference to these cases, see 1 Dan. Neg. Inst. § 46; Story, *Promissory Notes*, § 27; Chitty, *Bills*, p. 137; Bayley, *Bills*, p. 26; *Weidler v. Kauffman*, 14 Ohio, 456.

We need not here discuss the fact that the English cases were decided under a system of government, one of whose fundamental principles is that the King can do no wrong; and we would be slow to hold that republics, however proverbially ungrateful, are less mindful of the fulfilment of their obligations than monarchies. We do not understand, however, that the two cases cited turn upon the presumption that every nation performs its duty because it should do so, for that presumption, in a certain sense, exists as well in the case of the individual as the nation, and, if considered as explanatory of the holding in these cases, would make all obligations contingent upon the performance by anyone of a just obligation a negotiable instrument. We conceive these cases, however, to be founded upon the fact that the very operation of government leads automatically to the payment of its ships from time to time. This is a custom which, if not as fixed as the recurrence of the seasons, is at least as stable as the existence of the government itself. The payment of its sailors is a matter of such national and imperative concern, and so invariable in the past, that a promise contingent upon such a payment in the future may well be considered based upon a moral certainty. This at least is explanatory of *Andrews v. Franklin*. We find ourselves amply justified by the authorities above cited in saying that *Evans v. Underwood* does not follow from *Andrews v. Franklin*, in that the latter refers to a general and universal custom, and the other to the payment of an individual, which for various reasons might never occur. But indulging to these two cases the high respect which must be accorded them, both because of their age and the high character of the English tribunal enunciating them, we are of opinion that they do not lead to the conclusion that the confirmation of a land grant by Congress is a moral certainty. The United States has never become bound by treaty nor by international law to the confirmation of all private land claims in the territory of New Mexico, nor for the confirmation of all claims which may be asserted by interested parties to be land grants. The extent to which the nation went in the treaty of Guadalupe Hidalgo was to pledge itself that, in the territories conveyed by the

treaty, property of every kind should be invariably respected. This was simply a declaration of international morals. But the manner of that recognition in the case of an imperfect grant—and plaintiff, in his brief, concedes and contends that this was such—was exclusively for Congress to determine. In *Territory v. Delinquent Tax List* (N. M.) 76 Pac. 316, this court has heretofore had occasion to consider the subject of imperfect grants, and to point out, upon a full citation of authorities, that an imperfect grant is one, "the title to which was at the date of the treaty vested in the United States;" it is one "which does not convey full and absolute dominion;" it is one which requires "a further exercise of the granting power to pass the fee in the land;" it is one "which may be confirmed or disallowed by the political or granting powers;" it is one "depending for its completion and sanction upon the sovereign power; and to this course claimant had no just cause to object, as their condition was the same under the Spanish government." An imperfect grant thus depends for its recognition solely upon the grace of the new sovereign, and the manner of its recognition by the sovereign is purely conjectural. Congress is not bound, either by treaty or by morals, to confirm it. Other methods of satisfying the national obligation may be employed. The freedom of Congress to deal with imperfect grants as it pleases is illustrated in the act of March 3, 1891, chap. 539 (26 Stat. at L. 854, U. S. Comp. Stat. 1901, p. 765), establishing the court of private land claims, wherein it provided that no imperfect grant, no matter what may be its area by natural boundaries, shall be confirmed for more than 11 square leagues; and wherein it is further provided (§ 12, 26 Stat. at L. 859, U. S. Comp. Stat. 1901, p. 772) that any imperfect grant not presented within two years shall be taken and deemed in all courts and elsewhere to be abandoned, and shall be forever barred. The power thus given to restrict the area of the grant—indeed, to declare the grant of no effect unless presented within a given time—is illustrative of the power to deny confirmation entirely; of the power to provide by other means for the satisfaction of the claim upon the national conscience. And that is exactly what was done in the case of the well-known *Luis Maria Cabeza de Baca* grant, in this territory, which was satisfied by Congress, not by giving the claimants the land covered by the grant, but by providing (act June 21, 1860, chap. 167, 12 Stat. at L. 71; act June 11, 1864, chap. 123, 13 Stat. at L. 125) for an equivalent amount of land located in other sections of the West, and now familiarly known as the "*Baca floats*." It is entirely

conceivable that Congress might in other instances satisfy—might, indeed, in the case of this very grant have satisfied—the claim upon the national conscience by the retention of the land by the government, and the payment of an adequate amount of money to satisfy what Congress might deem to be the equities of the case. This likewise is illustrated by the land court act, wherein it is provided that, where portions of the grant have been taken up under the public land laws, claimants shall have no confirmation for the particular land, but must accept in lieu thereof \$1.25 an acre. It follows from the foregoing, therefore, that at the time the contract was made it was not morally certain that this grant would ever be confirmed. Indulging in its behalf all that has been said by plaintiff as to its merits as a private land claim (contentions to a limited extent recognized by the court of private land claims), it was within the right of the nation—it was entirely possible for Congress—to decline to confirm; it was entirely possible that it would settle the claim by the assignment of lieu lands or the appropriation of a stated sum. The presence of these possibilities establishes that at the time this obligation was made a confirmation was not bound to occur; it was not a moral certainty; the instrument was not payable at a time fixed, beyond peradventure; the instrument was not negotiable.

The conclusion here reached is readily vindicated by another line of reasoning. Assuming, as we must, a readiness upon the part of the government to satisfy its obligations when known, there are a certain class of these that it cannot know or provide for unless they be presented by those who hold them. To this class belong what are known as private land claims, Indian depredation claims, pension claims, customs refunds, and a score of other classes of obligations, which, unless presented, would never be known to the governmental authorities. For these, unlike the payment of English sailors, or our own sailors, for that matter, there is no monthly or quarterly pay day. Theoretically the government has in mind and intent the ultimate settlement of all its obligations, liquidated and unliquidated, contractual and noncontractual. Practically, until those of the description above enumerated are presented and prosecuted, there is no possibility of payment; and, in a machinery as vast as a government, this must necessarily be so. In matters such as private land claims, it cannot undertake to hunt out the claimants. It simply helps those who help themselves. As to the confirmation in recognition of these, there is, from a human standpoint, no element of predestination. The principle of free agency

on the part of the claimant has full sway. If we proceed on the assumption that what is to be will be, whether we assiat to that end or not, we will soon find that little headway is made. Applying this statement of truisms to the case at bar, if at the making of the instrument of November 22, 1873, the condition therein expressed was morally certain to accrue, it was morally certain for all purposes and as to all persons. Suppose, now, the claimants of the Cañon de Chama grant, relying upon this "moral certainty," and refusing to take any steps in the matter, had simply allowed the matter of the confirmation to await the function of that certainty,—the outcome of that predestined fate,—what would have been the status of this obligation at the present time; what its status when sued on in 1903? The answer is that the grant, not having been presented to the court of private land claims on or before March 3, 1893, would, under the provisions of § 12 of the land court act, already referred to, be "deemed and taken in all courts and elsewhere to be abandoned and . . . forever barred," and the condition named in the note would thus have become forever impossible of fulfilment, and the note itself forever incapable of maturity. But, if this condition could result from a default by the owners of the grant, what becomes of the moral certainty of maturity which inheres in and constitutes a negotiable instrument? If maturity may, as in this case, be rendered impossible of fulfilment, the fundamental idea of a negotiable instrument—that its time of payment must be fixed and beyond the control of the parties or any third party—fails. When it is reflected further that, even if the grant owners had waived the alleged moral certainty which attached to the confirmation of his claim, and had filed it seasonably before the land court, its confirmation still depended upon the presentation of proper proofs, the vigilance of counsel, and the other elements always entering into the success of matters in litigation, it will be seen that the instrument, when made, in 1873, depending upon a confirmation by Congress, was confronted by a number of contingencies, any one of which might have prevented the realization of the condition upon which maturity was predicated, and was accordingly not negotiable. It is no answer to these positions to show that the grant in question has, as a matter of fact, been confirmed by the court of private land claims. The fact that Congress may have decided to confirm the grant through the instrumentality of the land court, instead of to satisfy its equities in some other way, does not detract by relation from the fact that when the instrument was

signed it was possible that Congress might provide otherwise. The fact that the claim may, when presented to the land court, have successfully run the gauntlet, and emerged clothed in a three-hundredth of its claimed area, does not detract from the fact that in 1873 it was entirely possible that it might never have been presented to and prosecuted in that or any other court, and might thus, within the discretion of Congress, have become "abandoned and forever barred." The question is, What were the conditions when the contract was made? Negotiability is to be judged by the front sight, not by the back sight. The moral certainty must be present at the time of its execution, and not be a matter of relation accruing by reason of subsequent events. If it be not a bill or note *ab initio*, no subsequent event can make it so. Bayling, Bills, 5th ed. chap. 1, § 6, p. 16. The character of an instrument as a promissory note cannot depend upon future events, but solely upon its character when created. Ernst v. Stockman, 74 Pa. 15, 15 Am. Rep. 542; Eldred v. Malloy, 2 Colo. 320, 20 Am. Rep. 752; Story, Promissory Notes, § 22.

For the reasons stated, we are of opinion that the instrument sued on was not a negotiable instrument, but was simply a contract to pay upon a contingency which might or might not happen.

It follows from this conclusion that the burden was upon the plaintiff, especially in view of the pleadings which make an issue upon the subject of consideration, to prove a consideration for the contract made by defendant and Muller with Ellison. A written agreement such as this does not import a consideration. A valid consideration must be alleged and proved. Chitty, Bills, pp. 8, 9; Dan. Neg. Inst. §§ 160 et seq.; Shelton v. Bruce, 9 Yerg. 24; Jerome v. Whitney, 7 Johns. 322; Edgerton v. Edgerton, 8 Conn. 6. We have carefully examined the record upon this point, and fail to find any testimony to sustain the finding of the court that there was a sufficient consideration for the note in question. Plaintiff, in his brief, argues that the letter of June 18, 1895, from defendant to plaintiff, above quoted, admits the giving of the note, and that the same was for a sufficient consideration. We do not so construe that letter. It, in terms, denies the validity of the instrument upon the ground that the express condition, to wit, confirmation by Congress, has never been fulfilled, and asserts that there will have to be litigation over it. We do not think that the denial of liability on this one ground is in effect an admission of a valuable consideration for the instrument in question. It is further urged by plaintiff that the letter heretofore referred to, from

the defendant to Mrs. Ellison, offering to pay \$200, is likewise an admission of a sufficient consideration. That letter was, in terms, admitted as a part of defendant's case, and was, under the objection of counsel for plaintiff, to go out, should the rest of defendant's testimony be stricken out. This having been done, the letter is not evidence before us. If this letter, however, is to be considered a part of the record, the explanation accompanying it must likewise be considered; and defendant testified explicitly that the letter was an offer by way of compromise, in order to secure and retire an outstanding paper bearing his name.

It is finally contended by plaintiff that defendant's answer admits a valid consideration, to wit, the retainer of the services of said Ellison. Even if this allegation of the answer can, for this purpose, be segregated from the remaining allegations, which are designed to establish an entire failure of the consideration alleged, the consideration which it avers cannot avail plaintiff, for the reason that it does not accord with the allegations of his complaint, which are to the effect that the document in question was given in consideration of past services rendered by Ellison before the surveyor general, whereas defendant's allegation is that it was in consideration of services thereafter to be rendered, presumably before Congress, since the surveyor general had in the January preceding disposed of the grant by a favorable report to the Department of the Interior. In addition, these very averments of the answer upon which plaintiff now relies to establish consideration are put in issue by his reply. He cannot recover upon a theory which is entirely different from that which he alleges, and which is denied by his own pleadings. We therefore conclude that there is no proof in the record establishing a consideration for this contract; that in this respect plaintiff failed to make out his case, and the court erred in giving judgment in his favor upon the proofs.

Holding, as we do, that the plaintiff is not entitled to a recovery upon his testimony, and reversing the case upon that ground, we do not find it necessary to determine to what extent the testimony presented on behalf of the defendant was admissible. The case having been tried by the court below upon the theory that the instrument sued on was a negotiable instrument, it naturally resulted that the same weight was not given to the testimony for the defense that would have been given otherwise. Holding, as we do, that the instrument sued on was not negotiable, the case is open for all defenses that would have been available between the original parties, and we deem it fairer to re-

mand the case for the purpose of admitting such proof as may be offered by either side. Of course, no testimony can be received upon the new trial as to oral agreements contemporaneous with or prior to the instrument here sued on contradictory of the terms thereof; and, of course, in the further trial of this case, no testimony of the defendant "in respect of any matter occurring before the death of the deceased person" can justify a decision in his favor, "unless such evidence is corroborated by some other material evidence." Comp. Laws, § 3021. And of course, further, such corroboration must be upon the point or points in issue in the case necessary to a recovery. *Gillett v. Chavez* (N. M.) 78 Pac. 68, and cases cited.

The case will be reversed and remanded for further proceedings in accordance with this opinion.

Mills, Ch. J. and Parker, Abbott, and Mann, JJ., concur. McFie, J., having decided the case in the court below, took no part in this decision.

Petition for rehearing denied.

IOWA SUPREME COURT.

JOHN A. ELLIOTT, Admr., etc., of I. C. Penrose, Deceased, Appt.,

v.

CAPITAL CITY STATE BANK.

(... Iowa ...)

1. Bank—deposit—loan.

A general deposit of money in a bank is not a loan.

2. Same—certificate of deposit—statute of limitations.

A demand certificate of deposit issued by a bank is not a demand promissory note, within the rule that the statute of limita-

Case Note.—There is a conflict of authority upon the question whether a demand is necessary to mature a demand certificate of deposit. In some jurisdictions it is held that in this respect such a certificate is upon the same basis as a promissory note,—is mature at the date of issuance, and needs no demand to effect this situation. In these states the question as to the time within which demand must be made cannot arise. See note on "Maturity of certificate of deposit," in 15 L. R. A. 386. This was the view taken by the Iowa supreme court in *Mereness v. First Nat. Bank*, 112 Iowa, 11, 51 L. R. A. 410. 84 Am. St. Rep. 318, 83 N. W. 711; but that case is overruled by the present decision in *ELLIOTT v. CAPITAL CITY STATE BANK*.

In other states, however, a different view is taken, and it is held that the deposit not only creates a debt, but has also the nature of a bailment, and, hence, necessitates a del-

tions begins to run upon it as soon as issued.

3. Same—demand.

Demand for payment of the amount due under a demand certificate of deposit issued by a bank is necessary to set in motion the statute of limitations,—at least where, by its terms, it is payable on its return properly indorsed.

4. Same.

There is no obligation to demand payment of a demand certificate of deposit issued by a bank, within the period of the statute of limitations.

(June 7, 1905.)

A PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action brought to

mand to entitle the bailor or his assignee to a return of his money.

Within what time must the demand be made in jurisdictions taking this view? The argument in favor of limiting the period is that, a demand being necessary to mature the obligation, it must be made within a reasonable time after the issuance of the certificate. What shall be considered a reasonable time is uncertain, but in no case should it be permitted to extend beyond the length of time within which it is prescribed that, after its maturing, action upon the certificate must be brought.

In Iowa it is settled by *ELLIOTT v. CAPITAL CITY STATE BANK*, to the contrary, that there is no limitation to the period within which the demand may be made. Elsewhere, except in Pennsylvania, there appears to have been no explicit expression of opinion upon the point, although in several cases the courts, by necessary implication, adopted the same theory as they have held, that the demands in question were sufficient though not made until after the period of the statute of limitations had expired.

Direct authority is found in *McGough v. Jamison*, 107 Pa. 336. The court there holds that action upon a certificate of deposit is sustainable although no demand of payment was made within the statutory period of limitation after its issue. The certificate was payable to the order of the depositor "on return of this certificate." "It was not due," says the court, "until demanded and a return of the certificate. No action could be maintained thereon until that time. It follows, that is the time the statute began to run, for then the right of an action accrued. . . . The demand may be made after the expiration of six years from the date of the certificate."

In support of its conclusion, the court cites *Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507. In this case a check presented to the bank and marked "Good" is deemed to place its holder in the same position as the original depositor, whose deposit is held by the bank payable on demand. The check so certified was not presented until after the expiration of six years from 1 L.R.A. (N.S.)

enforce the amount due on a demand certificate of deposit. Reversed.

The facts are stated in the opinion.

Messrs. Dale & Harvison, for appellant:

A certificate of deposit is distinguishable from a promissory note payable on demand.

Morse, Banks & Banking, 3d ed. 1888, § 298, p. 519; *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186; *Curtis v. Leavitt*, 15 N. Y. 9; *Re Hunt*, 141 Mass. 515, 6 N. E. 554; *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Officer v. Officer*, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; *Hunt v. Hopley*, 120 Iowa, 695, 95 N. W. 205; Code, §§ 1848, 1849, 1852, 1855.

its date and certification, that being the period of the statute of limitation. Nevertheless the right of action against the bank was not deemed to have become barred.

In *Finkbone's Appeal*, 86 Pa. 368, upon which this decision is based, the court held that the failure of a depositor to call for a sum deposited with another party until after the period of the statute of limitations, when he had a receipt acknowledging the deposit and readiness to return the same in such amount "as she may want," did not bar an action to recover the same.

In *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186, the court regards as a certificate of deposit a special deposit with a mercantile firm, evidenced by the writing, "Due S. K. Ashton, Trustee, \$4,000, returnable on demand. It is understood this sum is especially deposited with us, and is distinct from the other transactions with said Ashton." Demand for payment of the debt so evidenced was not made within the statutory period, and counsel for the defense argued that, even if demand were necessary, which he denied, it should have been made within such time. The court, however, held the contrary. "As the instrument in question was not a promissory note, but a certificate of deposit, the defense of the statute of limitations, interposed by the defendant, was not available, for the reason that a demand of the money deposited was not made prior to six years before the commencement of the action."

Whether regarded as a certificate of deposit or as a promissory note due upon demand, it is held, in *Payne v. Gardiner*, 29 N. Y. 146, that a deposit with a mercantile firm, evidenced by a dated certificate, "Received from Capt. William H. Payne, \$1,000, which is to his credit on our books at six per cent. *Slate, Gardiner, & Howell*,"—was not barred by the lapse of the statutory period after date, where demand was not made until within such period before bringing action. "The rights and liabilities of the parties are precisely the same," says the court. "as if the money had been in a bank; and hence, there was no right of action against the depositaries until actual del-

A certificate of deposit is not due and payable until demand for payment is made.

Morse, Banks & Banking, 3d ed. 1888, § 301, p. 523; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Chemical Nat. Bank v. Bailey, 12 Blatchf. 480; Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 28, 32 L. ed. 342, 9 Sup. Ct. Rep. 3; Bull v. First Nat. Bank, 123 U. S. 105, 31 L. ed. 97, 8 Sup. Ct. Rep. 62, 14 Fed. 612; Rosenstock v. Dessar, 85 App. Div. 501, 83 N. Y. Supp. 334; Re Cook, 86 App. Div. 586, 83 N. Y. Supp. 1009; Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736; Read v. Marine Bank, 136 N. Y. 454, 32 Am. St. Rep. 758, 32 N. E. 1083; Smiley v. Fry, *supra*; Bank of British N. A. v. Merchants' Nat. Bank, 91 N. Y. 106; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Thomson v. Bank of British N. A. 82 N. Y. 1; Boughton v. Flint, 74 N. Y. 476; Howell v. Adams, 68 N. Y. 314; Payne v. Gardiner, 29 N. Y. 146;

Farmers' & M. Bank v. Butchers' & D. Bank, 14 N. Y. 623; Downes v. Phoenix Bank, 6 Hill, 297; Dickinson v. Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12; Shute v. Pacific Nat. Bank, *supra*; Watson v. Phoenix Bank, 8 Met. 217, 41 Am. Dec. 500; Miller v. Western Nat. Bank, 172 Pa. 197, 33 Atl. 684; Humphrey v. County Nat. Bank, 113 Pa. 417, 6 Atl. 155; McGough v. Jamison, 107 Pa. 336; Finkbone's Appeal, 86 Pa. 368; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507; White v. Meadowcroft, 91 Ill. App. 293; Brahm v. Adkins, 77 Ill. 263; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Brown v. McElroy, 52 Ind. 404; Long v. Straus, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123; McEwen v. Davis, 39 Ind. 109; Bellows Falls Bank v. Rutland County Bank, *supra*; Tobin v. McKinney, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228; Cornwall v. McKinney, 12 S. D. 118, 80 N. W. 171; Starr v. Stiles, 2 Ariz. 436, 19

mand made; and the statute of limitations began to run from the same time." Demand made within the statutory period before suit, though thirteen years after the date of the obligation, is held sufficient to support the action.

Although the point is not expressly raised in Tobin v. McKinney, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228, the inference is clear, again, that the court does not regard the time within which, after issuance of the certificate, demand may be made, as limited, so long as it is made within the statutory period before action brought. Recovery was allowed on a demand certificate which had been outstanding for nine years, where the evidence shows that demand thereon was made only a short time before suit.

In Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070, it appears that one party put in the hands of another party, not a banker, a sum of money for safe-keeping "until she should want it," for which the recipient issued a paper reciting the amount of money which is stated to be "with me, belonging to" the depositor. Defense to an action to recover the sum was based upon the plaintiff's failure to demand it within the statutory period after its deposit. But the court held that in such cases the time within which the demand must be made is to be determined by the construction to be put upon the contract in each case. Says the court: "If the contract requires a demand, without language referring to the time when the demand is to be made, it is as if the words 'within a reasonable time' were found in it. What is a reasonable time is a question of law, to be determined in reference to the nature of the contract and the probable intention of the parties as indicated by it. Where there is nothing to indicate an expectation that a demand is to be made quickly, or that there is to be delay in making it, we are of opinion that the time limit-
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ed for bringing such an action after the cause of action accrues should ordinarily be treated as the time within which a demand must be made." The court holds, however, that, under the circumstances, failure to demand within this period was excused, it appearing that the defendant was to hold the money for an indefinite time in the future, as much for the safety and convenience of the plaintiff as for the pecuniary benefit of either of them. "In some respects he was to stand in the place of a savings bank in receiving and keeping the money. A depositor in a savings bank need not call for his money within six years."

The rule laid down by the Massachusetts court seems reasonable, but the general rule which it lays down has been more often declared without stating the exception. In a variety of cases in which demand was held necessary to found a cause of action, it has been held that the action was barred by failure to make the demand within the statutory period for bringing the action where matured by demand. Demand of partnership account: Codman v. Rogers, 10 Pick. 112. Demand of payment of demand note: Kraft v. Thomas, 123 Ind. 513, 18 Am. St. Rep. 345, 24 N. E. 346. Demand of payment of moneys received, but not accounted for by attorney to client: Sheaf v. Dodge, 161 Ind. 270, 68 N. E. 292. Demand of goods held subject to order: Thompson v. Whitaker Iron Co. 41 W. Va. 574, 23 S. E. 795. Demand of moneys received by a corporate officer, but not accounted for: Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912. Demand of reinstatement in a body from which one was illegally expelled: Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 Pac. 1074. Demand of money from sheriff realized on execution, but not paid over: Keithler v. Foster, 22 Ohio St. 27.

Pac. 225; Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 460; Citizens' Bank v. Fromholz, 64 Neb. 284, 89 N. W. 775; Murphy v. Pacific Bank, 130 Cal. 542, 62 Pac. 1059; Green v. Odd Fellows' Sav. & Commercial Bank, 65 Cal. 71, 2 Pac. 887; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Planters' Bank v. Farmers' & M. Bank, 8 Gill & J. 449; Union Bank v. Planters' Bank, 9 Gill & J. 439, 31 Am. Dec. 113; Farmers' & M. Bank v. Planters' Bank, 10 Gill & J. 422; Johnson v. Farmers' Bank, 1 Harr. (Del.) 117; Boyden v. Bank of Cape Fear, 65 N. C. 13; Hill-singer v. Georgia Railroad Bank, 108 Ga. 357, 75 Am. St. Rep. 42, 33 S. E. 985; Patterson v. Blanchard, 98 Ga. 518, 25 S. E. 572; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; Nash v. Woodward, 62 S. C. 418, 40 S. E. 895; Smith v. Steen, 38 S. C. 361, 16 S. E. 1003; Tobias v. Morris, 126 Ala. 535, 28 So. 517; Wright v. Paine, 62 Ala. 340, 34 Am. Rep. 24; Arnold v. Penn, 11 Tex. Civ. App. 325, 32 S. W. 353; Bank of Missouri v. Benoist, 10 Mo. 519.

Messrs. Read & Read, for appellee:

The provision of the certificate, making it payable on the return of the certificate, properly indorsed, does not change its negotiability or its legal effect, or make it payable otherwise than upon demand.

Bean v. Briggs, 1 Iowa, 488, 63 Am. Dec. 464; Gregg v. Union County Nat. Bank, 87 Ind. 238; Francois v. Lewis, 68 Minn. 409, 71 N. W. 621; Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

Even if the certificate was required to be returned and a demand made of the bank, this would have to be done within the period of the statute of limitations.

Mereness v. First Nat. Bank, 112 Iowa, 11, 51 L. R. A. 410, 84 Am. St. Rep. 318, 83 N. W. 711; Hall v. Letts, 21 Iowa, 596; First Nat. Bank v. Greene, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; Baker v. Johnson County, 33 Iowa, 151; Prescott v. Gonser, 34 Iowa, 175; Beecher v. Clay County, 52 Iowa, 140, 2 N. W. 1037; Hint-rager v. Hennessy, 46 Iowa, 600; Lower v. Miller, 66 Iowa, 408, 23 N. W. 897; Hint-rager v. Traut, 69 Iowa, 746, 27 N. W. 807; Squier v. Parks, 56 Iowa, 407, 9 N. W. 324; Great Western Teleg. Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45; Mickel v. Walraven, 92 Iowa, 423, 60 N. W. 633; Grand Lodge. A. O. U. W. v. Graham, 96 Iowa, 592, 31 L. R. A. 133, 65 N. W. 837; Kraft v. Thomas, 123 Ind. 515, 18 Am. St. Rep. 345, 24 N. E. 346; Boustead v. Cuyler, 116 Pa. 551, 8 Atl. 848.

A certificate of deposit in the usual form, payable on demand or return of the certifi-
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cate, is the same in legal effect as a promissory note payable on demand, and is due immediately; and the statute of limitations begins to run from date.

Mereness v. First Nat. Bank, Bean v. Briggs, and Hall v. Letts, *supra*; Palmer v. Palmer, 36 Mich. 488, 24 Am. Rep. 605; Brummagim v. Tallant, 29 Cal. 503, 89 Am. Dec. 61; Miller v. Austen, 13 How. 218, 14 L. ed. 119; Bank of Peru v. Farnsworth, 18 Ill. 563; Laughlin v. Marshall, 19 Ill. 390; Hunt v. Divine, 37 Ill. 137; 1 Parsons, Bills & Notes, p. 26; Lynch v. Goldsmith, 64 Ga. 42; Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 706; Klauber v. Biggerstaff, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357; Cate v. Patterson, 25 Mich. 191; Boustead v. Cuyler, *supra*; Telford v. Patton, 144 Ill. 619, 33 N. E. 1119; Gregg v. Union County Nat. Bank, *supra*; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; Maxwell v. Agnew, 21 Fla. 154; Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; 1 Randolph, Com. Paper, §§ 11, 89; 2 Dan. Neg. Inst. 5th ed. § 1698; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910; Francois v. Lewis, 68 Minn. 409, 71 N. W. 621; Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363.

No previous demand is necessary before suit can be commenced.

Mobile Sav. Bank v. McDonnell, 83 Ala. 600, 4 So. 346; Sanford v. Lancaster, 81 Me. 438, 17 Atl. 402; Young v. Weston, 39 Me. 492; Ross v. Lafayette & I. R. Co. 6 Ind. 298; Douglass v. Sargent, 32 Kan. 413, 4 Pac. 861; Wheeler v. Warner, 47 N. Y. 519, 7 Am. Rep. 478; Payne v. Gardiner, 29 N. Y. 176; Kraft v. Thomas, *supra*.

On Rehearing.

When a general deposit of money is made in a bank, and no provision is made to the contrary, the ownership and the title of the money pass to the bank, and the bank becomes the debtor of the depositor.

Officer v. Officer, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Thompson v. Riggs, 5 Wall. 663, 18 L. ed. 704; First Nat. Bank v. Lanier, 11 Wall. 369, 20 L. ed. 172; Phoenix Bank v. Risley, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; Marine Bank v. Rushmore, 28 Ill. 403; Brahm v. Adkins, 77 Ill. 263; Campbell v. Watson, 62 N. J. Eq. 390, 50 Atl. 124; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483; Francois v. Lewis, 68 Minn. 409, 71 N. W. 621;

Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86; Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 706.

When a right of action depends upon a demand, such demand must be made within the period prescribed by the statute of limitations.

Ball v. Keokuk & N. W. R. Co. 62 Iowa, 751, 16 N. W. 592; First Nat. Bank v. Greene, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; Baker v. Johnson County, 33 Iowa, 151; Beecher v. Clay County, 52 Iowa, 140, 2 N. W. 1037; Squier v. Parks, 56 Iowa, 407, 9 N. W. 324; Hintrager v. Hennessy, 46 Iowa, 600; Grand Lodge, A. O. U. W. v. Graham, 96 Iowa, 592, 31 L. R. A. 133, 65 N. W. 837; Codman v. Rogers, 10 Pick. 112; Kraft v. Thomas, 123 Ind. 515, 18 Am. St. Rep. 345, 24 N. E. 346; High v. Shelby County, 92 Ind. 580; Newsom v. Bartholomew County, 103 Ind. 526, 3 N. E. 163; Sheaf v. Dodge, 161 Ind. 270, 68 N. E. 292; Thompson v. Whitaker Iron Co. 41 W. Va. 574, 23 S. W. 795; Landis v. Sexton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912; Atchison, T. & S. F. R. Co. v. Burlingame Twp. 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 Pac. 1074; Morrison v. Mullin, 34 Pa. 12; Jameson v. Jameson, 72 Mo. 640; Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Keithler v. Foster, 22 Ohio St. 27.

Sherwin, Ch. J., delivered the opinion of the court:

The certificate sued on is as follows:

\$1,500.00.

Des Moines, Iowa, March 23, 1885.
Capital City Bank.

Mary J. Penrose has deposited in this bank Fifteen Hundred Dollars, payable to the order of herself on the return of this certificate properly indorsed with 4 per cent interest, per annum.

No. 15108.

A. W. Naylor,
President.

The demurrer was sustained on the ground that the cause of action was barred by the statute of limitations, and the correctness of the ruling is the only question for determination.

The trial court evidently sustained the demurrer on the authority of *Mereness v. First Nat. Bank*, 112 Iowa, 11, 51 L. R. A. 410, 84 Am. St. Rep. 318, 83 N. W. 711, and, under the rule there announced, its decision was right. The decision in the *Mereness Case*, however, was planted on the ground that a general deposit of money in a bank is a loan of the money to the bank, and that an ordinary certificate of deposit is nothing

more nor less than a promissory note, to be governed, with certain exceptions, by the rules governing such notes. If it be true that a deposit in the usual course of business is a loan to the bank of the money deposited, then it may consistently be said that a certificate representing such a loan is a promissory note; but the fundamental error in the *Mereness Case*, and in the cases on which it was based, was the holding that an ordinary deposit of money in a bank is a loan thereof to the bank. See *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; *Long v. Emsley*, 57 Iowa, 11, 10 N. W. 280. In the later cases of *Officer v. Officer*, 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947, and *Hunt v. Hopley*, 120 Iowa, 695, 95 N. W. 205, we distinctly held that an ordinary deposit is not a loan to the bank, and in the latter case we expressly overruled *Lowry v. Polk County*, in so far as it so held. With this conclusion, and the arguments on which it is based in these cases, we are content, believing it to be sound and in accord with the great weight of authority. The conclusion in the *Mereness Case* having been predicated on false premises, it follows that it must fall with its foundation, unless there be some other sufficient reason for holding that a demand certificate of deposit should be treated as a demand promissory note, so far as the statute of limitations is involved. We do not believe that any sound reason for so holding exists. It is undoubtedly true that such certificates have many of the incidents of promissory notes, and that they are often classed as such, but it is equally as true that a certificate of deposit represents a transaction entirely different from that represented by a note. A promissory note ordinarily represents a loan or its equivalent, and it is generally the duty of the debtor to seek the creditor and pay him, and it was for the protection of the debtor that demand notes were originally held to be due at once. Deposits are made in a bank in accordance with the universal commercial usage, which becomes a part of the law of the transaction. They are neither loans, nor bailments in the strict sense of the term. A deposit is a transaction peculiar to the banking business, and one that the courts should recognize and deal with according to commercial usage and understanding. The primary purpose of a general deposit is to protect the fund, and some of the incidental purposes thereof are the conveniences of checking and transacting large business interests without keeping and handling large sums of money. The transaction is in reality for the benefit and convenience of the depositor; and, while the relation of debtor and creditor exists, and the

bank has the use of the money for commercial gain, it assumes no further obligation than to pay the amount received when it shall be demanded at its banking house. *Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507.

A bank may receive or decline deposits, and do business with whom it pleases. It may receive a general deposit to-day, and to-morrow, for reasons of its own, it may return the amount deposited, and refuse absolutely to transact business further with such depositor. See 5 Cyc. and cases cited. But, unless the banker desires to return the deposit, he is under no obligation to seek his creditor for the purpose of making payment. If no actual demand be necessary to mature the debt created by a deposit, then depositors may sue at once upon leaving the bank, and a transaction intended to be for the mutual benefit of both may become one of oppression and wrong to the bank, and this the law should not tolerate. That a certificate of deposit is distinguishable from a demand promissory note, we think clear. *Morse, Banks & Banking*, 3d ed. § 298; *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186; *Re Hunt*, 141 Mass. 515, 6 N. E. 554; *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Officer v. Officer*, and *Hunt v. Hopley*, *supra*. And that it is not due and payable until actual demand is made, we think is held by the overwhelming weight of authority. *Morse, Banks & Banking*, 3d ed. § 301; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008, followed by the same court in later cases; *Cottle v. Marine Bank*, 166 N. Y. 53, 59 N. E. 736, and New York cases therein cited; *Dickinson v. Leominster Sav. Bank*, 152 Mass. 49, 25 N. E. 12; *Miller v. Western Nat. Bank*, 172 Pa. 197, 33 Atl. 684; *McGough v. Jamison*, 107 Pa. 336; *Girard Bank v. Bank of Penn Twp.* *supra*; *Brahm v. Adkins*, 77 Ill. 263; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123; *Bellows Falls Bank v. Rutland County Bank*, *supra*; *Tobin v. McKinney*, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572; *Citizens' Bank v. Fromholz*, 64 Neb. 284, 89 N. W. 775.

The decisions of many of the other states are to the same effect, but we need cite no further authority on the proposition. Furthermore, the certificate in issue provides that it is payable on presentation properly indorsed, and its express language repels the thought that it is payable otherwise than on actual demand. *Morse, Banks & Banking*, § 302; *McGough v. Jamison*, *Cottle v. Marine Bank*, and *Girard Bank v. Bank of Penn Twp.* *supra*. And the principle is also analogous to that of a bill 1 L.R.A. (N.S.)

payable on or after sight, which is not due until it is presented and payment demanded. 3 Randolph, Com. Paper, 1608.

We think there is no merit in the appellee's contention that, if an actual demand is necessary to mature the certificate, such demand must be made within the period of the statute of limitations. The parties may contract as they will. The depositor having the right to demand the amount due him at any time, and the bank having the right to pay at any time, there can be no extension of the statute of limitations by either party, nor any laches on the part of either.

The demurrer should be overruled, and the case is reversed.

Petition for rehearing overruled.

SOUTH DAKOTA SUPREME COURT.

ELI P. FARNHAM et al., Appts.,

v.

NATHAN COLMAN, Justice of the Peace for Lawrence County.

(... S. D. ...)

I. Mandamus—from circuit court to magistrate.

Mandamus does not lie from a circuit court to compel a magistrate over whom it has no supervisory jurisdiction to compel, by contempt proceedings, a witness to produce

Subject Note.—Power of magistrate to punish witness for contempt.

I. In general.

- a. Source of the power, 1135.
- b. Power inferred from other legislation, 1137.
- c. Specific statutory authority.
 1. In general, 1138.
 2. Miscellaneous instances not within scope of statutes, 1138.
 3. Defective proceedings, 1139.
 4. Necessity of pendency of action, 1140.
- d. Contempt of witness in justice's court punishable by higher court, 1141.

II. Want of jurisdiction, 1142.

III. Depositions to be used in another state, 1142.

IV. Review of commitment by habeas corpus, 1142.

V. Collateral attack of commitment proceedings, 1143.

I. In general.

a. Source of the power.

The power of a justice of the peace to punish a witness for contempt on account of failure to respond to a summons, or to be

papers which he has been directed to produce by a *subpoena duces tecum*.

2. Right to face witness—evidence before magistrate.

The constitutional rights of one accused of crime to meet the witnesses face to face is not infringed by refusal to compel the production of evidence before a committing magistrate.

3. Magistrate—power to punish for contempt.

A committing magistrate has no jurisdiction to punish for contempt a witness who refused to obey a *subpoena duces tecum*.

4. Same—statutory authority.

A statute permitting a magistrate to punish a witness for refusal to testify does not authorize him to punish for failure to obey a *subpoena duces tecum*.

(April 25, 1905.)

sworn and to testify, has its source in 1 & 2 Philip & Mary, chap. 13. That statute, in terms, gave justices of the peace the power to bind material witnesses by recognizance to appear at the next general gaol delivery. This express authority was regarded by the early English law writers as necessarily including power to commit as for a contempt upon a failure or refusal of a witness to enter into a recognizance as required by the statute. Thus, in Hawkins' and Hale's works, the power of justices of the peace to commit witnesses for contempt is first advocated, founded, so far as appears, upon their construction of the statute above referred to; but possibly an earlier practice of this nature had been creeping in, which does not appear in the early English reports.

Thus, Lord Hale says: "If A brings B before a justice of the peace for suspicion of felony, if he can testify materially against him, he may bind him over to prosecute; and, if he refuses, the justice may commit him." 2 Hale, P. C. 52.

He again says expressly in regard to the statute under discussion: "The justices or coroner that take the examination of the person accused, and the information of the witnesses, may at that time, or at any time after, and before the trial, bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt in such refusal, and this is virtually included within their commission and by necessary consequences upon the statute of 1 & 2 Philip & Mary, chap. 13." Id. 282.

And in 2 Hawk. P. C. chap. 16, § 2, is the following: "And it is said, that whosoever a justice of peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person, being in his presence, shall refuse to be bound, or to do such thing, the justice may commit him to the jail, to remain there till he shall comply."

The foundations of this power under discussion, as above outlined, are very clearly 1 L.R.A. (N.S.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Lawrence County quashing an alternative writ of mandamus to compel defendant to enforce an order requiring a witness to produce certain papers. Affirmed.

The facts are stated in the opinion.

Messrs. Chambers Kellar, James G. Stanley, Polley & Stewart, and Ivan W. Goodner, for appellants:

The writ lies to compel the performance of any act of the lower tribunal to which, by the Constitution of the state or the laws thereof, a party is absolutely entitled.

Defendants' right to the compulsory production of evidence in their behalf is one which cannot be invaded or denied by the mere declaration on the part of the justice of the peace that he has no jurisdiction or

recapitulated in the early case of Bennet v. Watson, 3 Maule & S. 1, where a wife refused to obtain her husband's recognizance for her appearance as witness at a trial, and afterwards, upon being sent for, refused to attend. A warrant was then issued by the justice of the peace before whom the trial was, against her, she being a material witness necessary to the prisoner's conviction. The decision of the court, upholding the commitment, was based largely upon the ground that such was the prior practice, as shown by 2 Hawk. P. C. chap. 16, § 2, which practice was implied from the early statute of 1 & 2 Philip & Mary, chap. 13, allowing justices of the peace to bind witnesses by recognizance to appear at the next general gaol delivery. One judge says: "The power of commitment is absolutely necessary to the existence of the statute of Philip & Mary; for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then if he could further avoid being served with a *subpoena*, the party delinquent might escape unpunished. This consideration, coupled with Lord Hale's judgment founded on the practice, seems to me sufficient to establish the power. The question here is respecting a person who is under a legal disability; but she not only refuses to give recognizance, but she refuses to go, doing as much as in her lay to elude the justice of the case. The magistrate, therefore, has done nothing more than was proper to secure her appearance at the sessions; upon her refusing to go, or to find any recognizance, he commits. It seems to me he was right in so doing; the practice has been so, and it follows both from the practice and the opinion of Lord Hale that the law is so."

This, then, is the nature of the power,—it is not an inherent authority, but one expressly given by statute, or deemed so bestowed by necessary implication from some existent legislation.

power to compel the enforcement of his writ.

S. D. Const. Bill of Rights, art. 6, §§ 7, 8, and 23; State v. Henning, 3 S. D. 492, 54 N. W. 536; Swenehart v. Strathman, 12 S. D. 313, 81 N. W. 505; 20 Am. & Eng. Enc. Law, p. 242; Ex parte Simonton, 9 Port. (Ala.) 390, 33 Am. Dec. 320.

The accused in the preliminary hearing were entitled to the writ of *subpœna duces tecum* to compel the production of a paper.

United States v. Burr, Fed. Cas. No. 14,692d.

The dying declaration is admissible in behalf of the defendants as well as in behalf of the state.

Wharton, Crim. Ev. 9th ed. § 304, p. 226; 10 Am. & Eng. Enc. Law, 2d ed. p. 374; Moore v. State, 12 Ala. 764, 46 Am. Dec.

276; Mattox v. United States, 146 U. S. 151, 38 L. ed. 921, 13 Sup. Ct. Rep. 50; People v. Southern, 120 Cal. 645, 53 Pac. 214; People v. Knapp, 26 Mich. 112; Brock v. Com. 92 Ky. 183, 17 S. W. 337; Chittenden v. Com. 10 Ky. L. Rep. 330, 9 S. W. 386; State v. Ashworth, 50 La. Ann. 94, 23 So. 270; Com. v. Matthews, 89 Ky. 287, 12 S. W. 333; Jones v. State, 52 Ark. 345, 12 S. W. 704.

Defendants have a remedy by mandamus.

They are entitled to the writ to compel the performance by the justice of an act which the law specially enjoins as a duty resulting from his office.

Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; State ex rel. Mathews v. Eddy, 10 Mont. 311, 25 Pac. 1032; State ex rel. Northern P. R. Co. v. Loud, 24 Mont. 428, 62

b. Power inferred from other legislation.

A few decisions in the United States have implied the right from other legislation, similarly as was done in England (*supra*, I. a).

Thus, the power given by statute to a magistrate to issue a subpoena means the legal, and not the mere physical, power. It means the power to issue a subpoena which the party is bound to obey, and therefore includes the right to enforce his attendance in case of disobedience. People v. Hicks, 15 Barb. 153.

And a justice of the peace having power to issue a subpoena requiring a person to come before him and make an affidavit has the power, when the witness disregards the subpoena, to punish him for contempt. Robb v. McDonald, 29 Iowa, 330, 4 Am. Rep. 211.

In the absence of any statute specifically applicable, a justice of the peace holding special sessions has jurisdiction to fine, as for a criminal contempt, one who, after being duly subpoenaed as a witness, wilfully and contemptuously refused to be sworn. Bowen v. Hunter, 45 How. Pr. 193.

And, the statute giving a justice of the peace power to summon witnesses in the examination of any matter or pending proceeding to be inquired into by the court, also gives the justice power to fine as for contempt in case of their failure to appear or refusal to be sworn or testify, the same as in civil proceedings in justice's court. State ex rel. Long v. Keyes, 75 Wis. 288, 44 N. W. 13.

The power will not, however, be allowed under a statute unless it is very clearly inferable therefrom. Thus, under a city ordinance providing that, upon application and in the absence of any person who would make a complaint of the violation of an ordinance prohibiting the sale of liquor, the police justice might issue a subpoena to any person to appear before him and answer such questions as might be asked by the city attorney considering the violation of such ordinance, 1 L.R.A. (N.S.)

the police justice issued such a subpoena to an individual, who failed to appear in response to it, whereupon, under another provision of the city ordinance making the disobedience of such subpoena a contempt, and authorizing the police justice to impose a fine or imprisonment as a punishment therefor, the police justice adjudged the individual guilty of contempt, and committed him to the city prison. The case turned on the validity of the city ordinance. The statute conferred power on the police justice to punish for contempt offered to him while holding court or to process issued by him; but in this instance it was pointed out that the police justice was not acting in the capacity of a court, nor was the subpoena issued in a pending prosecution. The authority for the inquiry undertaken in the present instance was not otherwise expressly conferred by the statute, the only authority being the city ordinance, which it was contended was properly passed under the general-welfare clause of the statute, providing for the passage of such ordinance as might be deemed expedient for maintaining the peace, good government, and the welfare of the city. But this contention was not upheld by the courts, on the ground that when the power to imprison for contempt rests upon statute, it must be clearly expressed; and the general-welfare clause, above referred to, could not be extended to cover what is generally held to be the highest exercise of judicial power. Re Palmeter, 58 Kan. 809, 51 Pac. 288.

FARNHAM v. COLMAN, is also a strong illustration of this point. This decision seems almost out of harmony with some of those previously noted, unless it can be distinguished by the fact that herein there was some legislation upon the power of justices to punish a witness for contempt, and therefore, that in the presence of some pertinent legislation upon the subject, the legislature must not be presumed to have intended to bestow greater authority than that specifically granted.

Pac. 497; State ex rel. Davis v. Second Judicial Dist. Court, 30 Mont. 8, 75 Pac. 516; Willard v. Superior Court, 82 Cal. 456, 22 Pac. 1120; Boom v. De Haven, 72 Cal. 280, 13 Pac. 694; Raleigh v. First Judicial Dist. Court, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; Ex parte Parker, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; Ex parte Mahone, 30 Ala. 49, 68 Am. Dec. 111; State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Pac. 1076; Merced Min. Co. v. Fremont, 7 Cal. 130.

Messrs. William H. Parker and Robert C. Hayes, for respondent:

Respondent, in refusing to compel the witness Parker to produce the papers and documents called for by the *subpoena duces tecum*, or punish said Parker for contempt,

acted judicially and within the scope of his discretionary powers, and his conduct or action cannot be reviewed by mandamus.

High, Extr. Legal Rem. 2d ed. § 24; People ex rel. Meminger v. Sexton, 24 Cal. 79; People ex rel. Doughty v. Duchess C. P. Judges, 20 Wend. 658; Chase v. Blackstone Canal Co. 10 Pick. 244; People ex rel. Wheaton v. Weston, 28 Cal. 641; Lewis v. Barclay, 35 Cal. 213; People ex rel. Flagley v. Hubbard, 22 Cal. 35; Com. v. Common Pleas Judges, 3 Binn. 275; Ex parte Ostrander, 1 Denio, 681; Oneida C. P. Judges v. People, 18 Wend. 92; People ex rel. Brower v. Wayne County Judge, 1 Mich. 360; United States v. Lawrence, 3 Dall. 42, 1 L. ed. 502; Life & F. Ins. Co. v. Adams, 9 Pet. 602, 9 L. ed. 244; Com. ex rel. Brack-

c. Specific statutory authority.

1. In general.

In many of the states specific legislation regulating a justice's power to commit for contempt has been enacted. These statutes will not be herein set out except when necessary on account of decisions rendered under them.

The authority of justices of the peace to punish for contempts, especially commitments for refusal of witnesses, after due summons and payment of their fees, to appear and testify before them, has been generally admitted in Massachusetts, and has been regulated by statute from the earliest time of the commonwealth. Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502.

By statute, in the District of Columbia a justice of the peace has power to compel the attendance of witnesses by attachment, and to punish them for contempt by a fine not exceeding \$10, or imprisonment not exceeding ten days, in refusing to obey a summons to appear as a witness. Re Carson, 26 Wash. L. Rep. 152.

The right of an examining magistrate to compel a complaining witness to enter into a recognizance for his appearance at the next term of the court, and, in the event of his refusal so to do, to commit him to jail until he should comply with such order, was upheld in Re Petrie, 1 Kan. App. 184, 40 Pac. 118. An existing statute authorizing the magistrate so to do was held constitutional.

A witness who had been duly summoned by subpoena, failing to appear upon the day fixed for the trial, the justice of the peace before whom the cause was pending issued a writ of attachment against the witness for contempt in refusing to obey the subpoena, and the witness filing no answer, the justice of the peace fined him \$3 for his contempt. His power to do so was upheld by the court in view of a statute providing that justices shall have power to subpoena witnesses and enforce their attendance by attachment and fine. State v. Newton, 62 Ind. 517.

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A statute providing that on the trial of any person prosecuted for intoxication, if he be found guilty, he shall, under oath, disclose when, where, how, and from whom he procured the liquor by which his intoxication was produced; and that if he refuse to make such disclosure, it shall be the duty of the magistrate before whom he is tried to commit him for contempt of court, for not less than ten days or more than thirty, was held constitutional, and a commitment made by a justice of a city police court, in conformity therewith, was upheld in Re Clayton, 59 Conn. 510, 13 L. R. A. 66, 21 Am. St. Rep. 128, 21 Atl. 1005.

The statutory power given justices of the peace to punish a defaulting witness for contempt is also given to mayors in criminal proceedings before them in city courts. State v. Aiken, 113 N. C. 651, 18 S. E. 690.

2. Miscellaneous instances not within scope of statutes.

In one instance, after a complainant had made a charge before a magistrate, she changed her mind as to its prosecution, whereupon the magistrate summoned her to appear and proceed with the prosecution, and upon her failure so to do, he issued a warrant for her arrest, and detained her before him until a bystander paid the amount specified as costs by the justice, whereupon she was discharged. These acts on the part of the justice were held entirely unjustified and outside of his jurisdiction, and rendered him liable in trespass. The statute 32 & 33 Vict. chap. 31, D. §§ 16, 17, providing for the issuance of a warrant by a justice against a material witness refusing to respond to a summons, was held no justification, since it does not apply to a prosecutor unwilling to proceed with a charge. Cross v. Wilcox, 39 U. C. Q. B. 187.

A commitment of a witness for contempt by a justice of the peace is unauthorized and void where it appears that the witness was the attorney for the defendant in the pending cause, and that the alleged contempt was his refusal to produce a bill of sale which had been intrusted to him by his

enridge v. Common Pleas Judges, 1 Serg. & R. 187; Com. v. Hultz, 6 Pa. 470; Fish v. Weatherwax, 2 Johns. Cas. 217; People ex rel. Smith v. Twelfth Dist. Judge, 17 Cal. 547; People ex rel. Polhemus v. Pratt, 28 Cal. 168, 87 Am. Dec. 110; Cariaga v. Dryden, 29 Cal. 307; Beguhl v. Swan, 39 Cal. 411; Heilbron v. Superior Court, 72 Cal. 96, 13 Pac. 160; 19 Am. & Eng. Enc. Law, p. 854; 13 Enc. Pl. & Pr. p. 607; Ex parte Morgan, 114 U. S. 174, 29 L. ed. 135, 5 Sup. Ct. Rep. 825; Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; Ex parte Secombe, 19 How. 9, 15 L. ed. 565; Ex parte Burtis, 103 U. S. 238, 26 L. ed. 392; Territory ex rel. Gramburg v. Nowlin, 3 Dak. 349, 20 N. W. 430; People ex rel. Francis v. Troy, 78 N. Y. 33, 34 Am. Rep. 500; Sawyer v.

Mayhew, 10 S. D. 23, 71 N. W. 141; Re McCain, 9 S. D. 57, 68 N. W. 163; Heintz v. Moulton, 7 S. D. 272, 64 N. W. 135.

Mr. Aubrey Lawrence also for respondent.

Fuller, J., delivered the opinion of the court:

This appeal is from an order of the circuit court quashing an alternative writ of mandamus issued therefrom against a justice of the peace engaged in conducting a preliminary examination under an information charging appellants with the crime of murder. In the alternative form the writ commanded the respondent magistrate to compel the state's attorney, William H. Parker by punishment for contempt, to produce at the hearing certain statements or

client by reason of the confidence reposed in him as attorney. People ex rel. Mallory v. Benjamin, 9 How. Pr. 419. This was a decision under § 279 of the Revised Statutes, providing that a justice of the peace may commit a witness for contempt for a refusal to answer any pertinent and proper questions, when the party desiring his testimony shall make oath that it is so far material that without it he cannot safely proceed in the trial of the cause.

2. Defective proceedings.

In a number of instances the right of a justice to punish a witness for contempt has not been questioned, but the proceedings have been held defective on account of the omission of some act or allegation deemed requisite.

Thus, under a section of the prohibitory liquor law providing that whenever a complainant is required to state facts and circumstances for the information of the court to whom the complaint is made, and the complainant is unable, of his own knowledge, to state sufficient facts and circumstances to authorize the issuing of a warrant, the court may issue subpoenas for the attendance of witnesses to testify concerning such facts and circumstances,—a justice of the peace may not commit a witness for contempt for a refusal to testify upon being subpoenaed in conformity with the above statute, when the complaint does not set forth any specific facts or circumstances, but merely states a belief in facts which are suspected to be within the knowledge of the witness. Re Morton, 10 Mich. 208; Re Hall, 10 Mich. 210.

A warrant of commitment by a justice of the peace was held no justification to him in an action of trespass brought against him by the person committed, when the commitment was simply for refusing to give evidence touching a certain riot and disturbance, without its appearing that the person was apprised of the specific charge upon which he was desired as a witness. The judges distinguished this case from Bennet 1 L.R.A. (N.S.)

v. Watson, 3 Maule & S. 1 (*supra*, I. a); Cropper v. Horton, 8 Dowl. & R. 166.

In Evans v. Rees, 4 Perry & D. 32, 12 Ad. & El. 55, 4 Jur. 1032, the judges expressly stated that they wished to give no opinion upon the general power of justices to compel the attendance of witnesses, but they merely decided that a warrant issued by a justice of the peace upon the refusal of a witness to appear, to bring that witness before him "to find sufficient bail" to appear and give his evidence at the next assizes, was illegal on the ground that the justice took too much for granted, he having assumed that the witness was a material one and would refuse to enter into the usual recognition.

Section 279 of N. Y. Stat. at L. (1867) vol. 2 (Rev. Stat.), *274, now amended by § 3001, Code Civ. Proc., provided that a justice of the peace might commit a witness for contempt for a refusal to answer any pertinent and proper questions, when the party desiring his testimony should make oath that it was so far material that without it he could not safely proceed with the trial of the cause.

In an early case (1853) it was held that the statute which made provision respecting criminal proceedings gave express power to any magistrate to punish for contempt in like manner as might justices of the peace in civil actions. Therefore, there being in criminal proceedings no cause pending and no party to the cause to make an affidavit of the materiality of the witness, as is required in civil actions, the certification of the magistrate to that effect was sufficient, since that was a compliance with the spirit and object of the provision, which was that the magistrate must be convinced of the materiality of the testimony, and that the judgment of a magistrate was certainly of as much weight as the opinion of a party, although given upon oath. People v. Hicks, 15 Barb. 153.

But, a few years later (1857) it was held that the above section did not authorize a justice of the peace to commit for contempt for a refusal to be sworn as to the cause of

dying declarations pursuant to a previously served *subpœna duces tecum* which the witness, though called, sworn, and examined, had refused to obey. It appears from the petition that the cross-examination of one of the witnesses for the state disclosed that Richard Galvin, the victim of the homicide, after all hope of life was abandoned, and with the realization of immediately impending death, had made a dying declaration which was taken in shorthand by two competent persons, one of whom was the state's attorney's stenographer, and the same, after being typewritten, was signed by such declarant, whose death occurred soon afterward. It is conceded that the state's attorney, when called as a witness, was, and now is, in actual possession of, and wholly able

to produce, both the signed statement of Richard Galvin, since deceased, and the shorthand notes taken by the stenographers; that counsel for appellants urgently requested respondent to compel their production by punishing the witness for contempt, and that such magistrate refused to resort to such procedure. If there are any other essential facts, they may be stated as well in connection with the principles and usages of law applicable to a case of this character. Nor need anything be said concerning the propriety of resorting to the extraordinary remedy of mandamus to require a public prosecutor to produce before a committing magistrate evidence on behalf of the accused after all the witnesses for the state have been sworn and examined. Were

his intoxication, when found intoxicated on the street, on the ground that the power of the justice to commit under the above statute did not vest until the party at whose instance the witness was subpoenaed made an oath that the testimony desired was so far material that he could not safely proceed without it in the trial of the cause, and that under facts shown by the case at bar there was no one to make the oath required by the statute, neither was there any trial of a cause, and that it was a case in every respect dissimilar to the one contemplated by the statute referred to. *People v. Webster*, 14 How. Pr. 242.

Still later (1873) it was declared in *Bowen v. Hunter*, 45 How. Pr. 193, that the section above set out applied only to civil suits by a justice of the peace, and not to a criminal case before such a justice holding a court of special sessions.

And in 1876 a still narrower view was taken, the court holding that, in the absence of such an oath as is required by the section under consideration, a justice of the peace has no judicial authority to adjudge a witness refusing to testify guilty of a contempt, and that this is true notwithstanding that the making of the oath was impossible by reason of the fact that the witness was the defendant in the pending action, and was put upon the stand in her own behalf, and her refusal to testify occurred while she was under cross-examination by her opponent. The court stated that the right of a party to be a witness in his own behalf has been given by statute since the enactment of the statute in regard to the punishment of contempts, which therefore did not cover the situation in the case at bar, but that its provisions nevertheless could not, on that account, be disregarded; that a remedy probably existed for the protection of the plaintiff's rights in the pending cause by striking out the direct examination upon the refusal of the witness to testify upon cross-examination. *Rutherford v. Holmes*, 66 N. Y. 368. Affirming 5 Hun, 317. Two judges dissented.

The oath required by statute to be made regarding the nonattendance of a witness in 1 L.R.A. (N.S.)

response to a subpoena, of the materiality of his testimony and his refusal to be sworn, in order to obtain his commitment for contempt, may be merely oral, and not in writing. *Baker v. Williams*, 12 Barb. 527.

In one instance, it was urged that the absence of a statement to the effect that the justice was not in any way interested in the pending cause rendered a commitment defective; but the court held that, without such a statement, it was a complete justification to the justice issuing it when it recited all the facts necessary to show that the witness was guilty of a contempt in refusing to make a deposition before the justice. *Call v. Pike*, 68 Me. 217.

A justice of the peace has no power to commit a witness for contempt for a refusal to obey a subpoena when the attachment was served by the marshal of a village, since process from a justice of the peace to a marshal of a village is without warrant of law,—a constable is the ministerial officer of a justice's court. *Re Heister*, 5 Ohio L. J. 286.

4. Necessity of pendency of action.

The right of a justice to punish a witness for contempt has turned, in a few cases, on whether there was an action pending in which the testimony was desired, at the time it was refused.

Thus, an individual committed for refusing to make a deposition in *perpetuam* before two justices of the peace was released upon habeas corpus, it appearing that there was at the time no action pending in which the deposition desired was to be used. *Pierce's Case*, 16 Me. 255.

And so, habeas corpus will lie to review a commitment for contempt by a justice of the peace on account of the persons committed having refused to appear and make an affidavit in response to a subpoena issued by the justice, as allowed by statute, when the affidavits were not sought for use in any pending action, but were desired merely for the purposes of information. *Robb v. McDonald*, 29 Iowa, 330, 4 Am. Rep. 211, and *State ex rel. Whitcomb v. Seaton*, 61 Iowa,

it to be assumed that the respondent had the same authority to fine or imprison the state's attorney for contempt that is given him to discharge from custody or hold appellants to answer for the crime of murder, it would, of necessity, follow that his power to refuse to impose the penalty for contempt is equally ample, and, having thus decided in this instance, there could be no interference on the part of the circuit court by means of mandamus. In other words, had the magistrate power to punish the witness, he had power to refuse to do so, and mandamus from a court having no supervisory jurisdiction does not lie to review the action of such inferior tribunal. Territory ex rel. Gramburg v. Nowlin, 3 Dak. 349, 20 N. W. 430; Ex parte Burtis, 103 U. S. 238,

563, 16 N. W. 736, were distinguished on the ground that in these cases actions were pending in which the affidavits were desired. Dudley v. McCord, 65 Iowa, 671, 22 N. W. 920. To the same effect is Chambers v. Oehler, 107 Iowa, 155, 77 N. W. 853.

According to one case, it seems that the action must be pending at the time of the commitment in order to render it valid. Thus, power was given to justices of the peace in Massachusetts by the statute of 1838 to compel witnesses to attend and testify, and to punish them as for a contempt of court by fine upon their failure to so appear and testify when duly summoned. But this power was held to be merely incidental and dependent upon the pending of a cause; so that, it appearing that the cause had been finally determined before the proceeding for contempt was commenced by the justice, the witness would be discharged from imprisonment upon habeas corpus. Clarke's Case, 12 Cush. 320.

The witness in the above case was allowed to recover in an action of tort for false imprisonment, afterwards brought by him against the justice of the peace. Clarke v. May, 2 Gray, 410, 61 Am. Dec. 470.

And it appearing that the action before the justice in which the testimony refused was desired had been discontinued, one of the judges in Re Hall, 10 Mich. 210, was of the opinion that a witness committed should be discharged, on the ground that he should not have been committed when he could not have an opportunity to purge his contempt.

But, according to another decision, summary proceedings for the punishment of a defaulting witness in justice court may as well be had after the close of the suit in which the contempt of the witness occurred as before, and at any time before the penalty is barred by the statute of limitations. Robbins v. Gorham, 25 N. Y. 588, Affirming 26 Barb. 586. This decision was made under an existing statute giving justices of the peace the authority to fine recalcitrant witnesses.

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26 L. ed. 392; Matlock v. Smith, 96 Tex. 211, 71 S. W. 956; Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148; High, Extra. Legal Rem. §§ 153-158, inclusive. In derogation of the common law, § 141 of the Revised Code of Criminal Procedure provides that "when the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce must be sworn and examined," and counsel for appellants contend that under the statute and the Constitution their clients were deprived of an absolute and unqualified right to the production of the evidence demanded. Formerly all inquiry at preliminary examinations might be confined to the prosecution, and, as a matter of strict legal right, the accused was not entitled to offer evidence in his own

d. Contempt of witness in justice's court punishable by higher court.

The early practice in some jurisdictions, in accordance with statutory provisions, seems to have been to refer the punishment of the recalcitrant witness to a higher court.

The legislature of South Carolina by the act of 1794 enacted that witnesses who refuse to attend a justice's court, or who, when attending, refuse to testify, may be attached, not by the justice, but by a superior court, upon proper application. State v. Applegate, 2 M'Cord, L. 110.

A witness summoned in a suit for a small debt before a justice of the peace, failing to respond, an attachment for contempt was issued by the justice, returnable to the circuit court, which imposed a fine of 20s., that being the maximum limit of the punishment allowed by statute. Ex parte Gorman, 4 Cranch, C. C. 572. The statute referred to provided as follows: "Where witnesses do not attend according to summons, the justice before whom such witness ought to have attended shall enforce obedience to his process by attachment of contempt, to be returnable before the justices of the next county court, who shall take cognizance thereof, and shall, at their discretion, fine the offender any sum not exceeding 20s. current money for every such offense, to be applied towards the county charge." Act 1791, chap. 68, § 8.

An attachment for contempt was issued by a justice of the peace, returnable before the circuit court, against a witness who failed to appear before him in response to a summons, in Washington v. Dawson, 1 Hayw. & H. 236, Fed. Cas. No. 17,227. Counsel said that it was exceedingly desirable that the court should make a decision with reference to the case at bar that would settle the question as to the right of a justice of the peace to punish a witness for contempt, as many witnesses summoned to give testimony before the justices had refused to attend, under the idea that they were not legally bound to obey the summons. The court fined the witness one dollar, and concurred in the opinion that the practice should be established, and that witnesses

behalf; but, in some jurisdictions, it seems to have been considered entirely proper to permit him to make an unsworn statement and have his witnesses examined under oath. Consistent with the theory that the constitutional right of the accused "to meet the witnesses against him face to face, and to have compulsory process served for obtaining witnesses in his behalf" does not apply to a preliminary examination, Mr. Justice White makes the following observation: "The contention at bar that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement, demonstrates its error." *Goldsbey v. United States*, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216. In the recent case of *State v. Belding*, 43 Or. 95, 71 Pac. 330, Chief Justice Moore, in delivering the opinion of that court, by which a judgment inflicting the death penalty is affirmed, employs the following language: "When a defendant in a criminal action is examined before a magistrate, the state is expected to produce sufficient testimony to prove that a crime has been com-

mitted, and also to make a *prima facie* showing that the person accused thereof is apparently guilty. . . . By this means the defendant, without offering any testimony in exculpation is generally enabled to ascertain the nature of the indictment likely to be returned against him, and also to anticipate the extent and character of the testimony that will probably be produced in support of the charge; thus enabling him intelligently to prepare for his defense. . . . The guaranty of the organic law of the state that the accused in a criminal prosecution shall have the right to meet the witnesses face to face . . . is satisfied when, at some stage of the trial, the defendant is confronted with the witnesses, and given an opportunity to cross-examine them."

While it is clear that the refusal of the magistrate to compel obedience to the *subpoena duces tecum* did violence to no constitutional guaranty, and that mandamus from the circuit court will never lie to reverse the judicial action of such officers, we prefer to rest this decision upon the well-grounded principle that inferior tribunals

should know that it was their duty to yield obedience to the summons of the constituted authorities.

II. Want of jurisdiction.

Of course, a justice acting outside the limits of his jurisdiction cannot make a valid commitment.

A justice of the peace for a certain county, who commits a witness to prison for contempt when the offense to be tried was committed in a city wherein a police court had exclusive jurisdiction, acts without authority, and the commitment is unauthorized and void. *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

And a justice of the peace, holding a preliminary examination for an offense which he has no jurisdiction to try, has no power to commit a witness for refusing to testify, in the absence of an express statutory authority. *Re Farnham*, 8 Mich. 89.

After a review of the relevant statutes it was held in *Re Rich*, 10 Kan. App. 280, 62 Pac. 715, that a police judge having no authority to impanel a jury to try cases pending before him, and there being no appeal from his decision to the district court in a proceeding against the witness for an indirect contempt in refusing to obey a subpoena to appear and testify, he has no jurisdiction to punish therefor.

The right of a justice of the peace to arrest recalcitrant witnesses was not attacked in *Humphrey v. Knapp*, 41 Conn. 313, but upon the witnesses appearing before the justice in response to the *capias* one of them, who was a man, the other two being women was told that he should be held a

prisoner until a certain sum was paid, that sum being made part of the taxable costs attending the arrest of the three delinquent witnesses upon the *capias*. This was held error, on the ground that the witnesses had committed no joint offense, and that the justice should therefore have held each for his own share of the costs only.

III. Depositions to be used in another state.

The right of a justice of the peace to commit a witness for a refusal to give testimony under a commission to take his deposition, in pursuance of an order made by a court of another state, is recognized in *State v. Ingersoll*, 62 N. H. 437.

Under an existing statute it was held that justices of the peace might fine any person who, upon being duly summoned to appear before them and make a deposition to be used in another state, did, without reasonable excuse, neglect or refuse to appear and give the deposition required. *Burnham v. Stevens*, 33 N. H. 247.

IV. Review of commitment by habeas corpus.

A writ of habeas corpus will not lie in another court to review a commitment for contempt, made by a justice of the peace against a recalcitrant witness, unless the proceedings leading thereto were so grossly defective as to render them void. *Robb v. McDonald*, 29 Iowa, 330, 4 Am. Rep. 211. One judge dissents, on the ground that the justice of the peace was without jurisdiction to take the affidavits in question.

are without inherent power to punish for contempt, and that the extraordinary jurisdiction which the writ of mandamus commanded respondent to exercise is not given by statute. In holding that a United States court commissioner, sitting as a committing magistrate, has no power, under the laws of Minnesota, to punish a witness for contempt, Judge Nelson says: "It is then claimed by counsel that the power to examine gives the right to subpoena witnesses, and, as an incident to it, the power to enforce obedience to the subpoena by arrest and punishment for contempt. To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is, in most cases, the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications; but must be expressly conferred by law. . . . But there is authority of the courts of the United States directly upon this question. In *Ex parte*

Perkins, 29 Fed. 900, on habeas corpus before Circuit Court Judge Gresham, the particular question raised here was decided. Judge Gresham said: 'It is a stretch of language to say that the punishment of a witness for contempt, and by a commissioner, is a necessary part of the usual mode of process against offenders or essential to the exercise of any power expressly conferred on him by the Federal law.' So, in *Ex parte Doll* (1869) 7 Phila. 595, Fed. Cas. No. 3,968, before the late United States Judge Cadwalader,—Doll had been arrested on a complaint made by an officer of the internal revenue for failing to appear and testify in relation to his income. At the examination before the commissioner, an order was made that 'Doll produce his books before the commissioner, or be committed for contempt.' On refusal to comply, he was committed. Upon the hearing the power of the commissioner to arrest and punish for contempt was raised. The judge, in discharging the prisoner for the irregular proceeding of the commissioner, *inter alia*, said that 'he very much doubted even the power of Congress to invest a commissioner with

Robb v. McDonald, *supra*, was followed in *State ex rel. Whitcomb v. Seaton*, 61 Iowa, 563, 16 N. W. 736,—a decision in which the facts were somewhat similar. It was held that habeas corpus would not lie to review a commitment by a justice of the peace for contempt against one subpoenaed to appear before him and make an affidavit, notwithstanding the affidavit was, as a matter of fact, unnecessary.

These two decisions were distinguished in *Dudley v. McCord*, 65 Iowa, 671, 22 N. W. 920, where it was held that habeas corpus would lie to review a commitment when it appeared that the affidavits sought were not for use in any pending action, but were desired merely for purposes of information.

If the justice acted outside the scope of his jurisdiction, the proceedings are, of course, void, and the prisoner is entitled to be discharged upon habeas corpus.

A justice of the peace who commits a witness for contempt for a refusal to answer questions in regard to a crime which was committed outside of the county, and when the offender does not reside therein, does so without jurisdiction, and the witness is entitled to be discharged upon habeas corpus. *People v. Cassels*, 5 Hill, 164.

Therefore, it is proper, upon habeas corpus proceedings, to inquire into the commitment proceedings sufficiently to determine whether or not the justice acted within his jurisdiction.

If a justice of the peace had jurisdiction to punish a witness for contempt, the commitment will not be reviewed on habeas corpus; and therefore the proceedings will be inquired into only so far as it is necessary to determine whether the justice had

jurisdiction or not. *State ex rel. Welsh v. Towle*, 42 N. H. 540. Neither is there any right of appeal under such circumstances.

Upon the return to a writ of habeas corpus to inquire into the validity of a commitment for contempt by a justice of the peace for a refusal to answer a question asked by him in an action instituted in justice court, the court may inquire into the proceedings sufficiently to determine whether the justice had jurisdiction in the premises, and if the record shows a state of facts insufficient to confer jurisdiction, the witness is immediately entitled to his discharge. *People ex rel. Laird v. Hannah*, 92 Hun, 476, 37 N. Y. Supp. 702.

V. Collateral attack of commitment proceedings.

An action for false imprisonment will not lie against a justice of the peace for the arrest of a witness who neglected to appear before him at the time to which an adjournment was had, since the arrest complained of was a judicial act within his jurisdiction, in view of the statute which gives a justice of the peace power to issue writs of summons to witnesses to appear before him to give their depositions, and, upon their neglect or refusal to answer such summons, to bring them before him for punishment. Whether the witness was properly summoned, and whether the adjournment was properly made, are mere irregularities, which cannot be inquired into collaterally when it appears that the justice was acting within the limit of his jurisdiction. *Robertson v. Hale*, 68 N. H. 538, 44 Atl. 695.

M. M. M.

the authority in a proceeding originally instituted before him to summarily commit a citizen for an alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which these commissioners were appointed, and held their offices.' In the celebrated case of *Kilbourn v. Thompson* involving the question of the power of the Congress to arrest and punish a witness for contempt (103 U. S. 182, 26 L. ed. 384) in refusing to answer questions before a committee of the House, Justice Miller, speaking for the court, among other things, said: 'The Constitution declares that no person shall be deprived of his life, liberty, or property without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law, and governed by the rules of law previously established.' Re *Mason*, 43 Fed. 510. Although the recorder of the city of Hoboken, N. J., had all the powers that justices of the peace throughout the state possessed as committing magistrates, the court, in discharging on habeas corpus a prisoner found guilty of contempt, employs the following language: "To punish by a commitment for contempt is a power belonging only to judges of certain courts, and does not arise from the mere exercise of judicial functions. The power is great, and its exercise without review, where there is jurisdiction, and hence our duty to be careful not to extend it beyond the recognized bounds of the common law. The recorder did not commit in default of sureties to keep the peace, or to answer before the oyer or sessions, but his commitment was in execution by way of punishment. That power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal jurisdiction, but not extending, at the common law, below such as are courts of record recognized in the common law. The general doctrine of the English law is that all courts of record may fine or imprison for contempts in the face of the court. . . . And as early as *Griesley's Case*, 8 Coke, 38, . . . it was resolved, in the common pleas, that courts which are not of record cannot impose a fine or commit any to prison for contempts. A power to fine or imprison in such cases, although necessary for the proper discharge of the duties of a court not of an inferior jurisdiction, and for the maintenance of its independence and dignity, should not belong to all persons, bodies, or tribunals who may have a judicial duty to perform. The com-
1 L.R.A. (N.S.)

mon law wisely did not recognize it in courts below those of record; and we would be doing violence to the liberty of the citizen to encourage its existence in any of our own courts, except those, that, in their very nature, or from analogy to their English models, or in their constitution, are courts of record, with jurisdictions not beneath the character of those so treated in the common law." Re *Kerrigan*, 33 N. J. L. 344. The headnote, fully supported by the opinion, in *Re Farnham*, 8 Mich. 89, is as follows: "A magistrate having jurisdiction, under chapter 194 of the Compiled Laws, to examine and commit for trial, or hold to bail, persons charged with crimes not cognizable before a justice of the peace, has no power to commit a witness for refusing to testify on such examination. He has no powers except such as are expressly conferred by this chapter."

Sections 140 and 512 of the Revised Code of Criminal Procedure make it obligatory on the part of the magistrate to issue a subpoena for any witness required by the defendant, and, if any books, papers, or documents are needed, such subpoena must direct the witness to produce them at the preliminary hearing. Section 518 is as follows: "Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt, in the manner provided in the Code of Civil Procedure." Section 495 of such Code, which provides the means of producing witnesses, is the provision of the Civil Code fixing the penalty for contempt, and reads as follows: "The punishment for the said contempt shall be as follows: When the witness fails to attend, in obedience to the subpoena, except in case of a demand and failure to pay his fees, the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases the court or officer may fine a witness in a sum not exceeding fifty nor less than five dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify, or give his deposition." Now, the writ granted, and subsequently quashed by the circuit court was not a mandamus to compel the witness to "submit to be sworn, testify, or give his deposition." but, according to its recitals, to "compel the said witness, William H. Parker, by punishment for contempt, to produce at said hearing all of said statements, dying declarations, and stenographic notes," and the statute has provided no penalty for disobedience that can be exercised by the examining magistrate.

It follows that the alternative writ of

mandamus was properly quashed and the order appealed from is affirmed.

Corson, P. J., concurring specially:

I concur in the conclusion that the order of the circuit court should be affirmed on the last ground stated in the opinion, namely, that our statute providing for the punishment of contempts has not provided for punishing, as for a contempt, a refusal of a witness to produce documents called for under a *subpoena duces tecum* issued by a committing magistrate. The respondent, therefore, in denying plaintiffs' motion to punish the witness for his refusal to produce the statement described in the alternative writ of mandamus by proceedings for contempt, did not violate any duty imposed upon him by the statute or the common law.

ARKANSAS SUPREME COURT.

J. D. RODGERS, Appt.,
v.

CHOCTAW, OKLAHOMA, & GULF RAIL-
ROAD COMPANY.

(.... Ark.)

**Carrier—passenger in dangerous position—
care required.**

A railroad company is liable for injury to a passenger on a freight train, who, to the knowledge of the conductor, has, in the absence of a closet, gone to the platform to answer a call of nature during the stopping of the train upon a trestle, where the conductor neither warns him of the danger, nor takes any measures to prevent the starting of the train with a jerk while he is in a dangerous position, in consequence of which he is thrown to the ground and injured.

(October 7, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Monroe County in favor of defendant in an action brought to recover damages for personal injuries

Case Note.—The decision in the above case, so far as it recognizes any liability of the railroad company, does so on the ground of negligence toward a person of whose perilous position it had knowledge, even if the latter had come into such position through his own negligence. Cases of various kinds illustrating this doctrine are to be found in a note in 69 L. R. A. 523 et seq. But, on the question of the application of this doctrine to a person riding on the platform of a railroad car, there are not many precedents.

An intoxicated passenger, who insisted on riding upon the platform of a car although there was standing room inside, and, after 1 L.R.A. (N.S.)

alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. C. F. Greenlee, for appellant:

If injury resulted from the passenger's acting on the advice of those in charge of the train, the company will be liable.

St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Fitchburg R. Co. v. Nichols, 29 C. C. A. 500, 50 U. S. App. 297, 85 Fed. 945; St. Louis & S. F. R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Neal v. St. Louis, I. M. & S. R. Co. 71 Ark. 445, 78 S. W. 220; St. Louis, I. M. & S. R. Co. v. Petty, 63 Ark. 94, 37 S. W. 300.

Messrs. E. B. Peirce and T. S. Busbee, for appellee:

A passenger riding on a freight train, or a mixed train, must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains.

4 Elliott, Railroads, § 1629, p. 2552; Arkansas Midland R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

The defendant could not be required to stop its train between stations to allow plaintiff to alight.

The accident to plaintiff was not the proximate result of neglect to stop.

St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 405, 86 Am. St. Rep. 206, 64 S. W. 226; Erwin v. Kansas City, Ft. S. & M. R. Co. 94 Mo. App. 289, 68 S. W. 88; Crine v. East Tennessee, V. & G. R. Co. 84 Ga. 651, 11 S. E. 555.

Plaintiff was guilty of contributory negligence.

4 Elliott, Railroads, § 1629, p. 2552; Little Rock & Ft. S. R. Co. v. Tankersley, 54 Ark. 29, 14 S. W. 1099; Little Rock & Ft. S. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Memphis & L. R. R. Co. v. Salinger, 46 Ark. 537; Krumm v. St. Louis, I. M. & S. R. Co. 71 Ark. 590, 76 S. W. 1075;

refusing to go inside and when he was not observed, went down upon the steps and was thrown off by a lurch of the car in rounding the curve, was held to be guilty of contributory negligence which would preclude his recovery for the injury. Fisher v. West Virginia & P. R. Co. 42 W. Va. 183, 33 L. R. A. 69, 24 S. E. 570. In this case, however, the conductor did not know that the passenger had gone down upon the steps of the car, and the question of negligence toward him after knowing of his peril related solely to the conductor's acquiescence in letting him remain on the platform. A dissenting judge in that case contended that the conductor was negligent in this particular.

Macon & W. R. Co. v. Johnson, 38 Ga. 409; Blodgett v. Bartlett, 50 Ga. 353; Goodwin v. Boston & M. R. Co. 84 Me. 203, 24 Atl. 816; Smith v. Richmond & D. R. Co. 99 N. C. 241, 5 S. E. 896; Norfolk & W. R. Co. v. Ferguson, 79 Va. 241; St. Louis S. W. R. Co. v. Rice, 9 Tex. Civ. App. 509, 29 S. W. 525; South & North Ala. R. Co. v. Schaufier, 75 Ala. 136; Lindsey v. Chicago, R. I. & P. R. Co. 64 Iowa, 407, 20 N. W. 737; Alabama G. S. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403; Louisville & N. R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662; Wallace v. Western North Carolina R. Co. 98 N. C. 494, 2 Am. St. Rep. 346, 4 S. E. 545; Rockford, R. I. & St. L. R. Co. v. Coultas, 67 Ill. 398; Young v. Missouri P. R. Co. (Mo. App.) 84 S. W. 175; St. Louis & S. F. R. Co. v. Murray, 55 Ark. 252, 16 L. R. A. 787, 29 Am. St. Rep. 32, 18 S. W. 50.

McCulloch, J., delivered the opinion of the court:

The only question before us for determination is whether the evidence introduced by the plaintiff was legally sufficient to support a verdict in his favor, and in testing that question we must give the testimony its strongest probative force, and accept that view of the facts which it will warrant most favorable to plaintiff's cause of action. Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; Ford v. St. Louis, I. M. & S. R. Co. 66 Ark. 363, 50 S. W. 864; Burns v. St. Louis S. W. R. Co. (Ark.) 88 S. W. 824.

Appellant lived at Brinkley, a station on defendant's railroad, but was engaged in business at a switch known as the "G. & C. siding," $6\frac{1}{2}$ miles west of Brinkley, on

defendant's road. Passenger trains did not stop at this switch, and appellant was accustomed to ride out there two or three times a week on freight trains which stopped there. On the occasion in question he boarded a freight train at Brinkley to go to the switch, and also shipped a lot of merchandise to be put off there. *En route* he became sick, and his bowels wanted to move; the call being too urgent to await the arrival at his destination. The caboose was not provided with a closet, and he asked the conductor to slow the train down so that he could get off, attend to the call of nature, and walk the remainder of the distance to the switch. The conductor declined to do that. Shortly afterwards the train reached the switch, and was brought to a stop, but the caboose was stopped over a trestle 85 feet long and 20 feet above the surface of the ground. Appellant testified that he did not know that the caboose was over the trestle, and walked out on the rear step expecting to get off; that as he walked out on the step he met the conductor going into the caboose, and the latter said to him, "You are in a hurry?" to which appellant replied, "Yes, I am;" that a brakeman on the front platform of the caboose called to him, saying, "Just squat on the steps." Appellant describes the incident as follows: "This man I was speaking about [the brakeman] said, 'Just squat down there,' and I said, 'I can't get off on the dump, for they have stopped over a trestle,' and he said, 'Squat on the steps,' and I loosed my pants and had the rail by my left hand, and the train gave a jerk, and I fell to the trestle, and from there to the ground, and that's all there is to it." He testified also to material injury resulting from the fall. His col-

A case more nearly like that of *RODGERS v. CHOCTAW, O. & G. R. Co.* is one in which a boy fifteen years old, riding in a somewhat crowded car though it had standing room for him, went out on the platform of the car because of becoming sick. Believing that he would be compelled to vomit, he went down on the lower step of the car for that purpose, and while there was thrown off the train by a sudden jerk because the engineer suddenly, unnecessarily, and without warning, applied steam to the train. The court held that the injury was due to the contributory negligence of the passenger. *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106. But this case also lacks the element of the conductor's knowledge of the passenger's peril, which was deemed sufficient to control the case of *RODGERS v. CHOCTAW, O. & G. R. Co.*

The rule that a railroad company cannot excuse itself for injuries caused by its negligence to a passenger on the ground that he was riding on the car platform if, by over-

crowding the car, it had made it necessary for the passenger to ride there, is laid down in *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345, 90 N. W. 360. But in this case the injury was caused by the passenger's recklessness extending his head beyond the side of the car in order to look ahead, and for this negligence of his it was held that the conditions causing him to ride on the platform made no excuse. There was no negligence of the carrier subsequent to the reckless negligence of the passenger in putting his head beyond the side of the car, which could defeat the rule as to contributory negligence.

Other cases in which passengers have been injured by being thrown from a car platform are those in which the train suddenly starts while a passenger is entering or leaving the car; but these usually involve the question of the carrier's negligence only because the injury occurs while the passenger is rightfully on the platform.

lar bone and one rib were broken, and his arm was severely hurt.

Appellant contends that the railroad company was guilty of negligence in failing to provide a closet for the use of passengers, and that he should recover damages on that account. Freight trains are not equipped for the carriage of passengers, and public carriers are not required to equip them for that purpose. *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Krumm v. St. Louis, I. M. & S. R. Co.* 71 Ark. 590, 76 S. W. 1075; *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 19 L. R. A. 313, 33 N. W. 204. "A passenger riding on a freight train, or a mixed train, must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel upon such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train." 4 Elliott, Railroads, § 1629; *Hutchinson, Carr.* p. 616; 1 *Fetter, Carr. Pass.* pp. 33, 34; *Olds v. New York, N. H. & H. R. Co.* 172 Mass. 73, 51 N. E. 450. But where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train. *Hutchinson, Carr.* p. 614; 1 *Fetter, Carr. of Pass.* p. 585; *Erwin v. Kansas City, Ft. S. & M. R. Co.* 94 Mo. App. 289, 68 S. W. 88; *Chicago & A. R. Co. v. Arnol, supra*. Judge Thompson states the rule thus: "We find the courts agreed upon the proposition that, where a railway carrier carries passengers upon its freight trains, it thereby assumes toward them the relation of a carrier toward his passenger; and while, in such a case, it is a reasonable conclusion that the passenger assumes the increased risk incident to the operation and management of such trains, yet, subject to this qualification, the railway company becomes bound in favor of the passenger by all the obligations of a common carrier upon a regular passenger train." 3 *Thomp. Neg.* § 2901. Moreover, if it be held that it was the duty of the company to provide closets, the omission to do so cannot be said to have been the proximate cause of the injury complained of by appellant.

We think, however, that there was evidence from which the jury might have found the conductor knew of the perilous position of appellant, and could have prevented the injury, either by warning him of the danger, or by holding the train at a standstill. If the conductor was aware of his peril, and could by the exercise of ordinary care have warned him, and failed to do so, or could by the exercise of such care have prevented the

sudden movement of the train which threw appellant off, and failed to do so, the company is liable for the injury. Appellant testified that the conductor saw him go down the steps, and said, "You are in a hurry." Whether the conductor meant that appellant was in a hurry to debark, or to relieve himself from the steps of the caboose, does not appear; but the testimony shows that the conductor went into the caboose, and the jury might have found that he knew appellant was in a position of danger on the steps with the caboose on a trestle 20 feet high. They might also have found that the conductor heard the brakeman direct appellant to "squat down on the steps," and knew that he was about to relieve his bowels in that position. If so, he should have warned appellant of the danger, or exercised some care to prevent the train from suddenly moving. At least the question of his knowledge of appellant's position and care exercised to protect him should have been submitted to the jury under proper instructions. This court has repeatedly held that, notwithstanding the negligence of the injured person in putting himself in a perilous position, whether a passenger or a trespasser on the track, if the direct cause of the injury is the omission of employees of the railroad company, after becoming aware of his peril, to use a proper degree of care to protect him, the company is liable. *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371; *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *St. Louis & S. F. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *St. Louis, I. M. & S. R. Co. v. Evans* (Ark.) 86 S. W. 426; *Little Rock Traction & Electric Co. v. Kimbro* (Ark.) 87 S. W. 121, 644; *Kansas City Southern R. Co. v. McGinty* (Ark.) 88 S. W. 1001.

The court erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

LOUISIANA SUPREME COURT.

JACOB ITZKOVITCH

v.

EDWARD STANLEY WHITAKER.

(.... La.)

1. Injunction—protection of personal right.

The civil courts have jurisdiction in in-

Headnotes by BREAUX, Ch. J.

Case Note.—The express declaration in the above case, that civil courts have jurisdiction in injunction proceedings to protect a personal right, is in conflict with the usual declarations of courts of equity respecting their power to protect personal rights. It has been commonly declared by the courts,

junction proceedings instituted to protect a personal right.

2. Same—perpetual.

A rule nisi was issued and preliminary injunction granted on the allegations of the petition. The court, upon the allegations, decided that, if facts were as alleged, injunction should be issued; and it follows that in that case it should be made perpetual.

3. Hearing.

The case may be heard on the merits in order that it may be decided after having heard testimony.

(November 20, 1905.)

APPPLICATION by defendant for writs of prohibition and certiorari to prevent the judge of the Civil District Court for the Parish of Orleans, Division E, from proceeding to enjoin defendant from placing plaintiff's photograph in the rogues' gallery. Denied.

The facts are stated in the opinion.

Mr. Benjamin Rice Foreman, with Mr. Samuel Louis Gilmore, for relator.

Messrs. Solomon Wolf and Gustave Lemle, for respondent Itzkovitch:

The inspector had no right to do what he did, and injunction will lie to prevent him from continuing in his illegal course.

and by writers on equity jurisprudence, that a court of equity will interfere to protect rights of property or rights in property only, and not to protect merely personal rights.

Authorities to this effect are quoted by the court in *Chappell v. Stewart*, 82 Md. 323, 37 L. R. A. 783, 51 Am. St. Rep. 476, 33 Atl. 542, and in that case the court refused an injunction to protect a person from annoyance, and from interference by being watched and followed by a detective. The annotation to that case reviews numerous cases showing that there have always been some clearly defined exceptions to the general theory that equity will not protect personal rights, as, for instance, to protect the rights of married women and children, and some cases of contract, trust, or breach of confidence relating to personal rights.

In a considerable number of cases the courts have based their jurisdiction nominally on an alleged property right, when in reality the only real right involved was one of reputation or other personal right. As, for instance, in the case of injunctions against publishing private letters, such as *Woolsey v. Judd*, 4 Duer, 379, where the letters had no property value, and the injunction was sought merely to protect the writer against pain and humiliation, yet the court placed the relief on the fictitious basis of alleged property right.

In a variety of similar cases courts of equity have granted relief ostensibly to protect a property right, but really to protect a personal right. In *Bomeisler v. Forster*, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534, an injunction against prosecuting actions on

16 Am. & Eng. Enc. Law, p. 363; High, Inj. § 68; *Thornton v. Roll*, 118 Ill. 350, 8 N. E. 145; *Adams Exp. Co. v. Board of Police*, 65 How. Pr. 72; *McKibbin v. Ft. Smith*, 35 Ark. 352; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *People v. Canal Board*, 55 N. Y. 390; *Flood v. Van Wormer*, 147 N. Y. 284, 41 N. E. 569; *McDonogh v. Calloway*, 7 Rob. (La.) 442; *Cullen v. Bourke*, 93 N. Y. Supp. 1085.

Courts protect rights of privacy.

Corliss v. E. W. Walker Co. 31 L. R. A. 283, 64 Fed. 280; *Schuyler v. Curtis*, 64 Hun, 594, 19 N. Y. Supp. 264; *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 50 S. E. 68.

Mandatory injunction will issue.

McDonogh v. Calloway, *supra*; *Pierce v. New Orleans*, 18 La. Ann. 242.

Mr. George H. Theard in *propria persona*.

Breaux, Ch. J., delivered the opinion of the court:

Plaintiff complained of the inspector of

certain claims which had been released was granted, notwithstanding the sufficiency of the release as a defense to the legal actions. on the ground that the remedy would not be adequate because it would not prevent the humiliation or injury to the reputation of the complainant by making public certain scandalous matters, real or fabricated. The court, therefore, held that he was entitled to a specific performance of the contract by which he had obtained a release of the claims set up against him. Most obviously the entire basis of the equitable relief in this case was to protect the personal rights of the complainant; but the objection that equity could not protect a personal right does not appear to have been discussed by the court.

An injunction against the use of the name and portrait of a deceased person on a cigar label was denied in a suit by his widow, in the case of *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 48 L. R. A. 219, 80 Am. St. Rep. 507, 80 N. W. 285; but this was on the ground that there was no legal injury to be redressed, and not on the ground that equity could not protect the personal right if one existed.

So, in *Schuyler v. Curtis*, 147 N. Y. 434, 31 L. R. A. 286, 49 Am. St. Rep. 671, 42 N. E. 22, an injunction against exhibiting a statue of a deceased relative was denied on the ground that the complainants had no legal right to object, and not because, if a right existed, equity could not protect it. One judge dissented, and contended that there was a right in the relative to object, and said: "That the plaintiff is entitled, if anyone is, to a

police, who had his photograph taken, and who was about, he said, to have it placed in the rogues' gallery. He prayed to enjoin the defendant, and he averred damages in a sum over \$2,000. He averred substantially that he is an old resident of the city, has a family, is engaged in legitimate business, pays his taxes, and leads an honest life. The judge of the district court issued a rule nisi and directed the defendant to show cause why he should not be enjoined. An exception was filed to the rule nisi, in which he (defendant) stated that he had placed the picture in the rogues' gallery before plaintiff's petition had been filed and that he had forwarded copies to galleries in other states; that he was acting in the discharge of his duty as inspector of police; and that the civil district court had no jurisdiction to enjoin him while he was enforcing the criminal laws. In case this was overruled, he alleged, in substance, that defendant had been convicted of felony and that his character was notoriously bad.

The question of jurisdiction *vel non* is the first which presents itself for decision. The exception as relates to jurisdiction was properly overruled. For the purpose of the

hearing of this exception, the allegations of plaintiff's petition for an injunction must be taken as true. They were not traversed in the original exception, and we conclude that the issues tendered in the original exception are those which the court passed upon in sustaining its jurisdiction. The plaintiff, for the said hearing, must be considered an honest man. We think that the publication of an innocent man's photograph in the rogues' gallery gives rise to sufficient grounds to sustain an injunction. There is a right in equity to protect a person from such an invasion of private rights. Everyone who does not violate the law can insist upon being let alone. In such a case the right of privacy is absolute. It must be said that there is some limit to this right, which it is not necessary to discuss in this case. A person may be arrested, imprisoned, and acquitted, without right to damages. All of this is true, but bears no application to the issue in hand.

Where a person is not guilty, is honest (and that is the only light upon which to consider this case with the issues before us), he may obtain an injunction to prevent his photograph from being sent to the rogues' gallery. He has the personal right to the

remedy, has been heretofore mentioned, and it is the finding of the trial court, and that that remedy may be preventive in its character seems to me to be within the reason and principle upon which equity proceeds."

Similarly in the case of *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, it was held that neither an injunction, nor an action for damages, could be had because of the unauthorized publication of one's likeness for advertising purposes, because of the invasion of an alleged "right of privacy," as the law did not recognize any such right. Three judges dissented, and in the dissenting opinion it is said: "When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection."

The utterances of the dissenting judges are quoted, not because they settle the law of the case, but because they show the point of view of at least a part of the court on the scope of equitable jurisdiction in the case of personal rights, though the majority of the court refused relief, but based it, not on the lack of power in equity to protect the right, but on the nonexistence of the right. Discussing this question of an alleged right of privacy, it is said in *Pomeroy's Equity Jurisprudence*, vol. 6, § 632: "If there is such a thing as a right of privacy, an in-

junction is certainly a proper remedy for its protection."

An unusual case of the exercise of such equitable power is that of *Ex parte Warfield*, 40 Tex. Crim. Rep. 413, 76 Am. St. Rep. 727, 50 S. W. 933. It was there held that an injunction in favor of a husband, who had brought an action for partial alienation of his wife's affections, could be granted to prevent the defendant from writing to, speaking to, or talking with her, or from visiting the house where she stayed, in order to prevent him from exercising undue influence over her; and for violating such an injunction the defendant was punished for contempt.

But, while the cases above referred to show a progressive tendency in courts of equity to protect personal rights, though in some instances they have done so under pretense of protecting a fictitious property right, it is not possible to say how far many of the courts are yet prepared to adopt frankly the sound doctrine declared by the dissenting judges in the *Roberson Case* as above quoted. Yet it can hardly be doubted that this doctrine will eventually be accepted and enforced without fiction or pretense of a property right where none exists.

The clear declaration on the question by the Louisiana court in *ITZKOVITCH v. WHITAKER* is that of a court in a jurisdiction which has inherited the civil law instead of common law of England; but it represents at least the spirit of the modern courts of equity in other states.

restraining order, at least for the time being. The theory in opposition to this view is substantially that the picture should be taken and exhibited for the public good. There can be no public good subserved by taking the photograph of an honest man for the purpose before mentioned.

The court had jurisdiction to issue the preliminary injunction, and to make it perpetual if the evidence justifies the decree. The difficulty consists in the fact that there is no evidence before the court. None was offered. We have only the bare allegations before us, and not a scintilla of evidence to sustain them. It follows that all the district court did was to assume that the allegations were true and that they set forth sufficient to warrant the issuance of an injunction. There has been no final decision. The injunction is merely provisional. It having been finally decided that the court has jurisdiction, under the present state of the case it will be tried on all the issues presented, and a decision arrived at that will permanently decide all the issues. This cannot be done at this time.

The injunction is not strictly mandatory. If it were, under the jurisprudence of this state there are injunctions that have been sustained in exceptional cases, although slightly mandatory. The last utterance of this court was in *State ex rel. Yale v. Duffel*, 41 La. Ann. 518, 6 So. 512, in which the court held that, under the exceptional circumstances, injunction had properly gone forth to slightly undo that which had been done. We insert a list of decisions the weight of which sustains the injunction in hand, even if considered in the light of being slightly mandatory. We do not, we must say, concede that the injunction here is mandatory. *McDonogh v. Calloway*, 7 Rob. (La.) 442; *Pierce v. New Orleans*, 18 La. Ann. 242; *Black v. Good Intent Tow-Boat Co.* 31 La. Ann. 497; *State ex rel. Behan v. Sixth Dist. Judge*, 32 La. Ann. 1276; *New Orleans v. Great Southern Teleph. & Tel. Co.* 37 La. Ann. 571; *Beebe v. Guinault*, 20 La. Ann. 795; *State ex rel. Gaynor v. Young*, 38 La. Ann. 923; *State ex rel. Jacobs v. Eleventh Dist. Judge*, 40 La. Ann. 206, 3 So. 561.

Although mandamus may be the better practice from any point of view, we do not think that we should set aside the injunction on the ground urged on this particular point. The purpose is, so far as possible, to restore the *status quo ante litem* (temporarily, it may be).

The direction has gone to the defendant not to permit the photograph to be exhibited, for the time being at least. It must not be considered as part of the collection. The gallery will have a small space covered in 1 L.R.A. (N.S.)

some way in order to screen this photograph from view. The exhibition will be suspended and the distribution of copies stopped. The provisional injunction is not an interruption in the administration of the criminal law. The defendant can certainly enforce all laws needful, without let or hindrance. There is on that score no ground for complaint.

There are decisions of recent date on the subject of the "law of privacy," especially *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. 442.

Gentle young persons of the opposite sex have objected to the free use made of their pictures, and, objecting, have appealed to the courts. The decisions to which it has given rise are lengthy and interesting. We have read them only to arrive at the conclusion that they are not germane to the subject to which we have here given attention.

The rule which issued in this case is recalled and discharged.

The remedy asked for at this time is not granted. The questions go to the hearing of the issues hereafter.

ALABAMA SUPREME COURT.

CENTRAL FOUNDRY COMPANY, Appt.,
v.

WILLIAM M. BENNETT, Admr., etc., of
Turney Bennett, Deceased.

(... Ala.)

Damages for killing—evidence of possible earnings.

Evidence of the earnings of persons proficient in a trade is not admissible upon the question of damages for negligently killing an apprentice.

(November 30, 1905.)

Case Note.—Where the "line of promotion" in the occupation in which a party is engaged at the time of his injury or death is not so settled that advancement and higher wages may be regarded as fixed and certain, the courts generally agree with the holding in *CENTRAL FOUNDRY CO. v. BENNETT*, that evidence of the income of those in such positions is inadmissible as too remote and speculative to go to the jury upon the question of damages caused by an injury resulting in the incapacitation or death of the party in such alleged line of promotion.

It was held reversible error in *Geary v. Metropolitan Street R. Co.* 73 App. Div. 441, 77 N. Y. Supp. 54,—an action by the representative of a fireman who had been killed through defendant's negligence,—to permit the introduction of evidence as to different grades of advancement open to deceased and

A PPEAL by defendant from a judgment of the City Court of Bessemer in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of his intestate. Reversed.

The question involved sufficiently appears from the facts stated in the opinion.

Mr. Walker Percy for appellant.

Messrs. Frank S. White & Sons for appellee.

Anderson, J., delivered the opinion of the court:

The right given a personal representative to sue for injuries resulting in the death of his intestate, as provided by § 1751 of the Code of 1896, is intended as a remedy for compensation to those having a pecuniary

the salaries attached to each grade. While the jury had a right to consider his prospect of advancement and the probability of his attaining a higher position and earning a greater salary, it does not follow, says the court, that those salaries may be shown affirmatively. "There is not sufficient probability that the decedent would have advanced to these positions, to justify the reception of evidence showing the salaries. Evidence of specific salaries of higher positions would be misleading. It would unduly emphasize the right of the jury to consider the question as to whether the decedent would likely ever earn a larger salary or receive greater compensation, and tend to make them regard as probable what is, at most, only possible."

In *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251, cited by the court in *CENTRAL FOUNDRY CO. v. BENNETT*, the reception, over objection, of evidence offered by the representative of a deceased lad who was killed in the defendant's mine where he worked, of the different classes of employees that ordinarily worked in a mine, and the usual wages which they received, was held reversible error. "Such proof is altogether too problematical and uncertain as a basis of damages. There are always possibilities of promotion and advancement for every person. Whether any given person will reap the harvest depends on his personal qualities, his industry, his zeal, and the duration of his life. It is impossible, in the nature of things, for proof to be introduced which shall cover the various elements in the problem. As courts have held in similar cases, all evidence of this description is entirely inadmissible."

There is no distinction in principle as to the admissibility of this evidence where the defendant's negligence causes injury merely, and not death. It was applied in *Chase v. Burlington, C. R. & N. R. Co.* 76 Iowa, 675, 39 N. W. 196, where, in an action by a railroad "car catcher" to recover for injuries occasioned by defendant's negligence, it was held improper to admit evidence that plaintiff was in "line of promotion" for higher 1 L.R.A. (N.S.)

interest in the person killed, and the amount of recovery is limited to the value of such interest. 3 Wood, *Railway Law*, § 414, p. 1536. "That the jury may have proper data from which a pecuniary interest may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of deceased, and reasonable future expectations; and perhaps there are other facts which should exert a just influence in determining the pecuniary damage sustained." *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360. While under the rule laid down a jury would not be rigidly restricted in assessing damages to the earnings of intestate at the time of his death, and where intestate, as in this case, is shown to have

positions with increased salaries, for which he had been incapacitated by the accident.

"It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing; . . . the wages he was receiving and, perhaps, the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities." *Richmond & D. R. Co. v. Elliott*, 149 U. S. 267, 37 L. ed. 728, 13 Sup. Ct. Rep. 837, where it was held error to permit a switchman to testify as to his "standing a chance" of promotion to a position of greater responsibility for which he had become incapacitated by reason of the injury received.

Where no objection to the admission of such testimony was made, it was held not improper for the court to instruct the jury in regard to it. *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798, 25 S. E. 377.

The reception of similar evidence in the case of a railroad fireman was held improper in *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550, although judgment was not reversed, the court regarding it as of little weight compared with the rest of the proof of damage.

A distinction may properly be made where the advanced position and salary were contemplated by the contract under which plaintiff entered defendant's service. Thus, in *Bryant v. Omaha & C. B. R. & Bridge Co.* 98 Iowa, 483, 67 N. W. 392, where plaintiff, a stenographer, had been so seriously injured as to prevent her filling the advanced position contemplated by both parties to the contract of employment, evidence as to such position and its salary and plaintiff's probable promotion thereto was received.

But in *Galveston, H. & S. A. R. Co. v. Ford* (Tex. Civ. App.) 46 S. W. 77, in an action by the representatives of a locomotive fireman for damages for his death through defendant's negligence, the court permitted evidence that deceased at the time of his death

been bright, economical, and industrious, the jury might consider the fact that these qualities, with age and experience, would bring increased earning capacity. We do not think, however, that it was permissible for the plaintiff to have proven the earning capacity of a man proficient in a trade, when the evidence shows the intestate was wearing the swaddling clothes of apprenticeship. Such evidence was speculative and remote, and the defendant's objection thereto should have been sustained. He had served but six or seven weeks at this trade, and the undisputed evidence was that it required a service of three years to become a skilled machinist.

In the case of *Brown v. Chicago, R. I. & P. R. Co.* 64 Iowa, 656, 21 N. W. 195, the court says: "Plaintiff was permitted, against defendant's objection, to prove that firemen, employed on defendant's engines, when they had sufficient experience and had acquired the requisite skill, were sometimes employed as engineers, and when so employed they were paid an increased compensation for their services. This evidence was admitted for the purpose of showing what the earnings of the intestate would probably have been if he had lived the natural period of his life. In our opinion it was not competent. In determining the damages which the estate of a decedent will sustain in consequence of his death, it is proper to consider his calling

at the time of his death, his ability, the amount of his earnings, and the like circumstances; and the estimate should be made with reference to such facts as actually existed at the time of his death, and such as it is reasonably certain would have occurred in the future but for his death. . . . It is not claimed that he possessed the skill requisite for that employment, and whether he ever would have acquired that skill was uncertain. The evidence should therefore have been excluded." In *Bonnet v. Galveston, H. & S. A. R. Co.* 80 Tex. 72, 33 S. W. 334, the court says: "Although it had been testified that the deceased, just before his death, was preparing himself to become a machinist and engineer, the court did not err in excluding evidence as to the wages that machinists and engineers ordinarily received for their services. The probability of his becoming an engineer or machinist was too remote, contingent, and speculative to throw any light on his probable future earnings. It was calculated to mislead rather than to aid the jury in determining the question of damages." For other authorities on this subject see *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 255; *Chase v. Burlington, C. R. & N. R. Co.* 76 Iowa, 675, 39 N. W. 196; *Richmond & D. R. Co. v. Elliott*, 149 U. S. 267, 37 L. ed. 729, 13 Sup. Ct. Rep. 837.

Since all of the assignments of error in-

was in the line of promotion to the position of locomotive engineer, and that locomotive engineers earned from \$150 to \$275 per month. "This was proper testimony," says the court, "in reference to his reasonable future expectations, which the authorities agree are a proper element of damages in this class of cases. . . . It is true that there is no special evidence of Ford's aptitude or capacity with reference to the duties of engineer or anything else; but it appears that he had been retained in defendant's employ as fireman for about two years, which is some evidence that he was competent for that place and performed its duties satisfactorily. That firemen became engineers appears from the rule above quoted [a rule of the railroad company], which directs engineers to instruct them in the duties of that station, and it might be inferred that the engineers under whom the deceased had served had done what the rule required of them. We think the evidence referred to . . . was properly admitted."

This decision is based upon *Gulf, C. & S. F. R. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558,—an action by the representatives of a deceased switch engineer,—where an isolated paragraph, in addition to which nothing appears upon the point in the opinion or statements of facts, states that "the exception to so much of said petition as charged the reasonable prospect of deceased for pro- 1 L.R.A. (N.S.)

motion in the railway service, and the consequent enhancement of wages, was properly overruled, that being a matter for the consideration of the jury in estimating the damages."

In determining that a verdict was not excessive, the court, in *Union P. R. Co. v. Young*, 19 Kan. 488, adverted to the fact that the plaintiff "was engaged in an employment in which there is a regular system of promotions."

In *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71, which was an action by the father of an infant of two years, who had been killed on the railroad tracks of the defendant, it was held admissible, for the purpose of determining the amount of loss to the deceased's estate, to show the father's business, the compensation he received therein, and that in the course of time he came to own a mill,—all to show "what the business and earnings of deceased would probably have been, had he survived to manhood." This decision does not seem reconcilable with the later case of *Chase v. Burlington, C. R. & N. R. Co.*, *supra*.

See also *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. 665, where plaintiff, who was at the time of the accident an engineer, but unskilful, was permitted to give in evidence his intention to become a skilful engineer, such post commanding a much higher salary.

sisted upon are predicated on the admission of this evidence, we need not consider them separately.

The judgment of the City Court is reversed, and the cause remanded.

Haralson, Dowdell, and Denson, JJ., concur.

VERMONT SUPREME COURT.

STATE OF VERMONT

v.

W. H. STIMPSON.

SAME

v.

EDWARD LEE.

(.... Vt.)

1. Indictment—constitutional right to.

Indictment is not required by a constitutional provision that no one shall be deprived of his liberty "except by the laws of the land," even in case of common-law felonies; and the legislature may therefore authorize the institution of prosecutions by information.

2. Witness—discrediting—proof of wrongdoing.

It is not reversible error to refuse to permit one accused of statutory rape to cross-examine the prosecuting witness as to promiscuous intercourse with other men for the purpose of affecting her credibility.

(October 25, 1905.)

EXCEPTIONS by defendants to rulings of the Orleans County Court, made during the trials of informations against them for statutory rape and grand larceny respectively, which resulted in convictions. Overruled.

The facts are stated in the opinion.

Case Note.—While the question involved in the above case has not been passed upon in a considerable number of the states, the law of the subject may be fairly deemed sufficiently established. Aside from the fact which the court finds, that the Constitution of the state has been practically construed by the legislature for a great many years in conformity to the present decision sustaining prosecutions by information in the case of common-law felonies, the question has been authoritatively settled the same way, so far as the Constitution is concerned, by the decision of the United States Supreme Court in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Vincent v. California*, 149 U. S. 648, 37 L. ed. 884, 13 Sup. Ct. Rep. 960; *Bolln v. Nebraska*, 170 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell v. Dow*, 176 1 L.R.A. (N.S.)

Mr. J. W. Redmond, for respondent Stimpson:

The cross-examination should have been allowed.

State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696; *State v. Johnson*, 28 Vt. 512; *Seals v. State*, 114 Ga. 518, 88 Am. St. Rep. 34, 40 S. E. 731; *State v. Murray*, 63 N. C. 31; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *Carney v. State*, 118 Ind. 525, 21 N. E. 48; *Brennan v. People*, 7 Hun, 171; *State v. Long*, 93 N. C. 542.

The words "*nisi per legem terræ*" mean due process of law, in which is included presentment or indictment.

2 Co. Inst. 50, 51; 1 Kent, Com. 10th ed., 623; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Saco v. Wentworth*, 37 Me. 172, 58 Am. Dec. 786; *State v. Kingsly*, 10 Mont. 537, 26 Pac. 1066; *State v. Ah Jim*, 9 Mont. 167, 23 Pac. 76; *State v. King*, 9 Mont. 445, 24 Pac. 265; *State v. Barker*, 107 N. C. 913, 16 L. R. A. 50, 12 S. E. 115; *People v. Petrea*, 92 N. Y. 128; *Jones v. Robbins*, 8 Gray, 329; *Com. v. Horregan*, 127 Mass. 450; *Story*, Cont. ¶ 1785.

Mr. E. A. Cook for the State.

Messrs. Taylor & Dutton for respondent Lee.

Mr. F. G. Bicknell for the State.

Rowell, Ch. J., delivered the opinion of the court:

The case against Stimpson is an information for statutory rape, and the one against Lee is an information for grand larceny. The principal question in the former, and the only question in the latter, is whether § 1867 of the Vermont Statutes, as amended by act No. 46, p. 34 (Acts 1898), and act No. 64 (Acts 1904), is constitutional. It provides that state's attorneys may prosecute by information all crimes except those punishable by death or by imprisonment in the state prison for life. It is claimed that

U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; and, in a case arising in Vermont, the same decision was rendered by that court in *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80. The same doctrine has been established in several of the state jurisdictions, among others, it was so held in *State v. Tucker*, 36 Or. 291, 51 L. R. A. 246, 61 Pac. 894; *State v. Guglielmo* (Or.) 69 L. R. A. 467, 79 Pac. 577; *Re Lowrie*, 8 Colo. 505, 54 Am. Rep. 562, 9 Pac. 493; *State v. Boswell*, 104 Ind. 543, 4 N. E. 676; *State v. Brett*, 16 Mont. 367, 40 Pac. 875; *State v. Little Whirlwind*, 22 Mont. 427, 56 Pac. 821; *State v. Humason*, 5 Wash. 501, 32 Pac. 112; *Re Boulter*, 5 Wyo. 333, 40 Pac. 521. While it has not been passed upon in all the states, there must be little doubt, therefore, of the correctness of the conclusion.

said section is in contravention of the declaration in the Constitution that no person can "be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." This claim is based upon the contention that the words "laws of the land," as there used, require prosecutions for common-law felonies to be by indictment, because it is said those words as used in Magna Charta, from which we borrow them, required that by settled judicial construction in England at the time of the adoption of our Constitution, and that it is to be presumed that we took that construction with the words. As bearing on this question, it is important to consider whether that declaration in the Constitution has received a practical construction that has been acquiesced in for a considerable time; for, if it has, that will be a valuable aid, to say the least, in determining the intent and meaning of those words as there used.

As early as 1779 state's attorneys were provided for, and authorized to prosecute, manage, and plead, in all matters proper, for and in behalf of the state. Slade's State Papers, 331. By an act passed November 10, 1797, it was made the duty of state's attorneys to file informations *ex officio* in matters proper therefor. Rev. Stat. 1797, chap. 64, § 1. By an act passed February 27, 1787, it was provided that no person should be held to trial, nor put to plead for a capital offense punishable with death, unless a bill of indictment was found against him therefor by a grand jury lawfully impaneled and sworn. Stat. 1787, p. 82. This was only ten years, after the adoption of the Constitution, and indicates that thus early the legislature thought that without such an enactment one might be prosecuted for a capital offense even otherwise than by indictment; for it is not to be presumed that the legislature thought it was passing a useless act. This provision was carried into Revision 1797, chap. 3, § 65, p. 106. By an act "for the punishment of certain capital and other high crimes and misdemeanors," passed March 9, 1797, it was provided that no person should be tried for any offense under said act until a bill of indictment was found against him by the grand jurors attending the supreme court of judicature. Revision 1797, chap. 9, § 36, p. 173. This act did not include larceny except horse stealing. On March 4, 1797, during the same session, an act was passed "for the punishment of certain inferior crimes and misdemeanors." Revision 1797, chap. 10, p. 175. This act included larceny of money, goods, chattels, bonds, bills, notes, etc., regardless of value, and divers other offenses, but did not provide how any of them should be prosecuted; and larceny is a felony at common

law. These two statutes, taken altogether, point strongly to the conclusion that at that time it was not supposed that the Constitution required common-law felonies to be prosecuted by indictment, but that it was for the legislature to say what ones should be thus prosecuted, and what ones might be thus or otherwise prosecuted. The act of March 9, 1797, was re-enacted in 1818 with some additions, but not with the addition of larceny, and the act repealed. But the provision in respect of prosecuting by indictment was retained (Acts 1818, chap. 1, § 37, p. 19), and continued in force till the Revision of 1839, unless it was changed by chapter 9, § 1, p. 19, of the Acts of 1819, constituting state's attorneys "informing officers," which is doubtful, although it is said in *State v. Magoon*, 61 Vt. at page 47, 17 Atl. 729, that prosecution by information of all crimes was authorized by statute from 1819 to 1839. The act of March 4, 1797, was re-enacted in 1821, with an increased penalty for larceny, but was still silent as to the mode of prosecution, and continued so until the Revision of 1839.

Since 1816 it has been the law that, when a person is confined in jail on a complaint for a crime or misdemeanor, the supreme court may, on his application in writing, direct an information to be filed against him, whereon the court may receive and record a plea of guilty and award sentence. Vt. Stat. 1805. The act of October 30, 1828, provided that, whenever a person was in actual confinement in jail by virtue of a complaint for an offense against said act "for the punishment of certain capital and other high crimes and misdemeanors," the county court should have power and authority, on the application in writing of such person, to direct an information to be filed against him for the offense for which he stood charged, on the filing of which it was made the duty of the court to proceed in the trial in the same way and manner as if an indictment had been presented by the grand jury. Acts 1828, p. 4, No. 23, § 3. And that has been the law ever since (Vt. Stat. 1897), and has always been acted upon, except in homicide cases, probably, and without objection as far as we know. This, in effect, is a legislative construction that the Constitution does not require prosecution by indictment in any case, unless we say that the legislature thought the requirement, if it existed, could be waived by the accused with its consent, which we can hardly do, for the law seems to be otherwise. That mere rights and privileges guaranteed by the Constitution can be waived, to some extent at least, is probably true. But it would seem that constitutional requirements as to the mode and manner of instituting prosecutions involving the

deprivation of life or liberty cannot be dispensed with by the legislature, nor waived by the accused, even with the consent of the legislature. *Cooley*, Const. Lim. 8th ed. 214 et seq., 390; *Cancemi v. People*, 18 N. Y. 128; *Hopt v. Utah*, 110 U. S. 574, 579, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202. In 1839 it was enacted that no person should be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in case of proceedings before a justice and when a prosecution by information was expressly authorized by statute. Rev. Stat. chap. 93, § 1. This was but the act of March 9, 1797, as re-enacted in 1818, with some additions. By chapter 102, § 1, of the Revision of 1839, it was provided that state's attorneys might prosecute by information all crimes not capital and where the punishment was by imprisonment in the state prison for a term not exceeding seven years. Both of these statutes are still in force, with an enlargement in the latter of the authority of the state's attorney to prosecute by information all crimes not capital and not punishable in the state prison for life.

It was decided in *State v. Leach*, 77 Vt. 166, 59 Atl. 168, that statutory rape can be prosecuted by information. But the constitutionality of that mode of prosecuting was not raised nor considered, and the question has never been decided by this court, nor raised in it but twice before,—once in 1880, in *State v. Haley*, 52 Vt. 476, and again in 1888, in *State v. Magoon*, above cited, in both of which, strong judicial utterances were made in favor of the correctness of the long practical construction above shown. *State v. Haley* was an information for a liquor nuisance, a mere misdemeanor, and the respondent contended that the proceeding should have been by indictment. But the court held otherwise, and said that the statute had always been supposed to mean that all crimes, except capital and those for which the punishment exceeded seven years in the state prison, might be prosecuted by information, without regard to any distinction between felonies and misdemeanors, and without regard to the punishment prescribed, provided it did not exceed seven years in state prison and was not capital, and that such had been the construction and uniform practice by all courts, judges, state's attorneys, and lawyers down to that time. *State v. Magoon* was an information for grand larceny. The court said that, prosecutions by information for high crimes having been authorized by statute from a time reaching back to a period when many of those who framed and adopted our present Constitution were living, and those statutes having been acted upon unquestioned for nearly seventy years, it would 1 L.R.A. (N.S.)

not be profitable to consider the respondent's contention of unconstitutionality; its consideration being unnecessary. The question was not involved. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814, was an information for conspiracy, held to be a misdemeanor; and the contention was that the case did not come within the statute authorizing the state's attorney to prosecute by information, because the punishment might be by imprisonment in the state prison for more than seven years. Thus it appears that during substantially the whole time since the adoption of the Constitution the legislature has practically construed the clause in question not to require common-law felonies to be prosecuted by indictment, and this construction has been acquiesced in and accepted as correct by the courts and with great unanimity by the profession generally, many of the best of whom have revised the statutes from time to time, commencing with that great lawyer, Nathaniel Chipman, in 1797, who was prominently active in public affairs during the formative period of the Constitution and must have been imbued with its spirit and meaning.

There is abundant authority for saying that after this long acquiescence in that construction it should not be departed from, but should be accepted as correct beyond the permissibility of question. In *State v. Bosworth*, 13 Vt. 402, 413, it is said that questions arising under the Constitution, settled by a long and uniform practice, questioned in the judicial tribunals but once, and then sanctioned, should be considered at rest. "Where," the court asked, "then, is the security of individual or corporate rights, if these [constitutional] questions are to be considered as always open, if no acquiescence even though sanctioned by judicial decree, is to be considered as settling them?" There the construction had obtained only thirty-four years, while here it has obtained more than one hundred years. See also *Boyden v. Brookline*, 8 Vt. 284. In *Lincoln v. Smith*, 27 Vt. 328, 345, this court adopted the language of the Supreme Court of the United States in *Briscoe v. Bank of Kentucky*, 11 Pet., at page 318, 9 L. ed. at page 733, that "a uniform course of action involving the right to the exercise of an important power by the state government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised." In *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115, it was objected that the judges of the Supreme Court had no right to sit as circuit judges, not being appointed nor commissioned as such. But the court said that practice and acquiescence under it for several years, commencing with the organization of the judicial system, af-

forded an irresistible answer to the objection, and had fixed the construction of the Constitution, which was too strong to be shaken or controlled. There are many more cases to the same effect, but they need not be referred to. The subject is pretty fully treated in Cooley, Const. Lim. 7th ed. 102, and following. See also Black, Constr. & Interpretation of Laws, 31; Lewis's Sutherland, Stat. Constr. § 476; Endlich, Interpretation of Statutes, § 527. But the aids of contemporaneous and practical construction must be resorted to with caution and reserve, and can never be allowed to abrogate, contradict, enlarge, nor restrict the plain and obvious meaning of the text.

As to the true meaning of the words "law of the land" and "due process of law," as used in the Constitutions of our states, there is a diversity of opinion; but all agree that they mean the same thing, whatever that is, and that, if they were combined to read, "due process of the law of the land" the meaning would not be changed. The Supreme Court of the United States had this question under consideration in 1883 in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; and pretty much all that can be said on the subject was there brought out in the majority opinion by Mr. Justice Matthews and in the dissenting opinion of Mr. Justice Harlan. The Constitution of California, adopted in 1879, provides that offenses theretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law, and that a grand jury shall be summoned at least once a year in each county. By the Penal Code of the state, where a defendant has been examined and committed as thereby provided, it is the duty of the district attorney to inform against him for the offense. The plaintiff in error having been thus examined and committed for murder, the district attorney informed against him for that crime, and he was convicted and sentenced to death, and the question was whether that was "due process of law" within the meaning of the 14th Amendment of the Federal Constitution, which forbids the states to "deprive any person of life, liberty, or property without due process of law," and it was held that it was; that an indictment or a presentment by a grand jury, as known to the common law of England, is not essential to that "due process of law," when applied to prosecutions for felonies, that is guaranteed by the Federal Constitution, and forbidden to the states to dispense with in the administration of criminal law; that those words refer to the law of the land in each state that de-

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clines its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice that lie at the foundation of all our civil and political institutions, the greatest security for which lies in the right of the people to make their own laws, and to alter them at pleasure. The court said that in this country written Constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and so the provisions of Magna Charta were incorporated into bills of rights; that they were limitations upon all the powers of government, legislative as well as executive and judicial; that it necessarily happened, therefore, that, as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would justify and receive a corresponding and more comprehensive interpretation; that they applied in England only as guards against executive usurpation and tyranny, while here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary law of England, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. The court approved and commended as most accurate the language of Mr. Justice Johnson in *Bank of Columbia v. Okely*, 4 Wheat. 235, 244, 4 L. ed. 559, 561, when he said, speaking of those words from Magna Charta, incorporated into the Constitution of Maryland, that "after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Such is the oft-repeated and settled doctrine of that court. And this court approved that doctrine in *State v. Hodgson*, 66 Vt. 134, 157, 28 Atl. 1089, which was affirmed by the Supreme Court of the United States in *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80. And such has been and is the prevailing opinion in this country, both judicial and individual. Chancellor Kent says that "the better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice." 2 Com. *13. Webster's famous definition in *Dartmouth College v. Woodward*, 4 Wheat.

518, 4 L. ed. 629, is often quoted. "By the law of the land," he says, "is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," etc. Judge Cooley says this definition is apt and suitable to judicial proceedings. He says that he has met in no judicial decision a statement that embodies more tersely and accurately the correct view of the matter than the language of Mr. Justice Johnson above quoted. He then goes on to say that "the principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form," which, he says, may change from time to time, with due regard to the landmarks established for the protection of the citizen. Const. Lim. *355. Again he says: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Id. *356.

The supreme court of Tennessee says that, "when first adopted in Magna Charta, the phrase 'the law of the land' had reference to the common and statute law then existing in England, and when embodied in our Constitution, it referred to the same common law as previously modified, and as far as suited to the wants and conditions of our people in a new country. At present, 'the law of the land' embraces the same body of laws as still further modified; those parts validly cut off being now excluded, and those validly added being now included. Every valid statute of the state now in existence, whenever enacted, is the present 'law of the land' in respect to the subject-matter of that statute, and every existing enactment passed with due form and ceremony and not in conflict with some provision of the state or Federal Constitution is a valid statute; and no statute otherwise valid is unconstitutional because affecting one's life, liberty, or property, if, when being general, it embraces all persons who are or may be in like situation and circumstances, . . . or, when being special, it is, in addition, natural and reasonable in its classification." *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 437, 56 L. R. A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, Affirmed in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1.

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The supreme court of Mississippi says, in *Brown v. Levee Comrs.* 50 Miss. 468, speaking of the words "due process of law," that "the principle does not demand that the laws existing at any point of time shall be ir-repealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due course of law.'"

The Constitution of Wisconsin originally declared that "no person shall be held to answer for a criminal offense, unless on presentment or indictment of a grand jury." Const. 1848. art. 1, § 8. That clause was amended in 1870 (Laws 1870, chap. 118, p. 180) so as to read: "No person shall be held to answer for a criminal offense without due process of law." The statute of 1871 provided that the several courts of the state should possess, and might exercise, the same power and jurisdiction to try prosecutions on information for all crimes as they possessed and might exercise in cases of like prosecution on indictment. Laws 1871, chap. 137, § 1, p. 202. *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559, was an information for murder, and the question was whether the amendment changed the meaning of the Constitution, or, in other words, whether "due process of law" and "on presentment or indictment of a grand jury" meant the same thing; and it was held that they did not. The court said that the words "due process of law" did not mean, and had not the effect, to limit the powers of the state to prosecution of crime by indictment, but meant law in its regular course of administration according to prescribed forms and in accordance with the general rules for the prosecution of individual rights.

The supreme court of Texas says that, when the words "law of the land" were used in Magna Charta, they probably meant the established law of the Kingdom, in opposition to the Roman law, which was about being introduced into the land, but that now, in their most usual acceptation, they are regarded as meaning general public laws, binding all the members of the community in similar circumstances, and not partial or private laws affecting the rights of private individuals. *Janes v. Reynolds*, 2 Tex. 250.

The supreme court of California, in the judgment under review in the *Hurtado Case*, followed its previous decision in *Kalloch v. Superior Court*, 56 Cal. 229, in which it held that the proceeding, as regulated by the Cou-

stitution and laws of the state, was not opposed to any of the definitions of "due process of law" and "the law of the land," but was strictly within such definitions, as much as was a proceeding by indictment, and took from the accused no immunity nor protection to which he was entitled under the law.

In Utah, the words "due process of law" are held to mean law in the regular course of administration through the courts. *Re McKee*, 19 Utah, 231, 242, 57 Pac. 23. Indiana holds the same. *State v. Boswell*, 104 Ind. 541, 4 N. E. 675. It is said in *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 688, 689, that the words "law of the land" do not mean merely an act of the general assembly, for, if they did, every restriction upon legislative authority would be at once abrogated; but that they mean that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right as determined by the laws under which it vested, according to the course, mode, and usages of the common law, are not effectually laws of the land for those purposes. Many of the other states adopt the view of the cases referred to, but some of them hold the other way, notably Massachusetts, in *Jones v. Robbins*, 8 Gray, 329. Mr. Stephen says, in the first volume of his *History of the Criminal Law of England* (p. 595), that "from the earliest times the King accused persons of offenses not capital in his own court by the agency of his legal representatives without the intervention of a grand jury."

But it is objected that *Hurtado v. California* is not in point here, because, the case coming within the Penal Code of that state, its Constitution expressly authorized prosecution by information, whereas our Constitution gives no such authority. But the objection is not well taken; for, if an information for a capital offense was forbidden by the 14th Amendment, the Constitution of the state could not authorize it in any circumstances. So the case is precisely in point. Thus it appears that the practical construction that our Constitution has so long received in this respect accords with the prevailing opinion in this country, which we think the better opinion, and therefore we the more readily hold that our Constitution does not require common-law felonies to be prosecuted by indictment, and that consequently the statute in question is constitutional.

In the rape case, it appeared that the girl consented in fact; but she could not consent 1 L.R.A. (N.S.)

in law, as she was under the age of consent. As bearing on her credibility as a witness, and as tending to show a motive to charge the respondent with the crime, the respondent offered to show by her on cross-examination that she was six or eight months gone with child, and was never pregnant before; and that ever since she was twelve years old, down to the time in question, she had had sexual intercourse with many different men. The state offered to admit her pregnancy, but objected to her being cross-examined as to her intercourse with other men; but the respondent did not want the admission of pregnancy unless he could cross-examine as to the intercourse, which was not permitted. As a general rule, particular acts of misconduct are not provable by extrinsic evidence. In this state you cannot prove by such evidence that a woman is a prostitute for the purpose of impeaching her credibility as a witness (*Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435), nor that a witness is a notorious counterfeiter (*Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142), nor the keeper of a house of ill fame (*State v. Fournier*, 68 Vt. 262, 270, 35 Atl. 178).

State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696, relied upon by the respondent as expressly deciding this question, is not in point. That was an indictment for rape *simpliciter*, and the woman was of the age of consent as shown by the record in that case, and as is inferable from the case as reported. In such a case, there is no doubt but the respondent has a legal right to cross-examine the complainant as to her intercourse with other men, not to shake her credit as a witness, but to show her consent, and so no rape. What is said in that case about allowing the cross-examination to be as unrestricted and searching as consistent with the rules of law related to the refusal of the trial court to accord to the respondent his legal right to show by the complainant that her relations with him were friendly and cordial at the time of the alleged offense, and continued so afterwards. Whether in the case at bar the court could have allowed the cross-examination as matter of discretion is a question not before us. As to a motive to charge the respondent unjustly, the case as presented would afford no ground for such an inference, had the claimed intercourse with other men been shown.

Judgment in *Stimpson's Case* that there is no error in the proceedings of the County Court, and that the respondent take nothing by his exceptions; and judgment in *Lee's Case* that there is no error, and that sentence be imposed and execution thereof done.

SOUTH DAKOTA SUPREME COURT.

A. M. JOHNSON et al., Appts.,
v.

JOHN BERRY et al., Respts.

(. . . . S. D. . . .)

Threshing machine—failure to file bond—action for services.

The owner of a threshing machine who fails to file the bond required by a statute making it unlawful to use such machine without executing and filing a bond cannot maintain an action to recover compensation for threshing grain, even for one having knowledge of such failure.

(November 1, 1905.)

Case Note.—The authorities are by no means agreed on the question of the validity of a contract made in the course of the business for which the law requires a license, or a compliance with some condition, when the statute has not been complied with. The question is one of statutory intent. Sometimes the statute clearly declares that such contracts shall be unlawful, and in that case there is no question; but in many cases the statutes merely provide that a license must be procured, or some other steps taken, without expressly declaring that for failure to do so the contracts shall be void.

If it appears from the statutes that the purpose of the requirement is to protect the public, the cases generally recognize the rule that failure to comply with the statute makes the contracts void. In 16 L. R. A. 423, the decisions on the question are collected, and most of them, at least, are consistent with this rule.

A good illustration of this rule is furnished in *Randall v. Tuell*, 89 Me. 443, 38 L. R. A. 143, 36 Atl. 910, holding that the failure of an innkeeper to procure a license prevented him from recovering for board and lodging furnished at his inn, under a statute providing that "no person shall be a common innholder or victualer without a license, under the penalty of not more than \$50," while the license fee was fixed at \$1.00. The court said it was satisfied that the purpose of the statute was not revenue, but the protection of the public.

Similarly, it was held in *Smith v. Robertson*, 106 Ky. 472, 45 L. R. A. 510, 50 S. W. 852, that, under a statute requiring a license fee to be paid by the owner of a stallion kept for hire, making him guilty of a misdemeanor and liable to a fine for each offense for failure to procure the license, a contract for the use of the stallion was invalid. The court discusses the contention that the statute was for revenue only, but refuses to adopt it, and lays stress upon the fact that a penalty was provided for each offense.

The right of a real-estate agent to commissions for a sale when he had not paid the 1 L. R. A. (N.S.)

A PPEAL by plaintiffs from an order of the Circuit Court for Clark County granting a new trial after verdict in their favor in an action brought to recover the contract price for threshing grain. Affirmed.

The facts are stated in the opinion.

Mr. S. A. Keenan, for appellants:

The statute requiring the filing of bonds is intended merely for the protection of property from destruction by fire, and does not prevent collection for services rendered.

Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720; *Livingston v. School Dist. No. 7*, 11 S. D. 150, 76 N. W. 301; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 641, 24 L. ed. 649; *Vining v. Bricker*, 14 Ohio St. 334; *Fairly v. Wappoo Mills*, 44 S. C. 252, 29 L. R. A. 225, 22 S. E. 118;

license tax required by ordinance was denied in *Denning v. Yount*, 62 Kan. 217, 50 L. R. A. 103, 61 Pac. 803, and in *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207. The ordinance provided that no person should carry on the business without a license and payment of a semi-annual license tax of \$10, subject to a fine of from \$10 to \$100, for violation of the ordinance. This seems to be for the purpose of revenue, and to be so considered by the court; but the decision was placed on the ground that the ordinance made the business unlawful unless the license was paid, and that, therefore, no cause of action could be based on a violation of the ordinance.

This case is supported by some of the other decisions respecting contracts of unlicensed brokers or agents, as, for instance, *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230, where the court says that a contract in violation of statute requiring a license should not be upheld on the ground that the sole purpose of the act is to raise revenue, except when there is some doubt, from the language of the statute, whether or not the legislature intended to prohibit the exercise of the privilege without license.

The failure of an insurance agent to procure a license under a statute declaring that, if a person solicits insurance without a license, "or fraudulently assumes to be an agent, and thus procures risks and receives money for premiums, he forfeits not more than \$50 for each offense," was held to preclude him from recovering commissions, in *Black v. Security Mut. Life Asso.* 95 Me. 35, 54 L. R. A. 939, 49 Atl. 51. The license fee was only \$2, and the court held that the purpose of the statute was undoubtedly for the protection of the public, and not for revenue.

On the other hand, under a statute requiring a license tax for the business of loaning money, and making it a misdemeanor to do such business without a license, it was held, in *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L. R. A. 509, 95 Am. St. Rep. 186, 49 Pac. 314, that the loan was not void because the license was not obtained. This

Harris v. Runnels, 12 How. 79, 13 L. ed. 901; American Button-Hole & Overseaming Sewing Mach. Co. v. Moore, 2 Dak. 280, 8 N. W. 131; Sanford v. Duluth & D. Elevator Co. 2 N. D. 6, 48 N. W. 434; Penny-packer v. Capital Ins. Co. 80 Iowa, 56, 8 L. R. A. 236, 20 Am. St. Rep. 395, 45 N. W. 408; Wright v. Lee, 2 S. D. 598, 51 N. W. 706; Hammon, Contr. § 249; Lytle v. Newell, 24 Ky. L. Rep. 188, 68 S. W. 118; Alleghany County v. Allen, 69 N. J. L. 270, 55 Atl. 724; Wood v. Erie R. Co. 72 N. Y. 196, 28 Am. Rep. 125.

Mr. C. G. Sherwood, for respondents:

The contract was unlawful.

15 Am. & Eng. Enc. Law, 2d ed. p. 928.

An illegal contract cannot be enforced.

Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; Pollock, Principles of Contract, pp. 253-260; Penn v. Bornman, 102 Ill. 523; Alexander v. O'Donnell, 12 Kan. 608; Gunter v. Leckey, 30 Ala. 591; Bank of United States v. Owens, 2 Pet. 527, 7 L. ed. 508; Pangborn v. Westlake, 36 Iowa, 546; Harris v. Runnels, 12 How. 80, 13 L. ed. 901; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 384.

Fuller, P. J., delivered the opinion of the court:

Appellants prosecute this appeal from an order granting respondents a new trial in an action based upon an inseparable threshing contract, the performance of which was unlawful, and expressly declared to be a misdemeanor, because in direct violation of § 3145 of the Revised Political Code, en-

acted as follows: "It shall be unlawful for any person to use a steam threshing machine in this state until he shall first enter into a bond with good and sufficient surety, in the sum of \$500, payable to the state; said bond to be approved by and filed with the clerk of the circuit court of the county where he resides, in case he is a resident of this state; and if he be a nonresident, with the state auditor, conditioned to pay all damages arising from any fire caused by him in violation of the provisions of this article, and for any unlawful damages done or caused to any telegraph or telephone line by the moving of any traction engine, threshing machine, or other vehicle or thing along or across any public highway." That the foregoing section and other provisions of the same statute were designed for the protection of the general public is plain from the fact that a person owning or operating a steam threshing machine is obliged to thoroughly extinguish the fire before leaving his engine for any purpose, and for all loss occasioned by burning or otherwise injuring property while threshing grain or moving the outfit from place to place, he is expressly required to respond in damages to the owner. The exaction of a bond, payable to the state for the protection of her citizens, before any threshing by the use of steam can be lawfully done, is consonant with sound public policy, and the frequency of disastrous fires resulting from the negligent or unskillful use of these engines suggests the necessity of a statute prohibiting such threshing as that

was placed on the ground that loaning money was lawful business, which was neither *malum in se* nor *malum prohibitum*; that the prohibition was for the protection of the public revenue only, with no declaration that the prohibited acts should be void; and, therefore, that it was not to be assumed that the legislature intended to make the contract void in addition to the penalty prescribed.

Under an ordinance imposing a penalty for the failure of a broker to procure a license, it was held, in *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L. R. A. 215, 22 S. E. 108, that failure to procure the license did not prevent the broker from recovering commissions, because the object of the ordinance was simply to enforce the payment of the license tax. The ordinance declared that every person engaging in the business "should obtain" a license, and be subject, for failure to do so, to a penalty for each and every offense; but the court pointed out that it was not expressly declared unlawful to do the business without a license, and that, if it had done so, the contract would be unlawful and unenforceable.

One of the rules laid down in Benjamin. Sales, Corbin's ed. § 825, Bennett's 1892

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ed. § 598, is that it is material, in seeking the legislative intent, to consider whether a single penalty is imposed for doing unauthorized business, or a recurring penalty for each offense; and that, if but one penalty is imposed for carrying on the business, it will not make contracts void; but, if a penalty for each offense is imposed, it will show an attempt to prohibit the contract, and therefore make it void. But it will be seen from the cases herein referred to that such a rule for determining the legislative intent is not consistently recognized; though it may be considered to be a fairly settled rule of the courts to hold that, if they deem the purpose of the statute to be the protection of the public, a contract made in the course of the unauthorized business will be void. Where the purpose is chiefly for revenue, the decisions are not agreed.

In the case of *JOHNSON v. BERRY* it is entirely clear that the purpose of the statute requiring a bond as security for damages arising from fire or other causes was clearly for the protection of the public; and therefore, according to the general trend of the decisions, business done in violation of the law could not be a basis for a cause of action.

for which appellant seeks to recover by making the same a public offense. In holding that no recovery could be had on a contract, the execution of which is impliedly prohibited by the infliction of a penalty for the use of a threshing separator operated by horse power without boxing the tumbling rod, the Minnesota court quotes with approval from Lord Tenterden as follows: "Where a contract which a plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of law, or contrary to justice, morality, and sound policy." *Ingersoll v. Randall*, 14 Minn. 400, Gil. 304. In the case of *Penn v. Bornman*, 102 Ill. 523, the court says: "The general rule is that all contracts made in violation of an express statutory provision are inoperative and void, and no recovery can be had upon them though the defendant is a party to the violation of the law, in the absence of fraud or bad faith on his part upon which to found an estoppel."

For the most cogent reasons, the same doctrine has been recognized and universally applied to similar cases, and from one of such we quote as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law." *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468. The following cases are to the same effect: *Alexander v. O'Donnell*, 12 Kan. 608; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Griffith v. Wells*, 3 Denio, 226; *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720; *Miller v. Post*, 1 Allen, 434; *Allen v. Hawks*, 13 Pick. 79; *Solomon v. Dreschler*, 4 Minn. 278, Gil. 197; *Springfield Bank v. Merrick*, 14 Mass. 322. Although the evidence before us affords no reasonable ground for the claim that respondents were aware of appellants' failure to file the required bond, and the exact question is therefore neither presented nor decided, the foregoing cases and that of *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145, are authority to the point that full knowledge on respondents' part, together with the acceptance of the benefits of the contract, would not be sufficient to justify its enforcement, even though the statute does not declare the same void, but merely inflicts a penalty for the violation of its terms.
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The doctrine of the foregoing cases applied to the facts in this case demonstrates error in reaching the verdict in favor of appellants, and the order of the court below granting a new trial is therefore affirmed.

Haney, J., concurs only in the conclusion that the order appealed from should be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SWIFT & COMPANY, Plff. in Err.,

v.

MATILDA JOHNSON, Admr. of Charles Benson, Deceased.

(138 Fed. 867.)

1. Action for death—abandonment of family.

When the legislature has created a right of action for wrongful death for the benefit of the next of kin of deceased, and has declared that the father, if living, is the next of kin of minor children who leave neither widow nor children, an action for the death of such child must be for the sole benefit of the father, although he has deserted his family, to whose support the deceased was, at the time of death, contributing, and has left the locality of their residence without apparent interest in what becomes of them.

2. Same—charge to jury.

When the recovery for the death of a minor child must, under the statutes, be for the sole benefit of the father, who has aban-

Subject Note.—Recovery by parent for death of child, where parent has abandoned the child.

While there are many cases in which the courts, in applying the general rule that damages for wrongful death are measured by the pecuniary loss resulting to the beneficiaries of the action from the death, hold that the recovery, under the facts shown, must be limited to nominal damages, only a few of these holdings have been based, like that in the *SWIFT CASE*, on the ground that the parent had abandoned and deserted the infant decedent. The different jurisdictions have not acted in entire harmony in determining what are the pecuniary losses sustained in applying the rule to the state of facts under discussion. The decision in the *SWIFT CASE* is in harmony with that of *Thompson v. Chicago, M. & St. P. R. Co.* 104 Fed. 845, a case arising in Nebraska, where the rule is that not even nominal damages can be recovered by the next of kin under a general claim of damages, but that special damages, if they have been sustained, must be alleged and proved in order to justify any recovery.

In the *Thompson Case* the father had

doned his family, it is reversible error to permit the jury to infer that the mother, to whose relief in supporting the family the deceased contributed, might share in the division of the recovery, and to refuse to charge the jury that no part of the recovery could be for her benefit.

3. Child's services—loss of right to.

A father forfeits his right to his son's services by abandoning him and compelling him to assume the burden of his own support when far within his minority, the abandonment extending almost to cessation of communication between them.

4. Loss of child's prospective services.

No reasonable expectation that the continued life of a boy will be of pecuniary benefit to his father, so as to enable the latter to recover substantial damages for the wrongful killing of the child, under statutes limiting the recovery under such circumstances to the pecuniary loss inflicted, can be indulged, where the father had abandoned the child, and for a period of seven years had remained insensible to his parental obligations, although there is some slight evidence that they retained some affection for each other.

5. Same—speculation as to possibility.

Speculation as to the possibility of restoration of the natural relations between a father and his child, whom he had abandoned for a period of seven years, and compelled to assume the burden of his own support, cannot be made the basis of a recovery by the father of substantial damages for the wrongful killing of the child.

6. Federal courts—rule as to damages for death.

A Federal court, in determining the dam-

ages which can be assessed under a statute allowing compensatory damages for a wrongful death, will follow the general law applied in the Federal courts, which excludes all consideration of matters which rest in speculation, conjecture, or fancy, although the courts of the state where the statute was passed may permit the damages to be assessed by such methods.

(June 24, 1905.)

ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of her intestate. Reversed.

Statement by Van Devanter, Circuit Judge:

This was an action by an administratrix, on behalf of the next of kin, to recover damages for the death of her intestate. There was substantial evidence tending to show that the death resulted from an injury caused by the negligence of the defendant, which would have given the deceased a right of recovery, had he lived. The injury and death occurred at South St. Paul, Minnesota, March 13, 1903. The deceased was about seventeen years of age, and left surviving him a father, aged thirty-eight or thirty-nine years, a mother, and a younger sister, but no widow or child. In 1896 the father informed the mother that she must go out washing, and that he would not provide for her or the children. He then separated

abandoned his wife and the deceased infant more than ten years prior to the death, and gave them no support or protection; and the court held that the father, having emancipated the infant, was no longer entitled to his earnings, and was not entitled to judgment for even nominal damages.

In *Cook v. American E. C. & S. Gunpowder Co.* 70 N. J. L. 65, 56 Atl. 114, the court did not pass directly on the question as to whether the father, who had abandoned his wife and family, including the decedent, three years prior to the death, and who had entered into a bigamous marriage with another woman, by whom he had a child at the time of the death of the son, was entitled to more than nominal damages, but in holding that the verdict for \$2,500 damages in favor of such father was excessive, said, as to the amount of damages: "It is doubtful whether, under circumstances such as are here presented, a verdict for more than nominal damages could be sustained; but this question need not now be determined." The court, in discussing the facts of the case, said: "The deceased was about thirteen years of age, was living with his mother, and was earning 50 cents per day at the time of his death. His circumstances were such as to render it extremely R.A. (N.S.)

improbable that he would have been able to earn, between the time of his death and his arrival at full age, anything more than would be barely sufficient for his own support. At the time of his death he was not only deserted, but in effect emancipated, by his father. There was no reasonable ground to anticipate a revocation of that emancipation, or to suppose that, in case of its revocation, the father would profit largely from the son's earnings during minority. As to any expectation that after the son's arrival at full age he would contribute anything voluntarily toward his father's support, such expectation was wholly speculative, in view of the father's abandonment of the boy, and was so contrary to what was reasonable and probable under the circumstances that it could hardly be taken at all into consideration in estimating the damages."

The question has arisen in New York, and there been decided contrary to the above decisions, but not without a dissenting opinion. The question was decided in *Pineo v. New York, C. & H. R. R. Co.* 34 Hun. 80, where the decedent was a young girl of about fourteen years of age, whose mother was dead. Her father had abandoned his

from them, and did not thereafter contribute anything to their support, or have any communication with them, save that on one occasion he inquired of the son if he liked the work which he was doing, and told him to be good, and on another occasion gave him 50 cents. After the separation the children lived with the mother, who, for the next three or four years, supported them and herself from the proceeds of such employment as she could obtain. She then obtained a divorce and married again, the children continuing to live with her as before. From about that time the son had regular employment, and gave all of his earnings to his mother, who used them chiefly in supporting the children. At the time of his death he was earning \$45 per month. He was a strong and industrious lad, of fair education for one of his opportunities, and with a strong affection for his mother and sister. The only evidence respecting the son's disposition towards his father was this: The mother testified: "I don't know if he gave him anything. I don't know; but he said, if his father was in need of anything, he should give him a dollar." "He would very seldom speak of him. He always said, if his father was in need of anything, he would give him something." And another witness, intimately acquainted with the family, and who had seen the son frequently, testified: "Q. Did you ever hear him express his feelings towards his father? A. Not

until I spoke about how destitute his father was, and that I had got him some things. He said he would always carry money in his pocket, and, if he ever met his father, he would offer him money, if he would take it." When the father separated from the family he was a saloonkeeper at South St. Paul, was greatly addicted to the excessive use of liquor, and when intoxicated was inclined to use harsh and unkind language toward his wife and children. He was improvident and squandered whatever came into his hands. In 1901 he was still in South St. Paul, but doing nothing. In the spring of 1902 he was in destitute circumstances at Hastings, Minnesota, where he obtained employment until November of that year, when he received about \$200 in wages, and went away with the purpose to engage in the saloon business elsewhere. What became of him after leaving Hastings is not shown. During his employment at that place he remained sober, and was heard to speak affectionately of his children, but he did nothing towards resuming his parental duties, or towards restoring between himself and his children the natural and usual relations of parent and child. It does not appear that he took any interest in the prosecution of the action by the administratrix, or that he even knew of the death of the son. There was a verdict and judgment for plaintiff for \$2,500, which defendant seeks to have reversed upon this writ of error.

family some years before the accident, had not supported the daughter, and the family did not know whether he was dead or alive. On the trial it was assumed that the father, who was the next of kin, was living, and a verdict was rendered for \$3,500, which the general term refused to set aside. This decision was affirmed by the court of appeals in 99 N. Y. 644, by a memorandum decision, so that that court did not discuss the question involved. The opinion of the general term, in holding that the fact that the father had abandoned his family did not render the verdict excessive, said that the most that could be claimed from the father's conduct was that he had emancipated his child, and that the latter had become entitled to the profits of her labor, but that that did not prevent the father from recovering. The court, in its reasoning, referred to the fact that collateral relatives, having no legal claim whatever to what the deceased might have earned, are entitled, under the statute, to recover, where they are the only next of kin, saying that the only basis on which they could claim to sustain pecuniary loss resulting from the death of the deceased would be that if the deceased had lived and accumulated property, they would have become entitled to her unbequeathed assets 1 L.R.A. (N.S.)

on her death. Barker, J., who dissented on the ground that the father was not pecuniarily injured by the death of the child, said: "If we uphold this verdict, we do, in effect, say that the jury are omnipotent in this class of cases, and that there is no rule of law to be observed by them in assessing damages. The statute, in terms, restricts the damages to a fair and just compensation for the pecuniary injury sustained by the person for whose benefit the action is brought."

The right of a father to recover for the death of a child whom he had abandoned and left with its grandparents, who supported and maintained it without his assistance, was denied in *Southern R. Co. v. Flemister*, 120 Ga. 524, 48 S. E. 160. This decision was based on the ground that, under the Civil Code of Georgia, the father's right to the services and proceeds of the labor of a child is lost by his voluntary contract releasing the right to a third person, or by his failure to provide necessities for the child, or by his abandonment of it; the court saying that the father necessarily lost the right to sue for and recover the value of such services.

C. W. P.

Argued before Sanborn, Van Devanter, and Hook, Circuit Judges.

Messrs. Frank B. Kellogg, C. A. Severance, and Robert E. Olds, for plaintiff in error:

Recovery could be had only for the benefit of the next of kin.

Rev. Stat. § 5913.

Such statutes will be strictly construed; for—

a. They are in derogation of the common law.

Higgins v. Butcher, Yelv. 89; Baker v. Bolton, 1 Camp. 493; Carey v. Berkshire R. Co. 1 Cush. 475, 48 Am. Dec. 616; Mobile L. Ins. Co. v. Brame, 95 U. S. 756, 24 L. ed. 582; Tiffany, Death by Wrongful Act, §§ 1-18; Nash v. Tousley, 28 Minn. 5, 8 N. W. 875; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; Lexington v. Lewis, 10 Bush, 677; Board of Internal Improvement v. Searce, 2 Duv. 576; St. Louis, I. M. & S. R. Co. v. Yocum, 34 Ark. 497; Miller v. Southwestern R. Co. 55 Ga. 144.

b. Strictly speaking, the action provided is not a survival of the action which deceased would have had if he lived; it is rather a new action, brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute.

Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771; Blake v. Midland R. Co. 10 Eng. L. & Eq. 443; Robinson v. Canadian P. R. Co. [1892] A. C. 481; Atlanta, K. & N. R. Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820.

In this case, the father of the deceased is to be regarded as his next of kin.

The words "next of kin," occurring in the statute, are properly construed as having reference to the next of kin under the statute of distributions.

Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; Robel v. Chicago, M. & St. P. R. Co. 35 Minn. 84, 27 N. W. 305; Barnum v. Chicago, M. & St. P. R. Co. 30 Minn. 461, 16 N. W. 364; Sykora v. J. I. Case Threshing Mach. Co. 59 Minn. 130, 60 N. W. 1008; Sieber v. Great Northern R. Co. 76 Minn. 269, 79 N. W. 95; Bouvier's Law Dict. title "Next of Kin;" Warren v. Englehart, 13 Neb. 283, 13 N. W. 401; Steel v. Kurtz, 28 Ohio St. 191; Dickens v. New York C. R. Co. 23 N. Y. 158; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; Schouler, Exrs. & Admsrs. § 130; Blagge v. Balch, 162 U. S. 439, 464, 465, 40 L. ed. 1032, 1038, 1039, 16 Sup. Ct. Rep. 853; Clement's Estate, 160 Pa. 391, 28 Atl. 932; Thompson v. Chicago, M. & St. P. R. Co. 104 Fed. 845; Sanders v. Louisville & N. R. Co. 49 C. C. A. 565, 111 Fed. 708.

The damages recoverable are to be regarded as wholly compensatory for the father's pecuniary loss, and as exclusive of all punitive or exemplary elements, as well as all solace for loss of society, or compensation for his injured feelings, or for the suffering of the deceased.

Hutchins v. St. Paul, M. & M. R. Co. 44 Minn. 5, 46 N. W. 79; Foot v. Great Northern R. Co. 81 Minn. 493, 52 L. R. A. 354, 83 Am. St. Rep. 395, 84 N. W. 342; Blake v. Midland R. Co. 18 Q. B. 93.

The father in this case had no pecuniary interest in the continued existence of deceased.

He had relinquished and abandoned all right to control or avail himself of the benefit of the earnings or services of the deceased.

Thompson v. Chicago, M. & St. P. R. Co. 104 Fed. 845; Rodgers, Dom. Rel. § 485; McGarr v. National & P. Worsted Mills, 24 R. I. 447, 60 L. R. A. 122, 96 Am. St. Rep. 749, 53 Atl. 320; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Wodell v. Coggeshall, 2 Met. 89, 35 Am. Dec. 391; Farrell v. Farrell, 3 Houst. (Del.) 633; Berla v. Meisel (N. J. Eq.) 52 Atl. 999; Savannah, F. & W. R. Co. v. Smith, 93 Ga. 742, 21 S. E. 157; Winslow v. State, 92 Ala. 78, 9 So. 728.

No damages can in any event be awarded which are based upon loss of services for any period beyond that of minority of deceased.

Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Telfer v. Northern R. Co. 30 N. J. L. 188.

If any recovery is to be had based upon other grounds than loss of services up to the time of majority, it can be predicated only upon a reasonable expectation of pecuniary benefit after majority; and then only after averment and proof of special damage; no damage can be presumed from the mere fact of kinship, unsupported by other evidence.

Van Brunt v. Cincinnati, J. & M. R. Co. 78 Mich. 530, 44 N. W. 321; Clinton v. Laning, 61 Mich. 355, 28 N. W. 125; Fordyce v. McCants, 51 Ark. 509, 4 L. R. A. 296, 14 Am. St. Rep. 69, 11 S. W. 694; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Telfer v. Northern R. Co. 30 N. J. L. 188; Lewis v. Hunlock's Creek & M. Turnp. Co. 203 Pa. 511, 53 Atl. 349; Stimpson v. Wood, 59 L. T. N. S. 218; Sykes v. North-Eastern R. Co. 32 L. T. N. S. 199.

Evidence to the effect that the father might be necessitous and require assistance

in the future cannot be considered in this connection.

Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205.

The conduct of the father was such as not only to rebut any possible presumption of pecuniary interest arising from the fact of his relationship to the deceased, but also such as to preclude, on the plainest principles of justice, any recovery whatever for his benefit.

Richmond, F. & P. R. Co. v. Martin, 102 Va. 201, 45 S. E. 894; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Lamar v. Harris*, 117 Ga. 993, 44 S. E. 866; *Cole v. Mayne*, 122 Fed. 837; *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 18, 8 L. R. A. 486, 49 Am. St. Rep. 909, 31 S. W. 163; *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 517, 36 L. R. A. 812, 45 N. E. 708; *Tiffany, Death by Wrongful Act*, §§ 69-71.

Messrs. Alfred H. Veeder and Henry Veeder also for plaintiff in error.

Mr. S. C. Olmstead, for defendant in error:

The statute is to be construed as a remedial one, and must have a liberal interpretation to effectuate the evident purpose of its enactment.

Bolinger v. St. Paul & D. R. Co. 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Barnum v. Chicago, M. & St. P. R. Co.* 30 Minn. 461, 16 N. W. 364.

The statute assumes that the widow and next of kin have a reasonable expectation of pecuniary benefit, as of right or otherwise, and to a greater or less extent, from the continuance of life, which they lose by the act or omission causing the death, and this expectation is taken as the basis of the damages.

Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; *Barnum v. Chicago, M. & St. P. R. Co.* 30 Minn. 461, 16 N. W. 364; *Bolinger v. St. Paul & D. R. Co.* 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 84, 27 N. W. 305; *Clapp v. Minneapolis & St. L. R. Co.* 36 Minn. 6, 1 Am. St. Rep. 629, 29 N. W. 340; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79; *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 103, 9 N. W. 575; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 49 N. W. 694; *Sieber v. Great Northern R. Co.* 76 Minn. 269, 79 N. W. 95.

The surviving father was entitled, as a matter of right, to the services of his son; and that he had not claimed the wages or services of his son, and might not do so, does not militate at all against the fact of pecuniary loss.

Luessen v. Oshkosh Electric Light & P. 1 L.R.A. (N.S.)

Co. 109 Wis. 94, 85 N. W. 124; *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 18 N. E. 108; *Johnson v. Chicago & N. W. R. Co.* 64 Wis. 425, 25 N. W. 223; *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535, 42 N. E. 971; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653; *Freeman v. Carter*, 28 Tex. Civ. App. 571, 67 S. W. 527; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424, 49 Pac. 599; *Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47; *Taylor, B. & H. R. Co. v. Warner (Tex. Civ. App.)* 60 S. W. 442; *Lee v. Publishers George Knapp & Co.* 155 Mo. 610, 56 S. W. 458.

Van Devanter, Circuit Judge, delivered the opinion of the court:

The principal questions presented upon this record are: (1) For whose benefit was the action maintainable? (2) What was the proper measure of recovery?

By the common law no action lies for an injury resulting in death, but the state of Minnesota, like most or all of the other states, has enacted a statute modeled after Lord Campbell's act in England, which modifies the common-law rule, and authorizes the maintenance of such an action. Gen. Stat. 1894, § 5913. Being entirely statutory, the action can be maintained only for the benefit of the persons specified in the statute, and then only for the recovery of such damages as are contemplated by it. *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 125, 19 N. W. 566; *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; *Western U. Teleg. Co. v. McGill*, 21 L. R. A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699; *Sanders v. Louisville & N. R. Co.* 49 C. C. A. 565, 111 Fed. 708. Repeated and uniform decisions of the highest court of the state have given to the statute a settled meaning and effect, which may be summarized as follows: The right of action which the statute creates is for the exclusive benefit of (a) those who have demands for the support of the deceased during the time, if any, intervening between his injury and his death; (b) those who have demands for his funeral expenses; and (c) the widow and next of kin. The damages recoverable for the benefit of the widow and next of kin are confined to compensation for their strictly pecuniary loss, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased; and the extent of the loss is to be determined solely with reference to

the pecuniary benefit reasonably expected by the widow and next of kin, as of legal right or otherwise, from the continued life of the deceased. *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 103, 107, 9 N. W. 575; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 518, 21 N. W. 711; *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 84, 89, 27 N. W. 305; *Bolinger v. St. Paul & D. R. Co.* 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 9, 46 N. W. 79; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161, 164, 49 N. W. 694; *State ex rel. Krey v. Probate Court*, 51 Minn. 241, 53 N. W. 463; *Sykora v. J. I. Case Threshing Mach. Co.* 59 Minn. 130, 60 N. W. 1008; *Sieber v. Great Northern R. Co.* 76 Minn. 269, 275, 79 N. W. 95; *Foot v. Great Northern R. Co.* 81 Minn. 493, 52 L. R. A. 354, 83 Am. St. Rep. 395, 84 N. W. 342. As a matter of pleading, it is also settled by the decisions of the state court that a complaint does not show a right of recovery in respect of a widow or next of kin unless it alleges (stating names and how related) that the deceased left a widow or next of kin, who are entitled to compensation, and does not show a right of recovery in respect of demands for the support of the deceased or for his funeral expenses unless it alleges that there are such demands. *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. 208; *Sykora v. J. I. Case Threshing Mach. Co.* 59 Minn. 130, 60 N. W. 1008; *Barnum v. Chicago, M. & St. P. R. Co.* 30 Minn. 461, 16 N. W. 364.

The deceased left no widow or child, but was survived by a father, mother, and younger sister. In these circumstances, the statutes of the state make the father the sole next of kin. Gen. Stat. 1894, § 4477, cl. 6, § 4471, cl. 3. The complaint contains no allegation of the existence of any demand for the support of the deceased between his injury and his death, or for his funeral expenses, and no evidence upon that subject was offered at the trial. The action was maintainable, therefore, exclusively for the benefit of the father, and without any regard to the loss sustained by the mother or sister, because, as respects their loss, no right of recovery exists by the common law or by the statute.

It is said in the brief of counsel for the administratrix: "It was not questioned upon the trial, and is not questioned now, that a surviving father is the next of kin to his child, under the statutes of the state of Minnesota, and that the damages recoverable are to be regarded as wholly compensatory for the father's pecuniary loss."

But this statement is not fairly sustained by the record. The complaint alleges: "That at the time of his death said

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Charles Benson was an infant of the age of sixteen years on the 6th day of April, 1902. That he was unmarried, and left surviving him his father, August Benson, and his mother, Matilda Johnson. That his said father and mother, and each of them, have been damaged by and through the death of said Charles Benson in the sum of five thousand dollars."

And among the things occurring at the trial were these:

The plaintiff, over the defendant's objection, was permitted to introduce evidence of the mother's expectation of life. The defendant sought to show what had become of the father after his separation from the family, and in ruling upon the plaintiff's objection thereto, the court observed: "Generally the 'next of kin' means nearest of blood; and there certainly could be no person nearer to the plaintiff than his mother; and if the authority cited by the judge in the case (*Thompson v. Chicago, M. & St. P. R. Co.* 104 Fed. 845) which I refer to is correct—that the father has ceased to have any right to the services of the son while the latter remains a minor, but that the mother, from the fact that she continues to perform her parental duties, is entitled to his services—it seems to me as though that ought to place her in the condition or position with reference to the child which the father has given up and surrendered. But it is not the duty of this court to distribute, or to indicate what should be the proper distribution of, the damages, if any are recoverable in a case of this kind. That is a matter for the court to which the administratrix is answerable. A verdict covering an amount which any beneficiaries may be entitled to recover under the statute is for a gross sum."

In that connection, counsel for the defendant inquired: "Do I understand your honor to rule upon this question whether the father is the next of kin in this case?" and the court responded: "No; I do not rule upon that. I think it is immaterial."

At the conclusion of the evidence, and before the instructions to the jury were given, these statements were made:

The Court: In this state, especially in view of the language in this very act,—that the recovery shall be distributed the same as the personal property of the deceased would be distributed under the laws of the state.—I think, under that statute, the father, if living, would be the next of kin.

Mr. Olmstead (for plaintiff): I think I will have to concede that, whatever money may be recovered in this action, the title to it would stand in the father.

The Court: I think, as far as the dis-

tribution of the money is concerned, that is a matter that the court which has charge of the administration can attend to.

Thus, by the allegations of the complaint, and by the introduction of evidence of the mother's expectation of life, the plaintiff asserted a right to have the recovery include compensation for the mother's loss, or at least to have the amount of the recovery computed and determined with some regard to her loss; and in the course of the trial this contention received the approval of the court to a degree which was well calculated to make a strong impression upon the minds of the jurors, to cause them to give attention to the testimony bearing upon the mother's loss, to arouse their sympathies in her behalf (she being the administratrix and a principal witness), and to produce an award of damages in an amount which would enable her to obtain some substantial benefit therefrom through a distribution which it was indicated would be made by the state court exercising probate jurisdiction. The jurors could hardly have failed to understand that "distribution" meant division; and yet there could be no distribution of the recovery, in the sense of a division, because there was but a single beneficiary (the father), and the recovery, whatever the amount, would be for his exclusive benefit, as compensation for his pecuniary loss, and none other. The concession made by counsel for the plaintiff was not calculated to correct the erroneous impression theretofore conveyed to the jurors, because, when considered with the observation made by the court at the time, the concession was to the effect that the title—counsel immediately spoke of it as "the legal title"—to the money recovered would be in the father, but that the money would still be subject to distribution; in other words, the jurors were still left to infer that there would be a disposition or division of the money, in which the mother would or might be a participant and beneficiary.

Conceiving that the admission of evidence of the mother's expectation of life and the recognition which had been given to her loss and claim to compensation would operate prejudicially to it, the defendant requested the court to affirmatively charge the jury that no damages could be given for any loss sustained by the mother, and that no part of the recovery would be for her benefit. The request was refused, and error is assigned upon that ruling. The request should have been granted. The admission of evidence of the mother's expectation of life was error, and the recognition which was given to her loss and claim to compensation plainly tended to operate

prejudicially to the defendant. When, in the course of a jury trial, inadmissible evidence is admitted, or erroneous rulings are made, or incorrect opinions are expressed by the court, which are calculated to attract the attention of the jury to matters outside of the issues, or to otherwise operate prejudicially to either party, it is clearly the right of that party to have the jury plainly instructed in the final charge in a manner which will distinctly withdraw the objectionable evidence from their consideration, remove from their minds any erroneous impression arising from the mistaken rulings or opinions, and prevent any resultant prejudice. *St. Louis & S. F. R. Co. v. Farr*, 6 C. C. A. 211, 216, 15 U. S. App. 520, 56 Fed. 994, 1000; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. ed. 141, 145; *Waldron v. Waldron*, 156 U. S. 361, 383, 39 L. ed. 453, 459, 15 Sup. Ct. Rep. 383; *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 555, 43 L. ed. 543, 551, 19 Sup. Ct. Rep. 296; *Throckmorton v. Holt*, 180 U. S. 552, 567, 45 L. ed. 663, 671, 21 Sup. Ct. Rep. 474. It is said that the error was corrected, the jury properly enlightened, and prejudice prevented, by the court's final charge, in which the jury were told that the statute gave a right of action to the administratrix for the benefit of the next of kin, that the amount recoverable was the pecuniary loss to the next of kin, and that the next of kin was the father. Probably this instruction would have been sufficient if the matter had not been previously put before the jury in a manner calculated to mislead them, but the circumstances required something better designed to protect the previous error or mistake,—something which the jury would plainly recognize as intended to entirely withdraw from their consideration the mother's loss, and all expectation that she would or might participate in the recovery through its distribution by another court.

Error is also assigned upon the court's refusal to give an instruction requested by the defendant limiting the recovery to nominal damages. The correctness of the ruling depends upon two questions: (1) Did the evidence conclusively establish that the father had lost his legal right to the services and earnings of the son during his minority? (2) Apart from this legal right, was there any substantial evidence of a reasonable expectation of pecuniary benefit to the father from the continuance of the life of the son?

Generally, the father, as head of the family, is entitled to the services of his minor children, or to their earnings, if, by his permission, they are employed by

others. He is also under obligation to support his children during their minority. The right and obligation are correlative; and where the father neglects or refuses to support his child, denies him a home, or abandons him, so that he is obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings. *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Wodell v. Coggeshall*, 2 Met. 89, 35 Am. Dec. 391; *McCarthy v. Boston & L. R. Corp.* 148 Mass. 550, 2 L. R. A. 608, 20 N. E. 182; *Farrell v. Farrell*, 3 Houst. (Del.) 633; *McGarr v. National & P. Worsted Mills*, 24 R. I. 447, 60 L. R. A. 122, 98 Am. St. Rep. 749, 53 Atl. 320; *Nugent v. Powell*, 4 Wyo. 173, 194, 20 L. R. A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; *Winslow v. State*, 92 Ala. 78, 9 So. 728; *Savannah, F. & W. R. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157; *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L. R. A. 508, 69 Pac. 639; *Thompson v. Chicago, M. & St. P. R. Co.* 104 Fed. 845.

Without conflict, the evidence established these facts: The father had wilfully abandoned his family when the son was nine years of age, and the daughter six. He had wrongfully cast the burden of supporting the children upon the mother, whom he left in necessitous circumstances. He had thus obliged the son, when far within his minority, to obtain employment, and assist in the support of himself and sister. He had wholly neglected his paternal obligation for a period of seven years preceding the son's death. His neglect had been the same whether he was employed or unemployed, and whether he was free from the influence of intoxicants or under their influence; and his neglect had been intensified by an almost absolute cessation of communication with his children. No other conclusion was permissible under the evidence than that there had been an emancipation of the son, and that the father had forfeited and lost the right which otherwise he would have had to the son's services and earnings during his minority.

As the extent of the loss which is intended to be compensated under the statute is not to be determined solely by the legal rights of the beneficiary, but with reference to the pecuniary benefit which he may have reasonably expected, as of legal right or otherwise, it is yet to be considered whether or not there was any substantial evidence of a reasonable expectation of pecuniary benefit to the father, otherwise than as of legal right. The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of

the actual and the probable; and therefore the reasonable expectation must be made to appear by the evidence. Conjecture, speculation, and fancy cannot supply the absence of evidence, or avoid the effect of the evidence which is presented. The conditions surrounding the beneficiary and the deceased at the time of the death, their past relations, and the law of human experience, are the sole criteria of the expectation and of its reasonableness. Other conditions or changed relations, not reasonably probable, cannot be conjectured and assumed merely because of the possibility of their accomplishment and their conformity to higher ideals. As was said by Mr. Justice Brewer, when a member of the supreme court of Kansas: "The enigma of the future of a life is not to be solved by the mere matter of faith and hope, or even by the natural possibilities of accomplishment, but mainly and chiefly by the experiences of the past, and what the life has already been." *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443, 460.

The natural influence or prompting of kinship is always an important factor in cases like this, and is to be carefully considered, but it is not controlling. A father can have no reasonable expectation of pecuniary benefit from the continued life of a son who, although possessing a strong filial love, is without property and is incapacitated from labor of all kinds, or who, although possessed of property or earning capacity, has unmistakably shown that he is insensible to the natural influence or prompting of kinship. So, also, a father who wilfully abandons a minor son, and for several years proves insensible to every legal, moral, and natural obligation to him, can have no reasonable expectation of pecuniary benefit from his continued life while that situation continues. The case before us is of this type. The evidence is without conflict, and has been already commented upon. The father not only wilfully abandoned his son, but the circumstances of the abandonment and of its continuance for seven years unmistakably show that he was insensible to the influence and prompting of kinship; that he was an unnatural father. More than that, the mother and sister, in consequence of their abandonment by the father, had naturally and deservedly become objects of the son's special consideration; and it was reasonably probable that he would be disposed to employ his surplus means, if any, in administering to their wants and comfort. He was without property, his opportunities had been restricted, and his earning capacity did not reasonably promise to be large. There was also the possibility, if not probability, that

he would marry and have a family of his own, for whose support he would be obligated both legally and morally. These matters precluded a reasonable expectation that his continued life would be of pecuniary benefit to the father.

As is shown in the statement preceding this opinion, there was some evidence that the father and son retained some affection each for the other; and it is urged that, had the son lived, the natural relations of father and son might have been restored. A restoration was possible, but this evidence was too slight to overcome the effect of the seven years of wilful abandonment, neglect, and separation. It afforded a basis for conjecture, but not for belief. Notwithstanding these transient manifestations of affection, there was no resumption of communication between the father and the son. The father remained utterly indifferent to his legal, moral, and natural obligations, and the son continued to turn all of his earnings over to his mother. Contrasted with the character and duration of the abandonment, neglect, and separation, the evidence of continued affection was at best only a scintilla, and was not sufficient to make its effect a question for the jury. In the Federal courts, when the evidence upon a question of fact is so clearly preponderant or of such a conclusive character that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is the duty of the court to withdraw the question from the jury, and direct their finding; and thus, before the question of fact is submitted to the jury, a preliminary question of law always arises for the decision of the court, and that question is not whether there is literally no evidence, but whether there is any substantial evidence, the consideration of which is properly within the province of the jury. *Chicago, St. P. M. & O. R. Co. v. Belliwith*, 28 C. C. A. 358, 55 U. S. App. 113, 83 Fed. 437; *Patillo v. Allen-West Commission Co.* 65 C. C. A. 508, 131 Fed. 680; *Schuykill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 448, 20 L. ed. 867, 872; *Marion County v. Clark*, 94 U. S. 278, 24 L. ed. 59; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Southern P. Co. v. Pool*, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; *Coughnan v. Bigelow*, 164 U. S. 301, 307, 41 L. ed. 442, 446, 17 Sup. Ct. Rep. 117; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

Decisions of the supreme court of Minnesota are referred to as indicating that, notwithstanding the conditions surrounding the father and son at the time of the lat-

ter's death, and their past relations, it was permissible for the jury to speculate upon the restoration of the natural relations of father and son, and, because of its possibility, to award substantial damages for the father's benefit. There are expressions in some of the decisions of the state court which, taken by themselves, give slight color to the contention; but certainly the better, if not the only permissible, view of these expressions is that they refer, perhaps not happily, to the difficulty of getting at the amount of the damages with precision and accuracy, and are not at all intended to declare that the right to damages or their amount may be rested upon so uncertain a basis as mere speculation upon possible—not reasonably probable—occurrences in the future. The nature of the question justifies a statement of what has been said by the state court respecting it. In *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 520, 21 N. W. 711, it is said: "Any estimate of the pecuniary benefit which will be derived by the next of kin from the continuance in life of a child who dies at the age of eighteen months must be little, if any, better than mere guess work; yet the statute appears to authorize an action even in such a case."

In *Robel v. Chicago, M. & St. P. R. Co.* 35 Minn. 89, 27 N. W. 305, it is said: "Obviously and necessarily the amount of such damages must, in any case, be, to a great extent, conjectural, and much must be left to the judgment of the jury."

But it is to be observed that it is also said in that case: "But the statute contemplates an assessment of damages, and not a merely arbitrary award. Such assessment must be based upon the reasonable expectation of benefit to the surviving next of kin from the life of the deceased. Where such beneficiaries were so related to him that they would not have been legally entitled to support, service, or contribution from him, it may be accepted as the law that no substantial recovery can be had without proof of such facts and circumstances as render it probable that actual and substantial benefit would have accrued to them from his continued life. . . . Although the evidence in this case was exceedingly meager, yet, in view of the facts that the father of Robel would have been entitled to the fruits of his labor for a period of nine months subsequent to the time of his death, and that Robel was actually engaged in an active employment, presumably yielding compensation, we think that a recovery might have been had of more than a merely nominal amount."

It is said in *Gunderson v. Northwestern Elevator Co.* 47 Minn. 165, 49 N. W. 694,

that "the question of damages must, in such cases, be committed largely to the sound practical sense and fair judgment of the jury;" and that "in the case of a minor child the recovery is not limited to the probable value of the services or earnings during his minority, but may also include the reasonable expectation of pecuniary benefit beyond that period."

But it is to be observed that it is also said in that case: "It must, however, be determined judicially and upon the evidence, and the damages assessed must be reasonably appropriate to the case made by it, and are not left to the uncontrolled discretion of the jury."

And in *Sieber v. Great Northern R. Co.* 76 Minn. 275, 79 N. W. 95, it is said: "But at best the amount of damages must be largely a matter of conjecture; but in the same connection it is also said: "It is undoubtedly true that the reasonable character of the expectation of pecuniary benefit from the continued life of the deceased and of the probable amount of that benefit must appear from the facts in proof."

The true meaning of these decisions is indicated in *Bolinger v. St. Paul & D. R. Co.* 36 Minn. 421, 1 Am. St. Rep. 680, 31 N. W. 856, where it is said: "The determination of the amount of damages, however, must be a judicial one, and is not left to the uncontrolled discretion of the jury;" and in *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 10, 46 N. W. 79, where it is said: "But even in those cases the determination of the amount of damages is by no means left to the uncontrolled discretion of the jury. Their estimate must be based on facts in evidence." And also: "True, it is possible that he [deceased] might have become more thrifty in future, but this was not at all probable, in view of his age and past history. He might have met with some extraordinary streak of good luck, such as discovering a valuable mine or drawing a large prize in a lottery, but these contingencies are altogether too speculative to form any legitimate basis for an estimate of damages."

This statement of what has been said by the supreme court of the state shows the rule of that court to be that the right to substantial damages and their amount must be determined judicially, not arbitrarily, and must be determined upon the evidence, and not upon mere speculation, conjecture, or fancy. But if the decisions of that court were properly susceptible of the interpretation suggested, but not acceded to, they

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would not, in that respect, be obligatory upon this court. The state court has uniformly held that the statute authorizes the recovery of compensatory damages only, excluding all punitive elements, and this court is therefore controlled by the rule of general law applied by the Federal courts, which, in respect of the right to and the assessment of purely compensatory damages, excludes all consideration of matters which rest in speculation, conjecture, or fancy. *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837; *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 336, 39 L. ed. 1006, 1007, 15 Sup. Ct. Rep. 830; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Chicago & N. W. R. Co. v. De Clow*, 61 C. C. A. 34, 124 Fed. 142.

Because the evidence conclusively established that the father had lost his legal right to the services and earnings of the son during his minority, and because, apart from this legal right, there was no substantial evidence of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of the son, the instruction limiting the recovery to nominal damages should have been given. *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 551, 52 Am. Rep. 543, 6 Pac. 877; *Cherokee & P. Coal & Min. Co. v. Limb*, 47 Kan. 469, 471, 28 Pac. 181.

By the common law an adult child is under no legal obligation to support either parent; but, by statute, the state of Minnesota imposes an obligation upon children, if of sufficient ability, to support dependent parents residing in that state. Gen. Stat. 1894, §§ 1951, 1952. No reference to this statute, or claim under it, seems to have been made or considered in the court below, and none has been made in this court: nor has it been claimed that the father was a resident of Minnesota at the time of the son's death. Therefore the effect of the statute in a case to which it would be applicable has not been considered.

The judgment is reversed, with a direction to grant a new trial.

Hook, Circuit Judge, specially concurring:

I concur in the reversal of the judgment in this case upon the ground that, being influenced by the evidence and the ruling of the court, the jury probably included in their award of damages the pecuniary loss of others than the next of kin, and that it was not made sufficiently clear to them that they should not do so.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

J. WESLEY MYERS, Plff. in Err.,
v.

KNICKERBOCKER TRUST COMPANY.

(139 Fed. 111.)

Stockholders' liability—impairment of contract.

An unconstitutional impairment of contract is effected by the change of a law permitting individual creditors of a corporation to enforce their claims against individual stockholders to double the par value of their stock, so as to provide one suit in equity in behalf of all creditors, to which all stockholders may become parties, and abate suits pending under the former law.

(June 19, 1905.)

ERROR to the Circuit Court of the United States for the Middle District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to enforce defendant's liability as a holder of stock in an insolvent corporation. Affirmed.

The facts are stated in the opinion.

Case Note.—The holding of the court in *MYERS v. KNICKERBOCKER TRUST CO.* is, as stated therein, directly contrary to the previous decision of the highest court of Maryland in *Miners' & M. Bank v. Snyder*, 100 Md. 57, 68 L. R. A. 312, 59 Atl. 707, which, in considering the constitutionality of the same statute, held that no such change of remedy was made thereby as to impair the obligations of the contract as to a creditor who, before its passage, had commenced an action against a stockholder to enforce his statutory double liability for his own benefit.

Retroactive statutes changing the mode of enforcing stockholders' liabilities have been sustained in several cases where the change was much less pronounced than that made by the Maryland statute. Thus, the substitution of a proceeding by trustees in behalf of all creditors in equal ratio after the corporate assets have been exhausted, in place of previously existing remedies by an action at law by any creditor against any stockholder after the dissolution of the corporation, or by a bill in equity against all the stockholders to recover from each their proportionate share of the amount necessary to discharge the debt, was sustained in *Story v. Furman*, 25 N. Y. 214; *Herkimer County Bank v. Furman*, 17 Barb. 116; and *Walker v. Crain*, 17 Barb. 119. But, prior to such change, a court of equity could restrain any single creditor from prosecuting an action at law, and require the fund to be distributed ratably among the creditors in equity, so that no single creditor would be allowed to acquire priority of, or exclusive payment of, his claim. 1 L.R.A. (N.S.)

Argued before Acheson, Dallas, and Gray, Circuit Judges.

Messrs. C. E. Ehrehart and J. H. McNeal, for plaintiff in error:

There can be no such thing as a vested right in a remedy.

Wilson v. Simon, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022; *Bronson v. Kinzie*, 1 How. 315, 11 L. ed. 144; *State use of Isaac v. Jones*, 21 Md. 432; *Red River Valley Nat. Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; *Cooley*, Const. Lim. 442; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Penniman's Case (Vial v. Penniman)* 103 U. S. 714, 26 L. ed. 602; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Webb v. Den*, 17 How. 576, 15 L. ed. 35; *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513; *Madigan v. Workmen's Permanent Bldg. & L. Asso.* 73 Md. 317, 20 Atl. 1069; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

A statute transferring the right of action to enforce the statutory liability of stockholders from the creditors to trustees is constitutional.

And the substitution of an action by the receiver of an insolvent bank in place of an action by any creditor, unless such receiver refused, on request, to bring the action, was sustained in *Persons v. Gardner*, 42 App. Div. 490, 56 N. Y. Supp. 822, 59 N. Y. Supp. 463, Affirming 26 Misc. 663, 56 N. Y. Supp. 822. In this case, also, the action by the creditor, under the previous law, was in behalf of himself and all other creditors.

Nor does the substitution of a proceeding, by an assessment, directly upon the stockholders of an insolvent bank by its receivers, under the approval of the court, on due notice to the parties, to be made ratably on all stockholders liable therefor, of an amount sufficient to make up the probable deficiency, in place of the previous remedy by bill in equity by one or more bill holders in behalf of himself and all other bill holders, impair the obligation of the contract as to stockholders of existing banks. *Com. v. Cochituate Bank*, 3 Allen, 42.

Perhaps the case most directly opposed to *MYERS v. KNICKERBOCKER TRUST CO.* is that of *Hill v. Merchants' Mut. Ins. Co.* 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589, Affirming 86 Mo. 466, which affirmed 12 Mo. App. 148, in which the conditions were almost the exact opposite. Here a proceeding by notice and motion, in the action in which judgment was rendered against the corporation, for the amount of unpaid subscriptions of any stockholder, was substituted in place of a suit in equity against the stockholder, which was claimed by a stockholder to impair the obligation of his contract by depriving him of the right to

Story v. Furman, 25 N. Y. 214; Cutts v. Hardee, 38 Ga. 350; Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Western Nat. Bank v. Reckless, 96 Fed. 75.

The act of 1904 is clearly constitutional and valid.

Atkin v. Kansas, 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124; State v. Hyman, 98 Md. 596, 64 L. R. A. 644, 57 Atl. 6; Dorchester County v. Meekins, 50 Md. 39; Miners' & M. Bank v. Snyder (Md.) 68 L. R. A. 312, 59 Atl. 707; Ball v. Anderson, 196 Pa. 86, 79 Am. St. Rep. 693, 46 Atl. 366; Cushing v. Perot, 175 Pa. 66, 34 L. R. A. 737, 52 Am. St. Rep. 835, 34 Atl. 447.

The interpretation given the statute by the courts of the same state in which the statute was passed should be accepted as the proper interpretation of the same.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52.

Mr. W. Calvin Chesnut, for defendant in error:

If the highest courts of the state creating the corporation have decided that the liability imposed upon the stockholders is contractual in its nature, and may be enforced in a suit at law by a single creditor against a single stockholder, such liability may be enforced in the Federal courts sitting outside of the state creating the corporation.

obtain contribution from other stockholders, which he had under the law previously existing. The court, however, held that his liability to pay the amount of notes which he had given for such unpaid subscriptions had no such connection with the liability of other stockholders as to exempt him from an action at law for the amount which he had agreed to pay. In the court below, 12 Mo. App. 148, the court said that the change by which the creditor was given the direct and inexpensive remedy by motion, placing upon the stockholders the labor, delay, and expense of securing to themselves the equalization of their burdens as among themselves, instead of placing it on the moving creditor, who would not be benefited thereby, was not within the constitutional prohibition.

On the other hand, a retroactive statute, which, however, made a change much more pronounced than that made by the Maryland statute, has been held to impair the obligation of the contract in *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. Here, before the law was changed, as in the case of the Maryland statute, individual creditors of a corporation were permitted to enforce their claims for their own benefit, against individual stockholders. The statute provided for an action by the receivers of insolvent banks to enforce the liability of 1 L.R.A. (N.S.)

Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The retrospective feature of the act of 1904 is in conflict with article 1, § 10 of the United States Constitution, in that it impairs the obligation of the contract between the creditors of the corporation and the stockholders.

The liability of the stockholder to the creditor is contractual, and is not penal.

Norris v. Wrenschall, 34 Md. 492; *Colton v. Mayer*, 90 Md. 711, 47 L. R. A. 617, 78 Am. St. Rep. 456, 45 Atl. 874; 3 Clark & M. Priv. Corp. § 809, p. 2522.

The liability of the stockholders to the creditors is a primary obligation; that is, it is not necessary for the creditor to exhaust his rights against the corporation before suing the stockholder.

Hager v. Cleveland, 36 Md. 476; *Norris v. Wrenschall*, 34 Md. 492; *Fiery v. Emmert*, 36 Md. 464; *Garling v. Baechtel*, 41 Md. 305; *Colton v. Mayer*, 90 Md. 711, 47 L. R. A. 617, 78 Am. St. Rep. 456, 45 Atl. 874.

An individual creditor may sue an individual stockholder at law.

Norris v. Johnson, 34 Md. 485; *Garling v. Baechtel*, 41 Md. 305; *Cahill v. Original Big Gun Beneficial & Pleasure Assn.* 94 Md. 353, 89 Am. St. Rep. 434, 50 Atl. 1044; *Hammond v. Straus*, 53 Md. 11.

stockholders for equal distribution among its creditors, and suspended all right to maintain such action for one year after the closing of the bank.

And another statute applicable to corporations generally, requiring the receiver immediately to institute proceedings against all stockholders for the entire amount of their statutory liability for the benefit of all creditors, and providing for the distribution among the stockholders of any amount remaining after paying all claims against the corporation, together with the costs and expenses of the receivership, was held, in *Evans v. Nellis*, 101 Fed. 920, to impair the obligation of the contract, not only as to the creditor in taking away his immediate right to collect the debt of any particular stockholder for his own exclusive use, and diverting part or all of the amount collected to paying the costs, expenses, and commissions of the receiver and the claims of other creditors, but also as to the stockholder, by requiring payment of the entire amount of his liability regardless of whether or not it was needed to pay debts, and taking away the previously existing right to interpose any defense available against the creditor bringing suit against him.

The same statute was also held to be invalid, for the same reason, in *Webster v. Bowers*, 104 Fed. 627.

The stockholders' liability is not a fund for the *pro rata* benefit of all creditors, but the stockholders are liable to only those creditors to whom debts were contracted by the corporation while they were stockholders.

Weber v. Fickey, 47 Md. 196; Colton v. Mayer, 90 Md. 711, 47 L. R. A. 617, 78 Am. St. Rep. 456, 45 Atl. 874.

A law which undertakes entirely to repeal a liability of this character impairs the obligation of the contract, and is unconstitutional.

Norris v. Wrenschall, 34 Md. 492; Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120; Provident Sav. Inst. v. Jackson Place Skating & Bathing Rink, 52 Mo. 552; Conant v. Van Schaick, 24 Barb. 87.

Under the guise of effecting the remedy, the act really impairs the contract itself.

Baugh v. Nelson, 9 Gill, 299, 52 Am. Dec. 694; Garrison v. Hill, 81 Md. 556, 32 Atl. 191.

Not every change of remedy is valid.

State use of Isaac v. Jones, 21 Md. 433; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 18 L. ed. 403; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Walker v. Whitehead, 16 Wall. 317, 21 L. ed. 357; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748.

The alternative remedy given by such a statute must be equally adequate and efficacious.

Colton v. Mayer, 90 Md. 711, 47 L. R. A. 617, 78 Am. St. Rep. 456, 45 Atl. 874; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Dexter v. Edmands, 89 Fed. 467; Western Nat. Bank v. Reckless, 96 Fed. 70; Webster v. Bowers, 104 Fed. 627; Evans v. Nellis, 101 Fed. 920.

A state statute may not abolish the jurisdiction of the Federal court which has attached.

Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; Union Bank v. Vaiden, 18 How. 503, 15 L. ed. 472; Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 548, 13 Sup. Ct. Rep. 695; Reagan v. Farmers' Loan & T. Co. 154 U. S. 391, 38 L. ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 517, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; Shepard v. Tulare Irrig. District, 94 Fed. 4; Eastern Bldg. & L. Asso. v. Bedford, 88 Fed. 7; Hunt v. Danforth, 2 1 L.R.A. (N.S.)

Curt. C. C. 592, Fed. Cas. No. 6687; Demeritt v. Exchange Bank, Brunner, Col. Cas. 598, Fed. Cas. No. 3,780; Hyde v. Stone, 20 How. 170, 15 L. ed. 874.

Gray, Circuit Judge, delivered the opinion of the court:

The defendant in error, a corporation of the state of New York (hereinafter called the plaintiff) brought suit against the plaintiff in error (hereinafter called the defendant) upon his statutory liability as a holder of 200 shares of the capital stock of the City Trust & Banking Company, an insolvent corporation of the state of Maryland, of which the plaintiff was a creditor to the extent of \$65,000.

The suit, which was an action at law, was instituted on March 21, 1904, in the circuit court of the United States for the middle district of Pennsylvania, and came on to be tried on June 13, 1904. The alleged liability was based upon an act of the general assembly of Maryland, of 1892, chap. 109, § 851, p. 156, of which enacts that "each stockholder shall be liable to the depositors and creditors of any such corporation for double the amount of stock, at the par value, held by such stockholder in such corporation." The charter of the said City Trust & Banking Company, by an express provision thereof, was made subject to this provision of the statute. It is a proposition of general law, and not here disputed, that, to quote the language of the learned judge of the court below, "the liability so imposed is absolute, direct, and several, and any stockholder may be pursued by action at the instance of a creditor, and judgment recovered to the full extent fixed by the statute, so far as it is necessary to satisfy his claim, provided the stockholder has not already paid other corporate debts, for which, so far as he has, he is entitled to credit *pro tanto*." [133 Fed. 764.] Nor is it denied that this is the law of Maryland, as evidenced by numerous decisions of its court of last resort. The relation between a creditor of a corporation and a stockholder therein who has become such subject to the statutory liability thus imposed is a contractual one, and the obligation arising therefrom, may be enforced by any appropriate remedy at law or in equity. The right of action is transitory, and may be pursued in a court of competent jurisdiction in any state where such stockholder may be found.

Such being the state of the law when suit in the present case was instituted, the general assembly of the state of Maryland, by the act of March 25, 1904, p. 179, chap. 101, repealed § 851 of the act of 1892, as

above quoted, and re-enacted the same so as to read as follows:

"851. The stockholders of every such corporation shall be held individually responsible, equally and ratably, and not one for another for all contracts, debts, and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee, or pledgee, shall not be personally subject to any liability on such stockholders, but the persons pledging the stock and the estate and funds in the hands of such executor, administrator, guardian, or trustee, shall be subject to the liability imposed upon the holders of said shares. And the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary, to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee, or trustee of such corporation, acting under the orders of a court of competent jurisdiction; provided that this act shall not affect the rights or remedies of any creditor or depositor under the existing laws of this state against the stockholders of any such corporation, who were liable to any such creditor or depositor at the date of the passage of this act."

It will be observed that this act, by its express terms, was not retrospective, by reason of the proviso at the close of this section, 851 as re-enacted. Eighteen days thereafter, however, to wit, April 12, 1904, an act of the said general assembly was approved (being chap. 337, p. 597, of the Acts of 1904), by which it was provided that "the exclusive remedy for the enforcement against stockholders of all rights existing under the Code of Public General Laws, article 23, § 851, as said section stood before the repeal thereof by the act of March 25th, 1904," and the re-enactment of the same, with amendments, and which rights "were declared by said act not to be affected by the terms thereof, shall be, as against stockholders residing in the state of Maryland, by bill in equity in the nature of a creditors' bill, filed against such stockholders by one or more creditors, on behalf of themselves and all other creditors of the corporation who may come in and make themselves parties thereto, in a court having jurisdiction within the limits of the county or the city of Baltimore in which, as the case may be, the principal office of the corporation is situated at the time of the filing of the bill, or in case any such cor-

poration has, by reason of having been placed in the hands of a receiver, or from any other cause, ceased to have any principal office at the time of the filing of the bill, then the bill shall be filed in a court having jurisdiction within the limits of the county or the city of Baltimore, in which, as the case may be, the said corporation had its last and principal place of business; and to any such bill, stockholders residing beyond the limits of the state of Maryland may become parties defendant, and, upon so becoming parties, shall not be proceeded against in any other state or territory or in the District of Columbia in respect to any liability imposed by the said § 851, as said section stood before the repeal thereof, and which existed at the time of the passage of the act of 1904, hereinbefore referred to. This section shall become operative as of January 1st, 1903, and shall cause the abatement of all actions at law which shall have been brought against said stockholders since that date to enforce any liability created by § 851, as said section stood before the repeal thereof, and which existed at the time of the passage of the act of 1904, hereinbefore referred to: provided, however, that as to any plaintiff or plaintiffs in any of said abated suits who shall, within sixty days from the passage of this act, become a party or parties to a bill in equity of the character mentioned in this section, then, as regards the operation of the statute of limitations upon the claims so sued on, the time elapsed between the institution of said abated suits and the time of such plaintiff or plaintiffs becoming a party or parties to said bill in equity shall be excluded in ascertaining the period within which suits are required to be brought by the said statute of limitations. The costs taxable to any plaintiff or plaintiff in any action at law which shall be abated under the provisions of this section, the plaintiff or plaintiffs in which action shall become a party or parties to a bill in equity under the provisions of this section, shall become a part of the costs taxable in the proceedings in said equity case."

The court below permitted this act to be given in evidence by the defendant under the plea of *non assumpsit*, as also the fact that on June 9, 1904, four days before this case was called for trial, the defendant had become a party defendant to a bill in equity in Baltimore city, under the provisions of said act. At the conclusion of the case, the defendant, in several prayers, asked the court to withdraw the case from the jury, and rule that the plaintiff must be nonsuited, on account of the passage of this act and the fact that he had become a party to the equity suit pursuant to its provi-

sion in that behalf. The court, however, declined to do so, and directed a verdict for the plaintiff, subject to two points of law which were reserved, with the first of which only we are here concerned, to wit, "whether there was any evidence on which the plaintiff was entitled to recover, with leave to enter judgment in favor of the defendant, notwithstanding the verdict, if the court should be of the opinion that, upon the law, judgment should be so entered." The rule for judgment *non obstante veredicto* on the points reserved was afterwards discharged and judgment entered upon the verdict. There are several assignments of error, but, by stipulation of counsel, the only question for our determination is the constitutionality of chapter 337, p. 597, of the Acts of 1904.

It is to be observed that this act is entirely retrospective. It applies necessarily by its terms only to the rights of creditors against stockholders, as they existed under article 23, § 851 of the law of 1892, at the time of its repeal, which were declared by said repealing act not to be affected by the terms thereof. It is contended by the plaintiff, and so held by the court below, that this act impaired the obligation of the contract between it and the defendant as it existed at the time of its passage (April 12, 1904), and at the time of the institution of this suit for the enforcement of the same on March 21, 1904.

The liability of each stockholder to any creditor of the corporation, for double the amount of the par value of his stock, under the act of 1892, was statutory, but it was, as we have said, contractual in its nature, each stockholder voluntarily agreeing to incur the liability at the time of his becoming such. The creditor was authorized to sue and collect from any stockholder to the extent of such liability, without first exhausting his remedies against the corporation, the liability of the stockholder to the creditor being a primary obligation. The nature of the liability under the act of 1892, which we are now considering, is thus authoritatively stated by the court of appeals of Maryland, in the very recent case of *Miners' & M. Bank v. Snyder* (Md.) 68 L. R. A. 312, 59 Atl. 707, hereinafter referred to: The "act 1892, chap. 109, p. 153, which was then in force, created the liability of the stockholders of a trust company for its debts. That particular act has not heretofore been the subject of consideration by us, but we have several times had occasion to construe provisions of the Code and special charters imposing a liability of like nature upon stockholders in manufacturing and other corporations. In those cases we determined that such liability does not constitute a

corporate asset, enforceable by a receiver of the corporation, but it is a debt due directly by the stockholder to those persons who became creditors of the corporation while he held its stock. We further held that any such creditor could enforce the liability by a separate action against any stockholder from whom it was due, and recover the debt from him to the extent of double the par value of the stock held by him at the time it was contracted. It was thus made possible for the creditor, by the exercise of superior skill and diligence, to secure payment in full of his debt from the stockholder sued by him, to the exclusion of the other creditors. *Matthews v. Albert*, 24 Md. 535; *Norris v. Wrenschall*, 34 Md. 501; *Hammond v. Straus*, 53 Md. 10; *Attrill v. Huntington*, 70 Md. 197, 2 L. R. A. 779, 14 Am. St. Rep. 344, 16 Atl. 651; *Colton v. Mayer*, 90 Md. 717, 47 L. R. A. 617, 78 Am. St. Rep. 456, 45 Atl. 874, and cases there cited."

Accepting this interpretation of the Maryland act of 1892, by the court of last resort of that state, we are relieved from the necessity of independent interpretation on our part. It was to enforce the debt thus directly due from the stockholder to the creditor, the corporation plaintiff, that the suit below was instituted. The contention of the defendant below was, and is here, that though the payment of this debt was admittedly enforceable, by the suit as instituted, prior to the enactment of the statute of April 12, 1904, it was no longer so after the enactment of the same, and that the suit, by force of this statute, must abate. It is clear that such was the intended operation of this statute.

Whether the passage of such a law is within the competence of the state legislature is the single question now before us. The force and effect of the provision of § 10 of article 1 of the Constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts, has been considered by the Supreme Court of the United States in cases far too numerous for exhaustive citation.

In the earliest case in which the contract clause of the Constitution came up for direct and extensive discussion (*Sturges v. Crownshield*, 4 Wheat. 122, 197, 4 L. ed. 529, 549), Chief Justice Marshall's definition of the words "obligation of a contract," as used in this clause of the Constitution, is, perhaps, as satisfactory as any since formulated. He says: "In discussing the question whether a state is prohibited from passing such a law as this [an insolvent law], our first inquiry is into the meaning of words in common use,—

'what is the obligation of a contract?' and 'what will impair it?' It would seem difficult to substitute words which are more intelligible, or less liable to misconception, than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract."

Distinction was early made between those acts of the state legislature which merely affected or modified the remedy upon a contract, without destroying the same, and those which affected its substantial obligation. In applying this distinction, however, the decisions of the Supreme Court show increasing care to protect the substantial obligation of a contract from impairment by subsequent legislation which changes or modifies the remedy for its enforcement.

Chief Justice Taney, delivering the opinion of the Supreme Court in *Bronson v. Kinzie*, 1 How. 311, 317, 11 L. ed. 143, 145, says: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *McCracken v. Hayward*, 2 How. 608, 611, 11 L. ed. 397, 398, the Supreme Court says: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. . . . If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence, any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In *Seibert v. Lewis* (*Seibert v. United States*) 122 U. S. 284, 294, 30 L. ed. 1161, 1165, 7 Sup. Ct. Rep. 1190, 1194, the Supreme Court, speaking by Mr. Justice Matthews, says: "It is well settled by the decisions of this court, that the remedy subsisting in a state when and where the contract is made and is to be performed is

a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." *Edwards v. Kearzey*, 96 U. S. 595, 607, 24 L. ed. 793, 798. It had been previously said, upon a review of the decisions of the court, in *Von Hoffman v. Quincy* (*United States ex rel. Von Hoffman v. Quincy*) 4 Wall. 535, 553, 18 L. ed. 403, 409: "It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void." . . . In *Louisiana v. New Orleans*, 102 U. S. 203, 206, 26 L. ed. 132, 133, Mr. Justice Field, in the opinion of the court, said: "The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court."

In *Bryan v. Virginia*, 135 U. S. 685, 693, 34 L. ed. 312, 314, 10 Sup. Ct. Rep. 972, 982, the Supreme Court, speaking by Mr. Justice Bradley, says: "It is well settled by the adjudications of this court, that the obligation of a contract is impaired in the sense of the Constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy, equally adequate and efficacious."

Let us consider, then, how the act of April 12, 1904, if given the effect claimed for it, operates upon the law of the contract, as it existed at the time it was passed. We have already seen that the right of the plaintiff, as a creditor of the corporation when this suit was instituted, was to demand from the defendant, as a stockholder, payment of or upon his debt, up to the amount of double the par value of defendant's stock; that by the exercise of diligence, this right might become, and in this

case actually did become, exclusive of that of every other creditor as to this particular defendant, and that the right was enforceable in a common-law suit, such as was being proceeded with in the circuit court of the United States for the middle district of Pennsylvania, at the time of the passage of the said act of April 12, 1904. But, by this latter act, it was provided that the exclusive remedy for the enforcement against stockholders of such rights as existed under the act of 1892, and which were saved by the repealing and re-enacting act of March 25, 1904, should be by a bill in equity against stockholders residing in the state of Maryland, by one or more creditors, on behalf of themselves and all other creditors of the corporation who should come in and make themselves parties thereto in a state court having jurisdiction within the limits of the city of Baltimore, and that to any such bill, stockholders residing beyond the limits of Maryland might become parties defendant, and, upon so becoming, should not be proceeded against in any other state or territory in respect of any liability imposed by said § 851 (being the law of 1892). This is indeed a change of remedy, but one so drastic that it operates directly upon the contract and clearly impairs its obligation. Before the passage of the act, the contract which the plaintiff was properly seeking to enforce was one by which the stockholder had incurred an obligation to the plaintiff to respond to his demand, in a suit prosecuted with the requisite diligence, in a sum twice the amount of the par value of his stock. The remedy to enforce this right, and which was being pursued by the plaintiff at the time of the passage of the obnoxious law, was the one decided to be appropriate by the court of last resort in the state of Maryland. It was something more, then, than a mere change of remedy, to say that the right thus described and defined as existing under the law of Maryland of 1892, as interpreted by the highest courts of that state, no longer existed, but that this liability of the individual stockholder to the individual creditor should be changed into a right vested in all the creditors, to proceed in one action against all the stockholders. As said by Judge Lowell, in *Dexter v. Edmands*, 89 Fed. 467, "It is a difference between two substantive rights." It is not a question of an alternative and equally efficacious remedy for the enforcement of a right, but a change in the essential nature of the right itself, and a clear impairment of the obligation

of the contract out of which such right arose. The Maryland statute of 1892 gives this plaintiff, as an individual, a substantive right as against this individual defendant. The law of April 12, 1904, says that this substantive right can no longer be enforced. We have no difficulty, therefore, in deciding that this act of the legislature of Maryland, of April 12, 1904, entirely retrospective in its operation as it is, is void as being within the inhibition of article 1, cl. 10, of the Constitution, declaring that no state shall pass a law impairing the obligation of contracts.

With the policy of this later law, we are not here concerned. It may well be that it is wiser and more equitable to make this stockholders' liability an asset of the corporation, and either to allow a receiver to collect from all stockholders, and account *pro rata* to all creditors, or to accomplish the same result by a creditors' bill, in which all creditors may be parties and all stockholders defendants. But the law of the contract was not of this character at the time the liability of the defendant to the plaintiff accrued. The only question before us is whether the law of 1904 works an impairment of the contract existing between plaintiff and defendant at the date of its passage. Our attention has been called to the case of *Miners' & M. Bank v. Snyder* (Md. decided November 30, 1904, not yet officially reported) 68 L. R. A. 312, 59 Atl. 707, and above quoted from. In that case, the court of appeals of the state of Maryland had before it the very questions here presented, as to the effect of the law of 1904 upon the rights of creditors of an insolvent corporation as they existed under the law of 1892, and have come to an opposite conclusion to that which we have just stated as our own in the case before us. They held that this act does not impair the obligation of a contract, as the legislature had the power to alter and modify the remedy to enforce the contract, without impairing its obligation. We have read the opinion and judgment of the court in this case, with the interest and respect due to its high character, and with the deference to which it is entitled as the court of last resort in the state whose legislation is now under review. We are, however, compelled to adhere to the views we have expressed, and regret that they should be in opposition to those of that learned tribunal.

The judgment of the court below must therefore be affirmed.

GEORGIA SUPREME COURT.

E. W. WATSON, Plff. in Err.,
v.

AUGUSTA BREWING COMPANY.

(.... Ga.)

1. Beverage—injury to consumer—liability.

A manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not negligently to allow a foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when it is placed on sale; and one who, relying on this obligation, and without negligence on his own part, swallows several pieces of glass while drinking the beverage from a bottle, may recover from the manufacturer for injuries sustained in consequence.

2. Damages—mental suffering.

One who, under the circumstances stated in the preceding headnote, swallows several pieces of glass, which are subsequently removed from his stomach, leaving apparently no permanent injuries, may recover on account of mental suffering caused by the fear of death while the glass was in his stomach; but a vague fear, after the removal of the glass and he has been restored to health,

Headnotes by CANDLER, J.

Case Note.—In *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L. R. A. 612, 20 Am. St. Rep. 324, 10 S. E. 118, upon which the decision in *WATSON v. AUGUSTA BREWING Co.* relies, it appears that the plaintiff, having purchased a proprietary medicine at a drug store, took the dose prescribed upon the bottle, with the result that he was injured by the effect of a dangerous drug which it contained, and of which he had no knowledge or means of knowledge except through a chemical analysis. The ingredients being secret, the court says that the consumer "has a right to rely upon the statement and recommendation of the proprietor, printed and published to the world, and if, thus relying, he takes the medicine, and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained."

This is in accord with the broad and settled rule of duty which the law imposes upon everyone to avoid acts which are in their nature dangerous to the lives or health of others.

Thus it is held in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, that a wholesale dealer in drugs, whose agent erroneously labeled belladonna as "dandelion," is liable in an action of negligence, for an injury to a consumer who purchased from a retail dealer. "Nothing but mischief like that which actually happened could have been ex-

pected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of the act."

(November 9, 1905.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Candler, J.:

The allegations of the petition were substantially as follows: The Augusta Brewing Company is a Georgia corporation, engaged in the manufacture of certain drinks, among them soda water, which it sold as a refreshing and harmless drink. On a named date it sold to a merchant in Thomson, Georgia, some of its soda water, which the merchant placed on sale, "relying on the implied warranty of defendant that said soda water was suitable for salable purposes as a refreshing and harmless drink. Some of this soda water was, with the permission of the merchant mentioned, taken from his stock by the plaintiff and drunk from the bottle. "While drinking said soda water, . . . plaintiff swallowed three

pected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of the act."

Of the same character of negligence is the careless filling of a prescription, as in *Peters v. Johnson* (*Peters v. Jackson*) 50 W. Va. 644, 57 L. R. A. 428, 88 Am. St. Rep. 906, 41 S. E. 190, where a druggist was held liable to a third party, injured by the taking of saltpeter erroneously put up as epsom salts on an order by another party.

It thus appears that whether the negligence consists in negligently misnaming a dangerous drug, putting the wrong drug into a prescription, prescribing too large a dose of a medicine containing a dangerous drug, or, as in the case in hand, permitting dangerous substances to find their way into an otherwise harmless drink, the original vendor is held liable.

Contributory negligence on the part of the plaintiff, however, defeats his recovery. A party who takes "black drops" after a warning from the vendor that they are poisonous leaves no right of action surviving him. *Wohlfahrt v. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406. See, however, *Fisher v. Golladay*, 38 Mo. App. 531, where it is held not enough to establish contributory negligence as a matter of law that, upon mixing the drug with another, its action "may have appeared queer or suspicious." And in *Davis v. Guarneri*, 45 Ohio St. 470, 4 Am. St. Rep.

pieces of glass, or perhaps more, without knowing it, and one large piece of glass lodged in plaintiff's throat. . . . Said glass which plaintiff swallowed and the said piece of glass which lodged in plaintiff's throat were in the said soda water which plaintiff was drinking." Plaintiff immediately went to a physician, who extracted from his stomach three pieces of glass; plaintiff having previously ejected from his throat the piece of glass which had lodged therein. The bottle from which plaintiff drank the soda water was in good condition, and had no rough edges or other peculiarities which could put plaintiff on notice of the presence of the glass inside the bottle. The pieces of broken glass which he swallowed were in the bottle when it was filled, and the defendant was grossly negligent in leaving fragments of glass in the bottle, and in offering for sale for drinking purposes soda water containing pieces of broken glass. The defendant, by the exercise of ordinary care, could have known of the presence of the glass in the bottle, while plaintiff did not know and had no means of knowing it. Plaintiff was entirely free from fault, and drank the soda water, thinking it was safe to do so. Plaintiff suffered great physical pain while the glass was in his stomach and in having it extracted therefrom, "and plaintiff suffered

untold mental agony between the time he drank the soda water, when he swallowed the said glass, and before he could have the said glass taken from his stomach, fearing that an untimely death would be the result of the glass cutting him on the inside; and plaintiff still fears that he may yet suffer torture from injuries sustained by the glass cutting him on the inside, or, perhaps, from some of the glass which might not have been taken from his stomach, and which is still in plaintiff's stomach, and which may yet cause plaintiff's death. The suspense and agony which plaintiff suffers from what may yet be the dreaded results of this injury are great, and render plaintiff almost paralyzed with fear." Damages were laid in the sum of \$2,000. By amendment it was alleged that it was customary to drink bottled soda water from the bottle, and that the defendant was aware of this custom. The defendant demurred generally and specially, the grounds of special demurrer being that the petition endeavors to join inconsistent causes of action,—one, an action on an implied warranty and the other, an action in tort; that no physical injury is alleged; that the petition fails to allege the size or kind of glass that it is alleged was swallowed; that it does not appear whether the plaintiff was a purchaser or a donee of the bottle of soda water drunk by him;

548, 15 N. E. 350, it is held that the negligence of a husband cannot be attributed to his wife, who was injured by reason of the wrong labeling of a drug.

In the case of food, there is, of course, an implied warranty by the vendor that it shall be fit for consumption; but this contractual liability extends no further than to the purchaser, or the one for whom it is understood that such purchaser buys. On the other hand, his liability for negligence may be asserted by anyone who eats such food, regardless of the vendor's knowledge that it was bought for him. Thus in *Craft v. Parker, W. & Co.* 96 Mich. 245, 21 L. R. A. 139, 55 N. W. 812, where the latter principle is applied under circumstances which would seem to justify the application of the former as well, it is held that a vendor of spoiled meat is liable for the poisoning of the husband of the vendee, which resulted from the condition of the meat. If it is found, says the court, that he was negligent in selling meats that were dangerous to those who ate them, he will be liable for the consequences of his act if he knew them to be dangerous, or, by proper care on his part, could have known their condition.

A caterer is held in *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, to be liable to an action for negligence in furnishing unwholesome food at a ball, whereby plaintiff was injured. The guests "have a right to assume that he will furnish

for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties."

Applying the same principle also are the cases of *State use of Hartlove v. M. Fox & Son*, 79 Md. 514, 24 L. R. A. 679, 47 Am. St. Rep. 424, 29 Atl. 601, and *Skinn v. Reutter*, 135 Mich. 57, 63 L. R. A. 743, 106 Am. St. Rep. 384, 97 N. W. 152. In the former it is held that one who sells a horse known to be infected with glanders to one who is ignorant of this fact is liable for the death of the latter's employee, who contracts the disease as the natural and probable consequence of his contact with the horse. In the latter the rule is broadened so as to render one who sells hogs, sick with an infectious disease, which may endanger human life, liable to persons not immediately connected with the transaction, whose hogs are infected by reason of their contact with the hogs of such vendor.

The liability of the immediate vendor to the purchaser in cases of tort for sale of unwholesome food or drugs has often been upheld, as shown in the note to 21 L. R. A. 139.

that there is no allegation as to the manner, time, or place of defendant's negligence, nor that the defendant intended the bottles containing the soda water to be used as drinking vessels; and that the allegations as to the plaintiff's apprehensions of what might have existed or developed, or might in the future exist or develop, "were irrelevant and illegal." The court sustained the demurrer generally, and dismissed the petition, whereupon the plaintiff excepted.

Mr. G. L. Callaway, for plaintiff in error:
The law imposes the duty of diligence in such a case.

Blood Balm Co. v. Cooper, 83 Ga. 459, 5 L. R. A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Smith v. Clarke Hardware Co. 100 Ga. 165, 39 L. R. A. 607, 28 S. E. 73; 16 Am. & Eng. Enc. Law, p. 419; Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154.

The author of an original wrongful act is responsible for the resulting injury, though the damages to the party injured occur through the intervention of the legal and innocent acts of third parties.

Smith v. Clarke Hardware Co. 100 Ga. 165, 39 L. R. A. 607, 28 S. E. 73; Woodward v. Miller, 119 Ga. 618, 64 L. R. A. 932, 100 Am. St. Rep. 188, 46 S. E. 847.

Mr. William H. Barrett, for defendant in error:

There was no privity of contract in this case.

McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381, 55 L. R. A. 822, 91 Am. St. Rep. 637, 50 Atl. 651; Heizer v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L. R. A. 823, 33 Am. St. Rep. 482, 19 S. W. 630; Cobb v. Clark Co. 118 Ga. 483, 45 S. E. 305; Huset v. J. I. Case Threshing Mach. Co. 61 L. R. A. 303, 57 C. C. A. 237, 120 Fed. 865; Peters v. Johnson (Peters v. Jackson) 50 W. Va. 644, 57 L. R. A. 428, 88 Am. St. Rep. 909, 41 S. E. 190; Lewis v. Terry, 111 Cal. 39, 31 L. R. A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; Smith v. Clarke Hardware Co. 100 Ga. 163, 39 L. R. A. 607, 28 S. E. 73.

Candler, J., delivered the opinion of the court:

1. When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that, in the process of bottling, no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be in-
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jurious. The case of Woodward v. Miller, 119 Ga. 618, 64 L. R. A. 932, 100 Am. St. Rep. 188, 46 S. E. 847, is hardly in point; for in that case the manufacturer knew of the defect, and fraudulently concealed it from the purchaser. Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L. R. A. 612, 20 Am. St. Rep. 324, 10 S. E. 118, while differing somewhat as to its facts, furnishes strong reasoning to support the principle announced. The composition of patent or proprietary medicines is usually shrouded in mystery, and it is generally understood that many such remedies contain ingredients which, if taken in sufficient quantities, will produce injurious results upon the person taking them. If, then, one who buys a patent medicine may rely upon the obligation of the manufacturer not to place therein ingredients which, if taken in prescribed doses, will injure his health, certainly the purchaser of an alleged harmless and refreshing beverage should have the right to rest secure in the assumption that he will not be fed on broken glass. It does not matter that the plaintiff in the present case did not buy the soda water from the defendant, or that there was no privity of relationship between them. The duty not negligently to injure is due by the manufacturer, in a case of the particular character of the one under consideration, not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. On this subject, see, also, Blood Balm Co. v. Cooper, *supra*.

2. It follows from what has been ruled that the court below erred in sustaining the general demurrer. We are equally clear that many of the grounds of the special demurrer are without merit. While the petition contains the wholly unnecessary allegation that the dealer who purchased the soda water from the defendant relied upon its implied warranty that the drink was harmless, the suit cannot, by any possibility, be construed as one upon a warranty, as it is plainly an action in tort. While there is no distinct allegation of permanent disability, the physical suffering of the plaintiff, growing out of the swallowing of the glass and its removal from his stomach, was set out with sufficient definiteness to furnish a basis of recovery; and there was no lack of the required definiteness as to the time, place, and manner of the defendant's negligence. In the latter particular the case differs from Hudgins v. Coca Cola Bottling Co. 122 Ga. 695, 50 S. E. 974, in that there the petition was entirely silent as to what constituted the negligence com-

plained of, while here it is distinctly alleged that the defendant was negligent in leaving glass in the bottle when it was filled. A somewhat peculiar ground of demurrer is the one which seeks to place upon the plaintiff the onus of showing "the size and kind of glass" that he swallowed. Courts have gone far in requiring particularity of pleading; but we are not aware of any rule which would require a man who has unconsciously swallowed several pieces of glass to make a note of the shape, size, color, and character of the pieces after they have been removed from his stomach, in order to describe them in bringing suit to recover from the one who is responsible for his having swallowed them. It was not necessary to allege that the defendant intended that the bottles containing its soda water should be used as drinking vessels. It is sufficient for the purpose of this suit that such was the custom and it was cognizant thereof.

The only remaining point to be considered is whether or not the plaintiff in this case can recover for mental suffering growing out of his injury, and, if so, to what extent. It is a familiar principle that, where a physical injury has been sustained, the person injured may recover for mental suffering caused by or growing out of his bodily hurt. One may not recover, however, for mental suffering which is not reasonable, or which is merely fanciful. It can hardly be disputed that a reasonable fear of death constitutes mental suffering of a very keen sort. It is not unreasonable, we think, for one who has swallowed several pieces of glass to entertain a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury. But after the glass has been removed from his stomach, and he is apparently restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease. He may not continue for an indefinite period to vex his soul with dread on account of having been "cut on the inside," and hold the defendant liable for his apprehensions. It follows, therefore, that so much of the petition as seeks to recover on account of mental suffering endured since the glass was removed from the plaintiff's stomach should be stricken; and direction is given that, when the case is tried again, the special demurrer be sustained in so far as it attacks this portion of the petition.

Judgment reversed, with direction.

All the Justices concur.

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GEORGIA SUPREME COURT.

C. W. HODGES, Plff. in Err.,

v.

R. B. WATERS.

(.... Ga.)

Duty to pay rent to stranger.

One who goes into possession of land as the tenant of another cannot set up title adverse to the landlord, from whom he thus obtained possession, until there has been a surrender of the premises by the tenant to the landlord. However, if a tenant thus in possession expressly agrees to pay rent to another for a given time, he will be bound by these terms, if founded upon a sufficient consideration; but, after the expiration of the time fixed in the express agreement, no promise to pay rent will be implied, and such person may deny liability for rent after that time, although he still remains in possession of the premises as the tenant of the person who placed him in possession.

(November 13, 1905.)

ARROR to the Superior Court for Bulloch County to review a judgment in favor of plaintiff in an action brought to enforce payment of rent. Reversed.

Defendant took possession of the property for the use of which the rent was alleged to be due under an agreement with Mrs.

Headnote by COBB, P. J.

Case Note.—The doctrine that a tenant in possession previous to the acceptance of the lease may dispute his lessor's title, which is the subject of many conflicting decisions, has been apparently seldom restricted in its application, as in *HODGES v. WATERS*, to cases where such lease has expired.

In *Accidental Death Ins. Co. v. Mackenzie*, 5 L. T. N. S. 20, 10 C. B. N. S. 870, it was held that a tenant in possession at the time of taking a lease might dispute the lessor's title after its termination without first surrendering possession, apparently in reliance on the rule stated in Co. Litt. 47 b, hereinafter stated. The court seems also to have been influenced by the argument that it would be idle to require the lessee to give up possession when he might make an entry upon the land or bring ejectment. But in *Bigelow, Estoppel*, 5th ed. p. 532, it is said that it would seem to be a sufficient ground to sustain the foregoing case that a contemplated assignment between the original lessor and the party to whom attornment was made was never perfected.

In *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122, the question whether, where the tenant is in possession at the time of taking the lease, the title of the lessor covering and outlasting the period of the tenancy could be made a basis of an implied contract to pay rent after the expiration of the lease,

Sarah Waters. She conveyed the property to R. B. Waters, her son, and subsequently defendant entered into a written contract to pay rent to Mr. Waters. At the termination of this contract it was not renewed, and this action was brought to recover the rent due for the time subsequent to the expiration of the contract, on the theory that defendant was holding over under its terms.

Further facts appear in the opinion.

Messrs. **Brannen & Booth**, for plaintiff in error:

Hodges could not, having once recognized Mrs. Waters as his landlord and entered the land as her tenant, attorn to any other person.

Code, §§ 3116, 3122; *Jackson v. Mowry*, 30 Ga. 143; *Morgan v. Morgan*, 65 Ga. 493; *Grizzle v. Gladdis*, 75 Ga. 354; *Lathrop v. Standard Oil Co.* 83 Ga. 307, 9 S. E. 1041; *Beckham v. Maples*, 95 Ga. 774, 22 S. E. 804.

Mr. G. S. Johnston for defendant in error.

Cobb, P. J., delivered the opinion of the court:

The rule that one who goes into possession of land as a tenant of another is estopped to deny the title of him who occupies the

relation of landlord in the agreement is familiar law. In the application of this rule it is immaterial whether the landlord is the owner or has any legal interest in the premises. It is sufficient, as between him and his tenant, that he claims ownership, and, as a result of this claim, the tenant is put in possession and allowed to occupy the premises. *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291. Upon the question as to whether this estoppel operates where the tenant, at the time the contract of rental is made, is already in possession through another and former landlord, or another claim of title, the authorities are at variance. In *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129, the supreme court of California held that, if one in possession takes a lease from a stranger, the lessee so in possession is not estopped to deny the title of the lessor, since the latter parts with nothing, and the former has obtained nothing, by the transaction. This decision seems to follow an older decision, and in both cases one of the judges dissented. The better rule seems to be that laid down by the supreme court of Colorado in *Lyon v. Washburn*, 3 Colo. 201, where it is said that an attornment by one in possession estops the tenant from denying his

was alluded to, but not decided. It was held that a tenant in common, who, while in possession of the premises, took the lease of an interest therein from a claimant thereof, was not liable for rent, on the ground that attornment cannot be made to anyone not in privity to the title under which the possessor holds; and that, since no possession was given, the promise to pay rent was void for want of consideration.

The doctrine of the foregoing case is, however, to be limited to cases where the lessee was rightfully in possession, and has no application where such possessor is a mere trespasser. *Campau v. Lafferty*, 43 Mich. 429, 5 N. W. 648.

Further aid to the elucidation of the question decided in the case in hand may be derived from an examination of the general question as to the effect of possession previous to the acceptance of a lease on the right to dispute the title. The weight of authority seems to be that the lessee will be estopped from disputing the lessor's title. *McConnell v. Bowdry*, 4 T. B. Mon. 392; *Prevot v. Lawrence*, 51 N. Y. 219; *Caldwell v. Smith*, 77 Ala. 157; *Parrott v. Hungelburger*, 9 Mont. 526, 24 Pac. 14; *Bowdish v. Dubuque*, 38 Iowa, 341; *Thayer v. Society of United Brethren*, 20 Pa. 60; *Farmer v. Pickens*, 83 N. C. 549; *Bigelow, Estoppel*, 5th ed. p. 534. *Jones, Land. & T.* § 697, gives as the reason for this rule, that, although the party asserting the estoppel may not have lost the advantage of parting with possession, he may have been led into some admission or conduct prejudicial to his title, 1 L.R.A. (N.S.)

which otherwise would not have been.—a view derived from *Bigelow* through *Farmer v. Pickens, supra*.

There is a class of cases which constitute an exception to the rule that the lessee is estopped to deny the title of his lessor, in which the lease was taken through force, fraud, misrepresentation, or mistake. *Swift v. Dean*, 11 Vt. 323, 34 Am. Dec. 693; *Carter v. Marshall*, 72 Ill. 609; *Shultz v. Elliott*, 11 Humph. 183; *Claridge v. Mackenzie*, 4 Mann. & G. 143; *Doe ex dem. Higginbotham v. Barton*, 11 Ad. & El. 307, 4 Jur. 432. And such is held to be the case even where the mistake was one of law. *Lakin v. Dolly*, 53 Fed. 333. This broad exception covers a multitude of cases which are sometimes regarded as holding that mere possession when a lease is taken will take a case outside the rule.

But in the cases of *Tewksbury v. Magraff*, 33 Cal. 237, and *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129, it was held that the bare possession of the demised land when the lease is given is sufficient to take the case out of the operation of the general rule that the tenant cannot dispute the landlord's title. The court argues that the doctrine of estoppel is a harsh one, and is never to be applied except where to allow the truth to be told will consummate a wrong to one party, or enable the other to secure an unfair advantage; that the person who, while in possession, takes a lease, obtains no advantage, since the lessor obtains a legal equivalent for the possession; that he might have obtained in the rent/prom-

landlord's title, unless the attornment was brought about by fraud, force, or mistake of fact. In the opinion Wells, J., says: "To avoid the assertion of a hostile title, one may lawfully contract to pay for his own, and, if the threatened litigation be forborne, he is bound by his promise; and so the tenant, holding under a lord where title is unimpeachable, may, if he will, undertake to pay rent to every stranger who demands it. Such demand implies the threat of litigation and dispossession if the demand be refused; and if made in good faith, and without fraud or other improper practice to induce concession; and if the tenant yield to it with a full understanding of all the facts which are material to the question of his liability,—it is difficult to see why he should not be bound by his promise, even though he should become liable thereby to pay triple rent for the same premises." See also *Carter v. Marshall*, 72 Ill. 609; *Lucas v. Brooks*, 18 Wall. 436, 21 L. ed. 779. In *Hamilton v. Pittock*, 158 Pa. 457, 27 Atl. 1079, an instruction that "a man may, if he sees fit, where there are conflicting titles, take a lease from each of the owners of it, and, if he is not deceived by assertions in regard to the matter, he would have to pay both," was approved as sound law.

ised, and also gains, in the event of a controversy, a *prima facie* case as against the tenant, and possibly may have severed an adverse possession and stayed the running of the statute of limitations.

In *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115, and in *Petterson v. Sweet*, 13 Ill. App. 255, it was held that a parol promise by one in possession to pay rent to one out of possession, who had neither title nor right of possession, is void for want of consideration. See also *Fuller v. Sweet*, *supra*.

The argument that in such case there is no consideration for the attornment is answered in *Lyon v. Washburn*, 3 Colo. 201, as follows: "The argument omits from consideration the circumstance that every letting, and every acceptance of an attornment, involves an implied, if not an express, undertaking that the tenant shall peaceably enjoy the premises as against the landlord; that is to say, that proceedings for the assertion of the hostile title shall not be instituted. This undertaking to forbear suit, whether express or implied, is as effectual and sufficient a consideration for the promise to pay rent as an original delivery of the possession would be. It is no answer to say that the tenant may be liable to one landlord, by virtue of an original lease, and to another by virtue of a subsequent attornment; even if the law be assumed by the argument, it is still no answer. To avoid the assertion of a hostile title, one may lawfully contract to pay for his own; and, if 1 L.R.A. (N.S.)

Hodges, under his admissions, was a tenant of Mrs. Waters; the contract being that he was to have the use of the place, and the rent was to be paid by furnishing her with support. It is immaterial whether Mrs. Waters had any interest in the premises as between her and Hodges. He recognized her as his landlord, and he obtained possession from her; and as between them he cannot raise any question as to her title. By express agreement under seal, in the year 1896 as well as the year 1897, he recognized the plaintiff as his landlord, and agreed to pay him a stipulated amount as rent; the written agreement between the parties having all the formalities required to create the technical relation of landlord and tenant. So far as those years are concerned, he occupied the relation of tenant to both plaintiff and his mother, and as against each he was estopped to deny this relation, certainly so far as the payment of rent was concerned. He could not defeat the claim of Mrs. Waters for rent by showing that the agreement between her and her son was invalid for any reason. Neither could he defeat the claim of her son for the rent of those years by showing that the title of the mother was superior. Having received possession of the land from Mrs.

the threatened litigation be forborne, he is bound by his promise."

It thus appearing that the general tendency of the courts is to hold that prior possession is insufficient to preclude an estoppel, the question next arises as to the extent of such estoppel,—whether it operates only during the term of the lease, or until the tenant surrenders possession. Such authority as there is on the question has been hereinbefore reviewed; and it therefore remains only to examine the principle on which the doctrine of such estoppel rests.

Under the early common law, the estoppel of a tenant to deny the title of his landlord was deemed to arise from the sealed lease, and terminated at its expiration. *Bigelow, Estoppel*, 5th ed. 506. And see also *Co. Litt. 47b*, where it is said that, "if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended. For by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines."

But the modern estoppel is deemed to rest, not upon the lease, but on permissive possession, and, hence, will prevail so long as such possession continues, and though the contract of lease is void. See *Bigelow, Estoppel*, 5th ed. 511, and cases cited.

Upon this principle, if one who, while in possession, takes a lease from an adverse claimant, is to be considered as estopped at all to deny his lessor's title, it would seem that such estoppel should prevail so long as he continues in possession.

Waters, he could not by any act of his place himself in a position where, as against her, he could deny her title. So long as the possession thus acquired continued, he was estopped from denying her title as landlord. To deny her title it was necessary for him to surrender to her that possession which he had received from her, and re-enter after such surrender under some other person. Therefore an agreement to pay rent from year to year would arise between Hodges and Mrs. Waters until there had been an actual surrender of the premises to her. Hodges's possession having been in no way dependent upon any act of the plaintiff, to what extent the agreement between him and the plaintiff would create a liability for rent of the premises would depend upon the terms of the agreement. If Hodges, upon a sufficient consideration, agreed to pay the plaintiff rent for 1896 and 1897, he would be bound by this agreement, and must pay the rent. But after the expiration of the term fixed in the agreement, his obligation to pay rent depending upon the agreement alone, and his possession not having been obtained through the person to whom the promise was made, there would be no obligation upon him to attempt a vain and idle thing; that is, to surrender the premises belonging to one person to another who was not entitled to it. He was not compelled at the end of the year 1897 to abandon possession of the premises, which he at all times held under Mrs. Waters, in order to prevent a liability on his part to pay to her son rent in the future. Not having acquired possession from her son, the estoppel raised by the contract to pay rent was no broader in its operation than the contract provided for; and he was therefore not estopped from denying after 1897 that he was longer liable to pay rent as a tenant to the son of Mrs. Waters. If, at the time the defendant had made the contract to pay rent to the plaintiff, the plaintiff had been in possession claiming title to the property as his own, and no other person's rights were to be affected, then his entering into a contract to pay rent would have made the defendant a tenant of the person to whom the rent was payable, and render him liable to all the incidents of such a tenancy. See *Johnson v. Thrower*, 117 Ga. 1007, 44 S. E. 846; *Willis v. Harrell*, 118 Ga. 906, 45 S. E. 794 (9).

The defendant was liable to the plaintiff for the rent of the years 1896 and 1897, which he expressly agreed to pay; the consideration for such promise being the quieting of his possession from the threat of eviction made by the plaintiff. The defendant having testified that he had never agreed

to pay rent for any other year than those named, the judgment must be reversed upon that assignment of error which complained that the court erred in charging the jury that, if at any time the defendant had recognized the plaintiff as his landlord, he could never thereafter be heard to deny his obligation to pay rent so long as he remained in possession of the premises.

Judgment reversed.

All the Justices concur.

PENNSYLVANIA SUPREME COURT.

WILBUR HORNEY, Appt.,

v.

SAMUEL F. NIXON et al.

(213 Pa. 20.)

1. Theater ticket—breach of contract—trespass.

An action of trespass will not lie for breach of a contract on the part of a theater manager to permit a person to occupy the seat called for by a ticket which he has purchased.

2. Theater—not public service.

The proprietor of a theater is under no

Case Note.—The nature and extent of the right acquired by the holder of a ticket to a theater or other public place of amusement are, by the weight of authority, to be determined by the rules of law applicable to licenses generally. See *Collister v. Hayman*, post, 1188, and cases therein cited; *Elias*, Law of Theater Tickets, chap. 1. A dictum to the contrary, in *Drew v. Peer*, 93 Pa. 234, is expressly disapproved by the Pennsylvania supreme court in the case in hand.

While the earlier cases have held that the license so conferred upon the holder of a ticket, though for a valuable consideration, is revocable at will (*Wood v. Leadbitter*, 13 Mees & W. 838; *McCrea v. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Purcell v. Daly*, 19 Abb. N. C. 301; *Greenberg v. Western Turf Assn.* 140 Cal. 357, 73 Pac. 1050), expressions may be found in later decisions which seem to limit such right to cases of violation of the conditions, express or implied, of the contract of admission. See *Collister v. Hayman*, herewith reported; *Smith v. Leo*, 92 Hun, 242, 36 N. Y. Supp. 949, in which it was held that one who, at the invitation of the master of a dancing school, paid the admission fee and entered the hall, could not lawfully be turned out in the absence of sufficient cause; *Cremore v. Huber*, 18 App. Div. 231, 45 N. Y. Supp. 947, in which it was said that if a patron of a music hall does not, by his conduct, forfeit his right to remain, it is not his duty to leave the place upon the request of the proprietors.

obligation to admit all who may apply, a breach of which will sustain an action for tort.

3. Theater ticket—license—remedy for breach.

A theater ticket is a mere license, for the revocation of which before the holder has actually been given and has taken his seat, the only remedy is in assumpsit for breach of the contract.

(October 9, 1905.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in defendants' favor in an action brought to recover damages for alleged wrongful refusal to permit plaintiff to occupy a seat which he had purchased for a theatrical performance. Affirmed.

The facts are stated in the opinion.

Messrs. Henry E. Lallou, Jr., W. H. G. Gould, and Ulysses S. Koons, for appellant:

The right of a proprietor to revoke a license to enter a place of amusement may also be limited by a statute making it unlawful to refuse admission to any person over twenty-one, not under the influence of liquor, or guilty of boisterous conduct, or of lewd or immoral character, who presents a ticket of admission acquired by purchase. *Greenberg v. Western Turf Asso. supra*.

Such is also the effect of the so-called civil rights acts, forbidding the discrimination against any person on account of color, as is shown by cases in which negro holders of tickets have been allowed to recover more than compensatory damages for their exclusion from such theater. *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102.

But, in the absence of such a statute, colored persons to whom tickets for the orchestra of a theater are sold without a knowledge that the persons who are to use them are colored may be prevented from using them, and required to give them up for balcony tickets, or for the return of their money. *Younger v. Judah*, 111 Mo. 303, 16 L. R. A. 558, 33 Am. St. Rep. 527, 19 S. W. 1109.

Where a ticket is issued upon the condition that, if transferred, it shall be worthless, neither the transferee, nor the person to whom the ticket was originally issued, has a right of action, upon a refusal of the proprietor to admit the transferee. *Purcell v. Daly, supra*.

A person purchasing a reserved seat which has previously been sold to someone else does not acquire such a right to occupy it that his forcible removal therefrom, by persons connected with the theater, will necessarily constitute an assault. *Com. v. Powell*, 10 Phila. 180, 30 Phila. Leg. Int. 100.

The rule followed in *HORNEY v. NIXON*, as to the measure of damages recoverable by a ticket holder refused admission to a place of amusement, or to a seat purchased,

The tickets were more than a revocable license.

Drew v. Peer, 93 Pa. 234; *Com. v. Powell*, 10 Phila. 180, 12 Cent. L. J. 359; 1 Harvard Law Rev. 24; *McGoverney v. Staples*, 7 Alb. L. J. 219; *MacGowan v. Duff*, 14 Daly, 315, 12 N. Y. S. R. 680.

There is no distinction between an ejection from a theater and an ejection from a car.

In such cases there has always been the right of election, i.e., contract or trespass.

Laird v. Pittsburg Traction Co. 166 Pa. 4, 31 Atl. 51; *Perry v. Pittsburgh Union Pass. R. Co.* 153 Pa. 236, 25 Atl. 772; *Pennsylvania R. Co. v. Spicker*, 105 Pa. 142; *Light v. Harrisburg & M. Electric R. Co.* 4 Pa. Super. Ct. 427; *Baltimore & O. R. Co. v. Bambrey*, 2 Monaghan (Pa.) 109, 16 Atl. 67; *Duggan v. Baltimore & O. R. Co.* 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

This trespass was aggravated by compelling plaintiff to leave the theater.

is also supported by a *dictum* in *Purcell v. Daly, supra*, that the proprietor would be compelled to refund only the price paid for the tickets, together with such other expenses as the party might have been put to in connection with the matter.

Exemplary damages are not recoverable by a person to whom tickets for another evening had been issued by mistake, who gave up his seats upon the demand of the usher and left the theater, the ejection being attended neither by violence nor by insults. *MacGowan v. Duff*, 14 Daly, 315, 12 N. Y. S. R. 680.

Consequential damages may be recovered for injuries resulting from the rude ejection of the ticket holder. *Drew v. Peer, supra*.

But in *Smith v. Leo, supra*, the recovery of compensatory damages for the indignity and disgrace resulting from the expulsion from a dance hall of a person who had paid the price of admission was sustained.

Where the cause of action is based on a civil rights statute, the amount recoverable is usually determined by the statute, as in *Baylies v. Curry*, 128 Ill. 287, 21 N. E. 595; although such a statute has been regarded as giving a cause of action *ex delicto*, as in *Joseph v. Bidwell, supra*, in which the court reduced the amount of damages awarded from \$1,000 to \$300.

The California statute hereinbefore referred to, which allows a person refused admission contrary to its provisions to recover his actual damages and \$100 in addition thereto, has been held not to preclude the recovery of additional punitive damages. *Greenberg v. Western Turf Asso. supra*.

But under such statute the injury to plaintiff's business in publishing a paper devoted to racing news is not a proper element of damage for exclusion of a ticket holder from a race track. *Ibid*.

Herbst v. Hafner, 7 Pa. Super. Ct. 363; Farmakis v. Boyle, 8 Pa. Dist. R. 696; Kerr v. Sharp, 14 Serg. & R. 399; Brisben v. Wilson, 60 Pa. 452; Brown v. Stackhouse, 155 Pa. 583, 35 Am. St. Rep. 908, 26 Atl. 669; Brown v. Powell, 25 Pa. 229.

The mere fact that there was no written lease does not make any difference.

Moore v. Miller, 8 Pa. 272; Oakford v. Nirdlinger, 196 Pa. 162, 46 Atl. 374.

Messrs. J. Siegmund Levin and Arthur Straus Arnold, for appellees:

The conducting of a theater is a purely private enterprise, and the law does not, by implication, impose upon the proprietor thereof a mandatory requirement to serve the public.

Tiedeman, State & Federal Control of Persons & Property, p. 301; Purcell v. Daly, 19 Abb. N. C. 301; District of Columbia v. Saville, 1 MacArth. 581; Greenberg v. Western Turf Assn. 140 Cal. 357, 73 Pac. 1050.

A theater ticket is a revocable license, and the only remedy of a purchaser denied the enjoyment thereof is an action on the contract for such damages as are the immediate consequences of the breach of contract.

Wood v. Leadbitter, 13 Mees. & W. 838; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Burton v. Scherpf, 1 Allen, 133, 79 Am. Dec. 717; Mendenhall v. Klinck, 51 N. Y. 246; Pearce v. Spalding, 12 Mo. App. 141; Johnson v. Wilkinson, 139 Mass. 4, 52 Am. Rep. 698, 29 N. E. 62; MacGowan v. Duff, 14 Daly, 315, 12 N. Y. S. R. 680; Purcell v. Daly, *supra*; Oxford v. Leathe, 165 Mass. 254, 43 N. E. 92; Kerrison v. Smith, L. R. 2 Q. B. Div. 445; Collister v. Hayman, 71 App. Div. 316, 75 N. Y. Supp. 967; Greenberg v. Western Turf Assn. *supra*; Waterman, Trespass, p. 160; Washb. Real Prop. ¶ 845.

Brown, J., delivered the opinion of the court:

Lewis J. Somers, the father-in-law of the plaintiff, purchased from the Columbia Field Club eight tickets for a theatrical performance to be given on February 26, 1904, at a theater in the city of Philadelphia under the management of the appellees. They had issued a certain number of tickets to the club, to be sold by it, as the performance was to be for its benefit. After the tickets had been issued to it a fire commission, appointed by the mayor of the city, directed the aisles of the theater to be widened as a measure of greater safety to the public, by removing the end seat on each row of the center section. The eight tickets purchased by Somers were in the fifth row of this section and were numbered from 1 to 8; No. 1 being for the one along the

aisle. Two of these eight tickets, Nos. 3 and 4, were purchased by plaintiff from his father-in-law. The order of the fire commission led to some confusion in connection with the sale of seats, as the appellees did not know who had purchased tickets from the club before the order was complied with; but arrangements were made to issue other tickets to the holders of those for the seats along the aisles which had been removed. By some oversight all of the eight seats called for by the tickets purchased by Somers were resold, and when he and his family presented their coupons to the usher they were informed that they could not, under the circumstances, be given the seats called for. They were offered eight together elsewhere, as they insisted upon being seated as a family, but these were declined as being too far back. They were then offered seats in two of the boxes, but these were refused, on the ground that, as they had come as a family, they insisted upon sitting together and in the seats called for by their coupons. In view of the alterations made in pursuance of the order of the fire commission, it was impossible for the managers of the theater to give the family these eight seats, but, according to plaintiff's own testimony, they courteously offered to seat them elsewhere. The party, however, refused every proposition and became noisy, to the annoyance of those witnessing the performance, which had commenced. They were told that they could not continue discussing the matter inside of the theater and were directed to go outside, where, according to the testimony of the treasurer of the appellees, they were tendered back the money they had paid for their tickets. After having so declined every offer to give them other seats to witness the performance, they left the theater; and the plaintiff shortly afterwards brought this action to recover the price of the tickets purchased by him, and "for the inconvenience and annoyance and mortification and indignity and humiliation suffered" by him.

Under the foregoing facts the court below directed a verdict for the defendants, for the reason that there could be no recovery in trespass,—the form of action adopted by the plaintiff; and the single question before us is the correctness of this ruling. It was so manifestly correct that the judgment might well be affirmed, without saying more. The case as presented by the plaintiff has not a single tortious feature. He had purchased a ticket, calling on its face for a seat which he insisted on having, and it was the duty of the defendants to give it to him; but their failure to perform that duty was simply a failure to perform their contract with the holder of the ticket, and

for such failure the remedy, as in any other simple breach of contract, is in assumpsit for damages for the breach. The confusion resulting from the change in the rows of seats, which followed the order of the fire commission, was the excuse given for not being able to furnish the family the seats called for by the tickets, and it ought to have been accepted by any reasonable person. The plaintiff, if not willing to take any of the other seats offered to him, ought to have been content to have his money refunded.

In support of the contention that the appellant has a right of action in trespass, decisions in cases of common carriers are cited, in which trespass was held to have been the proper form of action for refusal to carry passengers, or for unlawfully ejecting them without force or violence. But the difference between the duty of a common carrier and that of a theater proprietor has been wholly overlooked. That of the former is absolute to carry whoever may wish to be carried. It is a duty growing out of no contract, but rests at all times on the common carrier in return for the franchises and privileges conferred by the state. If, in violation of this duty, it refuses to receive a passenger, or unlawfully ejects him from one of its conveyances, trespass will lie upon the disregard of the implied obligation to serve the public, or the tort may be waived and assumpsit maintained for a breach of the contract of carriage, if one has been entered into. The rule is thus stated in 15 Enc. Pl. & Pr. p. 1121: "It may be stated as an abstract proposition that, where the duty of a common carrier to a passenger is not one which is implied by law by reason of the relation of the parties, but depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort; but where the duty is implied by law by reason of the relation of the parties, or where the passenger sustains an injury by reason of the breach of a duty which the railroad owes to the public in general, the remedy is in tort." "When the gist of the action is a breach of duty, and not of contract, and the contract is not alleged as the cause of action; and when from the facts alleged the law raises the duty by reason of the calling of the defendant, as in the case of innkeepers and common carriers; and the breach of duty is solely counted upon,—the rules applying to actions *ex delicto* determine the rights of the parties." Frink v. Potter, 17 Ill. 406. "The liability of a carrier of passengers is a subject which has become of great practical importance since the introduction of railroads, and the subject of the measure of damages 1 L.R.A. (N.S.)

for breach of contract of carriage of a passenger has been much discussed. The relation between carrier and passenger is more than a mere contract relation; indeed, it may exist in the absence of contract. It is clear that any person rightfully on the cars of a railway company is entitled to protection by the carrier, though he is a free passenger. Any breach of this duty owed by the carrier to the passenger would seem to be a tort. Recovery may be had either in an action of tort or in an action for breach of the contract. The contract made by a common carrier of passengers (and we shall see that the same is true of contracts made by all incorporated telegraph companies) is not a simply voluntary engagement, such as an ordinary contract *inter partes*, but an agreement made in pursuance of an obligation towards all the world, imposed either by his mere status as common carrier, or under his charter, or both. In other words, it is a contract which he is under a duty to make and under a duty to perform, so that a breach is not a mere breach of contract, but also, as we have said, a tort." 2 Sedgw. Damages, 8th ed. § 859.

The proprietor of a theater is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public. When he sells a ticket he creates contractual relations with the holder of it, and whatever duties on his part grow out of these relations he is bound to perform, or respond in damages for the breach of his contract, if it is of that only that complaint can be made. Such is just the situation here. A courteous explanation was made why the contract with the plaintiff as the holder of the ticket issued by the defendants could not be specifically performed; other seats in different parts of the house were offered to him and the rest of the family, which could have been occupied by them together as one party, but were declined; seats in the proscenium boxes were refused, because the party would be separated, and even after all this they were not evicted from the building, but simply told that their loud discussion of what they conceived to be the great wrong done them could not be carried on inside the theater, to the annoyance to those who were witnessing the performance; and, without rudeness or violence, they were directed to go into the foyer, where they continued to discuss the

situation. They could have had seats at any time, but would take none except those called for by their tickets. The allegation of the plaintiff, in his attempt to make out a case of trespass against the appellees, is that by their conduct he was unlawfully ejected from the theater, to his mortification, indignity, and humiliation. The proof is just to the contrary, and shows nothing but a simple breach of a simple contract, resulting from a cause which was explained to him and which ought to have been regarded as unavoidable. But he and some of the rest would listen to nothing but what their tickets called for. If the contract with him was broken, he is entitled to nothing more than the actual damages for the breach, and these, according to the testimony of the treasurer of the appellees, were tendered to him.

In affirming this judgment nothing more would be said, but for the citation of *Drew v. Peer*, 93 Pa. 234, as authority for the right of the plaintiff to maintain trespass. There is no analogy between the two cases. *Peer* and his wife, two colored persons, purchased tickets for reserved seats in the theater of the defendant. On the evening of the performance they passed through the street door and were within a few feet of the ticket taker at the entrance to the orchestra circle, when the man who was taking the tickets cried out, "Clear them niggers out!" and they were violently ejected from the building. In an action in case a recovery was had and sustained, and it was said by Sterrett, J.: "Whether the tickets conferred merely a license, or something more, is immaterial. If they gave only a license to enter the theater and remain there during the performance, it is very clear that the agents of the defendant had no right to revoke it as they did, and summarily eject *Peer* and his wife from the building in such a manner as to injure her. We incline to the opinion, however, that as purchasers and holders of tickets for particular seats they had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance on that particular evening." All that was decided was that the defendant had no right to revoke the license in the manner he did, and violently and rudely eject the plaintiff and his wife from the theater. The suit was for damages resulting from their rude ejection, and what is said about the tickets being more than a mere license is to be regarded as simply *obiter dictum*. Even as such it is certainly not in accord with the authorities in this country and in England. Licenses which are given by the sale of

tickets to theaters and other places of amusement are revocable. *Cooley, Torts*. 2d ed. § 306. "A theater ticket, being a mere license to the purchaser, which may be revoked at the pleasure of the theatrical manager, upon such revocation, if the person attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering or may be removed by force, and can maintain no action of tort therefor. His only remedy is by an action on the contract to recover the money paid for the ticket and damages sustained by the breach of the contract implied by the sale and delivery of such ticket." 21 Enc. Pl. & Pn p. 647. Among the cases sustaining this are *Wood v. Leadbitter*, 13 Mees. & W. 838; *McCrea v. Marsh*, 12 Gray. 211, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Pearce v. Spalding*, 12 Mo. App. 141; *Johnson v. Wilkinson*, 139 Mass. 3, 52 Am. Rep. 698, 29 N. E. 62; *Greenberg v. Western Turf Asso.* 140 Cal. 357, 73 Pac. 1050. In the light of these and other authorities, a theater ticket is to be regarded as a mere license, for the revocation of which, before the holder has actually been given his seat and has taken it, the only remedy is in assumpsit for the breach of the contract.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

WILLIAM H. COLLISTER, Appt.,
v.

ALBERT HAYMAN et al., Resp'ts.

(.... N. Y.)

1. Theater ticket—effect of license.

The licensing of theaters and ticket brokers neither imposes any duties upon the one, nor confers any rights upon the other, with reference to tickets, in addition

Case Note.—The right of the manager of a theater to impose whatever restriction he may see fit as a condition of admission to it appears to have been but little litigated outside of cases arising under civil rights acts. The doctrine of *COLLISTER v. HAYMAN*, that a license granted to a theater is not a franchise, and imposes no duty for the benefit of the public, is supported by the decision in *Purcell v. Daly*, 19 Abb. N. C. 301, where it is said that such license in no way changes the character of the institution from a private to a public one, or deprives the manager of the right to discontinue performances, or to use the theater property for other purposes, or to say whom he will, or will not, admit to the theater. As was said in *Clifford v. Brandon*, 2 Campb. 358, cited with approval in *Pearce v. Spald-*

to those conferred by the contract under which the ticket is sold.

2. Same—conditions.

A condition upon a theater ticket that the ticket will not be honored if sold on the sidewalk is not against public policy.

3. Theater—right to control.

The operation of a theater is not a business affected with a public interest which deprives the proprietor of the right to control it as a private business.

4. Ticket broker—interference with business—injunction.

A ticket broker cannot enjoin the proprietor of a theater from warning intending purchasers that tickets purchased on the sidewalk in violation of the conditions printed thereon will not be honored, although such conduct interferes with his business and subjects him to loss.

(December 5, 1905.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County, Part 3, dismissing the complaint in an action brought to enjoin defendants from the alleged wrongful interference with plaintiff's business. Affirmed.

ing, 12 Mo. App. 141, theaters are not necessities of life, and the proprietors of them may manage their business in their own way; and, if that way is unfair or unpopular, they will suffer in diminished receipts.

In *Purcell v. Daly*, *supra*, it was held that the proprietor of a theater had a right to contract with an intending patron that the ticket, as evidenced by a notification printed thereon, should not be transferable.

In many states, including Arkansas, California, Florida, Illinois, Indiana, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Iowa, Nebraska, Michigan, Minnesota, Colorado, and South Carolina, statutes have been enacted providing, in substance, that no citizen of a state shall, by reason of race, color, or previous condition, be accepted or excluded from the full and equal enjoyment of the accommodations and privileges of places of public resort, including theaters and other places of public amusement. Such statutes have been held constitutional in *Baylies v. Curry*, 128 Ill. 287, 21 N. E. 595; *Ferguson v. Gies*, 82 Mich. 358, 9 L. R. A. 589, 21 Am. St. Rep. 576, 46 N. W. 718; *Messenger v. State*, 25 Neb. 674, 41 N. W. 638; *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146; *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31; *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102. They do not take private property for public use without compensation (*Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375); and are within the police power of the state to regulate places of public resort (*People v. King*, 110 1 L.R.A. (N.S.)

Statement by Vann, J.:

The plaintiff brought this action to restrain the defendants, as proprietors of the Knickerbocker theater, in the city of New York, from interfering with his business of selling, on the sidewalk and outside of the prohibited limits, tickets of admission to that theater. He alleged in his complaint that at the times therein mentioned he was "a licensed theater-ticket speculator," while the defendants were managers of the Knickerbocker theater. In December, 1901, the defendants issued tickets of admission to their theater, and among others, two coupons attached, numbered, respectively, "aa5" and "aa7." The body of the tickets, printed in several lines, was as follows: "Knickerbocker Theater, Al. Hayman & Co., Proprietors. December 3, Tuesday evening. Orchestra, \$2.00. If sold on the sidewalk, this ticket will be refused at the door. Evenings at 8:15." The coupons bore the number of the seats, the date, name of the theater, etc. The plaintiff further alleged that on the 3d of December, 1901, he came lawfully into possession of a large number of tickets of admission to various seats in said theater, including those above described, and on the evening of that day he was on the street

N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245).

And damages have been held to be recoverable under such a statute, although the ticket expressly stated that it was agreed that the management should have the right to refuse admission to the holder upon returning the price of the ticket. *Joseph v. Bidwell*, *supra*.

But a similar Federal statute has been held unconstitutional as not being authorized by the 13th or 14th Amendment, the latter of which is regarded as applicable only to state, and not to individual, action. *Civil Rights Cases*, 109 U. S. 9, 27 L. ed. 838, 3 Sup. Ct. Rep. 18.

In the absence of any statute to the contrary, a discrimination against colored persons by permitting them to sit only in the balcony of the theater is not unlawful. *Younger v. Judah*, 111 Mo. 303, 16 L. R. A. 558, 33 Am. St. Rep. 527, 19 S. W. 1109.

An act (Cal. Stat. 1893, p. 220) making it unlawful to refuse admission to places of amusement to any person over twenty-one, not under the influence of liquor, or guilty of boisterous conduct, or of lewd or immoral character, who presents a ticket of admission acquired by purchase, was held a valid exercise of the police power, in *Greenberg v. Western Turf Assn.* 140 Cal. 357, 73 Pac. 1050.

On the question of the nature of a theater ticket and the remedy for breach of contract with the purchaser, see the case of *Horney v. Nixon*, *ante*, 1184, and the note accompanying it.

"more than 5 feet removed from any point of the entrance to the Knickerbocker theater," engaged in offering such tickets for sale. The defendants, however, interfered with him in carrying on the sale of tickets by warning persons about to purchase not to purchase from him, and by stating to them that the management would not recognize such tickets, and that those so purchasing would not be admitted to the theater. The defendants at the time and for at least a month before had stationed in front of their theater, at each side of the entrance thereto, large signs, 5 by 7 feet, with the following words conspicuously painted upon them: "Tickets purchased on the sidewalk will positively be refused at the door." Furthermore, the defendants, on the evening in question as well as previously, had stationed near the entrance to the theater private detectives to warn those intending to purchase tickets from the plaintiff not to do so, and informing them that, if they bought tickets from him, they would not be admitted to the theater, and that he had no right to sell any tickets of admission, even though they had been duly issued by the proprietors. The plaintiff finally alleged that by the methods thus described the defendants had prevented many people from purchasing tickets of him; that the selling of theater tickets was his sole business, from which he derived an income of at least \$4,000 a year; and that by means of the premises, as well as by threats to continue such acts, he was prevented from carrying on a lawful calling. The relief demanded was an injunction restraining the defendants from doing the acts complained of and for the sum of \$4,000 damages. The defendants answered, admitting many of the allegations of the complaint, and putting at issue the remainder. Upon the trial at special term, the motion of the defendants to dismiss the complaint upon the pleadings was granted, and the judgment entered accordingly was unanimously affirmed by the appellate division. The plaintiff appealed to this court.

Mr. Max D. Steuer, for appellant:

Defendants' business is not a private one in which the public has no concern or no control.

Civil Rights Cases, 109 U. S. 62, 27 L. ed. 856, 3 Sup. Ct. Rep. 18; *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Grannan v. Westchester Racing Assn.* 153 N. Y. 457, 47 N. E. 896; *People v. King*, 110 N. Y. 419, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *Drew v. Peer*, 93 Pa. 234; *Pingrey, Extraordinary Industrial & Interstate Contr.* 577, §509.
1 L.R.A. (N.S.)

Mr. Nathaniel Cohen, with **Messrs. Howe & Hummel**, for respondents:

A theater ticket is a mere license, revocable at the pleasure of the person issuing it. *Wood v. Leadbitter*, 13 Mees. & W. 838; *McCrea v. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Pearce v. Spalding*, 12 Mo. App. 141; *Johnson v. Wilkinson*, 139 Mass. 4, 52 Am. Rep. 698, 29 N. E. 62; *Greenburg v. Western Turf Assn.* 140 Cal. 357, 73 Pac. 1050; *Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088; *Purcell v. Daly*, 19 Abb. N. C. 301.

Vann, J., delivered the opinion of the court:

A theater may be licensed, like a circus: but the license is not a franchise; and does not place the proprietors under any duty to the public, or under any obligation to keep the theater open. The license of a "ticket speculator," so far as it has any validity, simply authorizes him to conduct his business on the sidewalk, within the limits prescribed. City Charter Laws 1897, chap. 378, §§ 50, 51, 1472, 1473, pp. 21, 22, 519. Neither the license to the owner of the theater, nor the license to the ticket speculator, adds to or takes from the rights of the parties to the contract made when the proprietor sells a ticket. The rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made. "The privilege accorded by the city authorities cannot change the inherent nature of a theater ticket." The ticket is not the contract, although to some extent it is evidence thereof. The contract is implied from the circumstances, and is an agreement on the part of the proprietor, for the consideration mentioned, to admit the holder of the ticket, upon presentation thereof, to his theater at the date named, with the right to occupy the seat specified and to there witness the performance. A theater ticket is a license, issued by the proprietor, pursuant to the contract, as convenient evidence of the right of the holder to admission to the theater at the date named, with the privilege specified, subject, however, to his observance of any reasonable condition appearing upon the face thereof. The license, although granted for a consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein. *Purcell v. Daly*, 19 Abb. N. C. 301; *Wood v. Leadbitter*, 13 Mees. & W. 838; *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *McCrea v. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Greenberg v. Western Turf Assn.* 140 Cal. 357, 73 Pac. 1050; 28 Am. & Eng. Enc. Law, 2d ed. p. 124; *Pingrey, Extraordinary Industrial & Inter-*

state Contr. § 509; Wandell, Law of the Theater, 221; Goddard, Bailments & Carriers, § 333.

The main question presented for decision is whether the defendants had the right to make a contract with the purchasers upon the condition printed in the ticket. There is no restraint by statute against such a condition, and it is not opposed to public policy. There is no tendency toward monopoly, for anyone can buy and sell theater tickets, provided the sales are not made on the sidewalk where the tickets themselves provide they cannot be sold. The law does not prevent the proprietor of a theater from making reasonable regulations for the conduct of his business, and imposing such reasonable conditions upon the purchasers of tickets as in his judgment will best serve the interest of that business. A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theater is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices, is reasonable, and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket, which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who as he alleges, was accustomed to make at least \$4,000 a year from his business. That amount, of course, came out of patrons of the theater; and if other ticket speculators, carrying on the same business at various theaters in the city of New York, are equally successful, the additional expense to theater goers must be very large.

The defendants were conducting a private business, which, even if clothed with a public interest, was without a franchise to accommodate the public, and they had the right to control it, the same as the proprietors of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the state, and hence under obligation to transport anyone who applies and to continue the business year in and year out, the proprietors of a theater can open and close their place at will, and no one can make lawful complaint. They can charge what they choose for admission to their theater. They can limit the number admitted. They can refuse to sell tickets and collect the price of admission at the door. 1 L.R.A. (N.S.)

They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted, or that a woman cannot enter unless she is accompanied by a male escort, and the like. The proprietors, in the control of their business, may regulate the terms of admission in any reasonable way. If those terms are not satisfactory, no one is obliged to buy a ticket or make the contract. If the terms are satisfactory, and the contract is made, the minds of the parties meet upon the condition, and the purchaser impliedly promises to perform it. There is no rule of law that prevents the enforcement of the contract in the manner provided thereby, which is to refuse admission to the holder of a ticket who bought it on the sidewalk. Where the condition is part of the contract at its origin, it continues a part thereof as long as it exists, and binds all subsequent holders with notice.

The case would be very different if, after the sale of a ticket containing no evidence of the restriction, an attempt were made to enforce it against a purchaser without notice. The purchaser is warned in advance of what he is buying. He has notice before he buys of the condition which the proprietors saw fit to make a part of the contract. He acts with his eyes open, and if he does not like the condition he need not buy; but, if he buys, he impliedly assents to the condition, which controls, not only himself, but any purchaser from him. When the plaintiff came lawfully into the possession of the tickets in question, with others, as he alleges he had notice of the condition which appeared upon the face thereof, and was bound thereby. He bought subject to that condition, and every right he acquired was subordinate thereto. The ticket was assignable: for there was no restriction in the contract against selling it except in a particular place, and a transfer could be made by simple delivery. The plaintiff, therefore, took it with the right to sell to any person at any time and in any place that he saw fit, provided he did not violate the condition, which imposed no unreasonable restraint upon the assignability of property. When he tried to sell on the sidewalk, he clearly acted in defiance of the contract, and violated the condition to which he had given an implied assent. With notice that, if he sold the ticket on the sidewalk, it would be refused at the door, he was attempting to sell on the sidewalk, when the defendants, by their signs and agents, warned intending

purchasers that the condition would be enforced and that the holder of a ticket purchased from him under such circumstances would be denied admission. The defendants did nothing but notify people, so that they could not be imposed upon by him and induced to purchase tickets which would be of no use, because sold in violation of the contract.

This is not a case involving the liberty of the plaintiff to sell his property; for he could sell it to any person and in any place, except in the one prohibited by the contract which constituted the property. The contract did not interfere with his absolute freedom of action, except to this limited extent, duly agreed upon in advance; while he attempts to interfere with freedom of contract on the part of the defendants by restraining them from enforcing an agreement which they had made and to which he had assented. Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the legislature may prohibit parties from agreeing upon is subject to the limitations of the fundamental law. Those limitations do not bear upon the case now before us. Our recent decision in *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, relied upon by the appellant, is not analogous. We there adjudged unconstitutional a statute which prohibited as a crime the selling of transportation tickets by any person except common carriers and their specially authorized agents, in so far as it undertook to prohibit citizens of the state from engaging in the business of brokerage in passenger tickets. This case involves not a statute, but a contract, which excludes no one from carrying on the business of selling theater tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves.

The statute entitled "An Act to Protect All Citizens in Their Civil and Legal Rights" has no application. Laws 1895, chap. 1042, p. 974; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245. That act provides for the equal accommodation of all persons in "places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." It makes it a misdemeanor to deny "to any citizens except for reasons applicable alike to all citizens of every race, creed, or color, and regardless of race, creed, and color, the full enjoyment of any of the accommodations, advantages, facilities, or privileges" enumerated in the statute including thea-

ters by specific mention. This has no bearing upon the resale of tickets in violation of a contract made with the original purchaser. It was especially designed to prevent the exclusion from "places of public accommodation or amusement" of anyone on account of race, creed, or color, and apparently was also intended to prevent any discrimination founded on rank, grade, class, or occupation. The contract and tickets in question did not discriminate against any person on account of any reason named in the statute, for the same condition is imposed upon all, and all are treated alike. The holder is not excluded because he bought of the plaintiff, but because he bought in the prohibited place. The plaintiff was not excluded, for he could have used the tickets himself. No class of persons was excluded, such as lawyers, doctors, merchants, or mechanics, but simply those who bought in violation of the terms of the contract after notice thereof.

We think that the contract with the original purchaser of the tickets was valid, that the express condition named therein bound all subsequent purchasers, and that it could be enforced in the manner provided thereby. The judgment should therefore be affirmed, with costs.

Cullen, Ch. J., and Gray, O'Brien, Bartlett, Haigt, and Werner, JJ., concur.

CALIFORNIA SUPREME COURT.

MARY ELLEN WADMAN et al., Exrs.,
etc., of Ellen Kelly, Deceased, Resp'ts.,
v.

W. J. BURKE et al., Appts.

(147 Cal. 351.)

I. Appeal—from denial of new trial.

An appeal from an order denying a motion for new trial does not bring up for review the sufficiency of the complaint or findings.

Subject Note.—Effect of renewing tenancy without reserving right to remove fixtures.

I. Introduction, 1192.

II. New lease as implied surrender of rights under old tenancy.

a. The prevailing rule, 1193.

b. The contrary doctrine, 1193.

III. Effect of special covenants in new lease, 1199.

IV. Construction of leases and agreements, intention of parties, 1200.

V. Renewal or extension of old term, 1202.

I. Introduction.

The rule followed in *WADMAN v. BURKE*,

to support the judgment or conclusions of law.

2. Trade fixtures—right to remove—new lease.

A tenant who has placed trade fixtures on the leased premises loses his right to remove them by entering into a new lease which contains no recognition of his title thereto, but which binds him to surrender the premises in as good state and condition as reasonable use and wear will permit.

(Shaw and Lorigan, JJ., dissent.)

(July 25, 1905.)

APPEAL by defendants from an order of the Superior Court for the City and County of San Francisco denying a motion for new trial after judgment in plaintiffs' favor in a suit to enjoin the removal of certain fixtures from plaintiffs' property. Affirmed.

The facts are stated in the opinion.

Messrs. J. D. Sullivan and Herbert Choyanski, for appellants:

Where the tenant continues in pos-

session after the expiration of the term, there is no presumption of surrender of fixtures.

session after the expiration of the term, there is no presumption of surrender of fixtures.

Penton v. Robart, 2 East, 88; Weeton v. Woodcock, 7 Mees. & W. 14; Mackintosh v. Trotter, 3 Mees. & W. 184; King v. Wilcomb, 7 Barb. 263; Devin v. Dougherty, 27 How. Pr. 455; Allen v. Kennedy, 40 Ind. 142.

Intention has much to do with the question whether fixtures become part of the realty.

Ryder v. Faxon, 171 Mass. 208, 68 Am. St. Rep. 417, 50 N. E. 631.

Acceptance of a new lease did not defeat the right.

Ross v. Campbell, 9 Colo. App. 38, 47 Pac. 465; Second Nat. Bank v. O. E. Merrill Co. 69 Wis. 501, 34 N. W. 514; Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957; Hedderich v. Smith, 103 Ind. 205, 53 Am. Rep. 509, 2 N. E. 315.

Mr. Charles E. Nougues, also for appellants:

The renewal was not an independent lease-

that a tenant loses his right to carry off trade fixtures by continuing the tenancy under a new lease silent on the subject, is that adopted in the main body of cases. Judge Cooley uttered a strong protest against it in Michigan nearly thirty years ago, and, while his words have had some effect, the rule was then too well rooted to be overturned even by the force of so eminent an authority.

The reason given for the rule is that the tenant, by accepting the new lease, is deemed to have surrendered or abandoned his rights under the old tenancy; that fixtures on the premises at the time of the new letting are a part of the thing demised; and that the tenant, by accepting a new lease of the soil without reserving the fixtures, acknowledges the right of his landlord to them.

In New York the present tendency is to limit the doctrine to fixtures savoring of the realty, and to hold it inapplicable to ordinary movable trade fixtures. But this has not been done elsewhere.

If the plain intention of the parties is that the fixtures shall belong to the tenant, it has several times been held that the tenant's title will not be affected by the execution of a new lease in which fixtures are not mentioned. And where the new tenancy is nothing but a renewal or extension of the old, all of the cases agree that all rights of the tenant under the first letting survive.

II. New lease as implied surrender of rights under old tenancy.

a. The prevailing rule.

It would seem, by a decision in 1881, that 1 L.R.A. (N.S.)

the question decided in WADMAN v. BURKE is not regarded as settled in England.

In *Ex parte D'Eresby*, 44 L. T. N. S. 781, an interesting case, reversing *Ex parte Sheen*, 43 L. T. N. S. 638, it appeared that a well-known artist, who was a friend of an innkeeper, painted on an old signboard a picture which was afterwards used as the sign of the inn, and soon became very valuable. After a while it was taken down, framed, and fastened to the wall in the main hallway of the house. Other tenants came and occupied the place under new leases in which neither the picture nor the sign was mentioned, and, one of them failing, his trustees claimed the picture as against the owner of the house; but it was decided that it belonged to the latter. At first the court said that on execution of the new leases the sign became clearly a part of the inn, and was entirely relieved of any right of any person to remove it; but afterwards, on reflection, stated that this opinion was *obiter*, and added that, when the simple question should arise of a tenant having removable fixtures, continuing his possession under a new or extended term, it desired to hold itself perfectly free to decide as to the question whether he retained the right of removal during such continuous possession.

The rule was recognized in *Pronguey v. Gurney*, 37 U. C. Q. B. 347, in which the court said there was no doubt that when a tenant took a lease, in the absence of any exception in the lease, the fixtures when attached to the land passed to the landlord as property of the landlord; but it was held that the mere agreement to increase or decrease rents was not a surrender of the tenancy. In the same case, on demurrer (36 U. C. Q. B. 53), it was held that the mere

ing by the defendants; it was nothing more nor less than a continuation of the former term.

Bogan v. Wright, 22 Misc. 94, 48 N. Y. Supp. 546; *Chretien v. Doney*, 1 N. Y. 419; *House v. Burr*, 24 Barb. 526; *Woodcock v. Roberts*, 66 Barb. 498; *Crawford v. Kastner*, 26 Hun, 440; *Kelso v. Kelly*, 1 Daly, 419; *Hausauer v. Dahlman*, 72 Hun, 607, 25 N. Y. Supp. 277; *Kramer v. Cook*, 7 Gray, 550; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Orton v. Noonan*, 27 Wis. 272; *Noonan v. Orton*, 27 Wis. 300; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Dix v. Atkins*, 130 Mass. 171; *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522; *Kearney v. Metropolitan Elev. R. Co.* 129 N. Y. 76, 29 N. E. 70; *Witmark v. New York Elev. R. Co.* 149 N. Y. 393, 44 N. E. 78.

fact that a purchaser of the soil knew that the tenant in possession claimed certain fixtures would not prevent them from passing to him by operation of law, if they became part of the freehold through the acceptance of a new lease.

Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173, is the leading American authority on the question. The court held that a tenant's right to remove buildings was at an end when he accepted a new lease of the premises, failing to reserve it, and containing a covenant to give up the premises at the end of the term in as good state and condition as a reasonable use, etc., would permit. The court said that the privilege of removal was conceded to the tenant for reasons of public policy, and that it was lost by the surrender after the term had run out. In reason and principle, the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under a new letting, were equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant was under a new tenancy, and not under the old, and the rights which existed under the former tenancy and which were not claimed or exercised, were abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises.

A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting the lease of the premises without excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it. *Ibid.*

In *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364, Affirming 81 Hun, 504, 30 N. Y. Supp. 1011, it was held that the purchaser of a tenant's buildings lost his title by taking the same premises himself under a lease 1 L.R.A. (N.S.)

A surrender is the restoring and yielding up of an estate or interest in lands to one who has an immediate estate in reversion or remainder.

Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120; *Witmark v. New York Elev. R. Co.* 76 Hun, 302, 27 N. Y. Supp. 777, Affirmed in 149 N. Y. 393, 44 N. E. 78.

Messrs. William B. Bosley and John S. Drum, for respondents:

Burke lost his right of removal when he accepted his new lease, and failed either to exercise or reserve such right.

Civil Code, §§ 1013, 1019; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301; *Jungerman v. Bovee*, 19 Cal. 354; *Merritt v.*

silent as to the removal of fixtures. The court said the buildings in such an event were deemed abandoned to the landlord.

And in *Stephens v. Ely*, 102 N. Y. 79, 56 N. E. 499, Reversing 14 App. Div. 202, 43 N. Y. Supp. 762, it was held that the right to remove certain plumbing put in by tenants under their first lease was lost by taking a new lease without reserving it. The new lease contained the usual covenants to leave the premises in as good state and condition as reasonable use, etc., would permit. The court said the legal effect of accepting the new lease was to destroy the right of removal of the fixtures, which before the end of the first term existed in the tenants.

The last-mentioned case was followed in *Nieland v. Mahnken*, 89 App. Div. 463, 85 N. Y. Supp. 809, in which it was held that a tenant lost the right to remove a watering trough, plate-glass windows, tiling, plumbing, storm house, etc., by not reserving it in a new lease of the same premises, the lease containing the usual covenants to deliver it up at the end of the term, etc.

And in *Hayes v. Schultz*, 33 Misc. 137, 68 N. Y. Supp. 340, it was held that a tenant could not remove an extension to a building under a previous agreement, where a new lease was taken which failed to keep the right alive.

So it would seem, under this rule, where a tenant quits the premises leaving improvements behind him, and afterwards takes a new lease of the same place as an under-tenant, that the improvements would go to the owner of the ground. *Scott v. Haverstraw Clay & Brick Co.* 135 N. Y. 141, 31 N. E. 1102.

In *Van Vleck v. White*, 66 App. Div. 14, 72 N. Y. Supp. 1026, it was held that a trustee in bankruptcy lost the right to remove fixtures by taking a new lease of the premises, together with the buildings and the appurtenances, but silent as to fixtures.

The New York courts are, however, as before stated, not inclined to extend the rule to removable trade fixtures not savoring of the realty.

Judd, 14 Cal. 59; Marks v. Ryan, 63 Cal. 107; Board of Education v. Grant, 118 Cal. 39, 50 Pac. 5.

Van Dyke, J., delivered the opinion of the court:

This is an appeal from an order denying defendants' motion for a new trial. The action was instituted April 28, 1897, to obtain an injunction restraining the defendants from selling and removing certain saloon fixtures from a building belonging to the estate of the plaintiffs' testatrix. On the 26th of March, 1888, defendant Burke leased from Lawrence Kelly, then the owner, the premises at the northeast corner of Valencia and Twenty-sixth streets, in the city and county of San Francisco, for the term of five years from the 1st day of Sep-

tember following, at the monthly rental of \$75 per month, payable in advance on the 1st day of each and every month during said term. Said lease also contained a covenant for the renewal for the further term of five years at the monthly rental of \$100 per month. Before the expiration of the term created by this lease said Lawrence Kelly granted and transferred the premises described therein to Ellen Kelly, the testatrix of these plaintiffs. The court found that, after the said defendant Burke was let into possession of the premises in question under and in pursuance of said lease, and during the autumn of 1888, he caused to be permanently and securely attached, annexed, and affixed to said building, by physical connection, certain doors, front and back bars, and lunch counters,

In Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 341, 26 N. E. 301, the court said the decision in Loughran v. Ross, *supra*, was placed on quite technical reasoning, supported, it was true, by some authorities; but that it was not one of those cases whose principle should be extended.

In Smusch v. Kohn, 22 Misc. 344, 49 N. Y. Supp. 176, the court refused to extend the rule to cover store fixtures, and said it would be a dangerous doctrine to hold that the ordinary removable store fixtures of a tenant passed to his landlord by the mere act of renewing the term, unless by express stipulation he reserved the right to remove them, Approving Second Nat. Bank v. O. E. Merrill Co. 69 Wis. 501, 34 N. W. 514, *infra*.

And in Bernheimer v. Adams, 70 App. Div. 114, 75 N. Y. Supp. 93, Affirmed in 175 N. Y. 472, 67 N. E. 1080, it was said that the Loughran Case should be deemed not applicable to trade fixtures, not distinctively realty, designed to retain their character as personal property, and capable of removal without material injury to the freehold. It was therefore held that, where a tenant, having the right to remove fixtures, sold them and quit the premises, and the purchaser at the same time, or after the purchase, took a new lease, without reserving the right to the fixtures, he did not thereby lose the right to carry them away.

The court also held that the taking of a new lease did not necessarily and conclusively presume the surrender of a former lease and the transfer of ownership of fixtures to the landlord. The presumption might be rebutted by circumstances showing that it would be unreasonable to infer that such was the intention. *Ibid*.

The rule that where a lease is renewed the right to carry away the fixtures is gone, was approved in Merritt v. Judd, 14 Cal. 59; and the court went on further, and said that the doctrine applied not only to a lease, but to other agreements which terminated the possession under it; and held that a tenant, after his lease had run out, had

no better right to the fixtures under an executory contract of sale than he would have had under the renewal of his lease, which would have left them to the landlord. Upon the execution of the new lease, the tenant was in the same situation as if the landlord, being seised of the land, had leased both land and fixtures to him. The dispute in this case was over a small steam engine and pump.

In Marks v. Ryan, 63 Cal. 107, a tenant built a house and barn on the leased premises before his term had run out, and the tenancy continued under three other leases silent as to a removal of the buildings, but providing that at the expiration of the term, the tenant would quit and surrender the premises in as good state and condition as reasonable use, wear, etc., would permit. The court said the rights of the landlord and tenant must be viewed in the same light as they would be if the buildings had been erected before, and had been standing upon the land at the time of the execution of the first lease, or as if the second, or any subsequent, lease had been in fact first; and, viewed in that light, it was quite clear that the buildings standing upon the premises were a part of the realty, and would have passed with it by deed, although not specifically mentioned in it.

In Leman v. Best, 30 Ill. App. 323, where it appeared that a hotel and certain cigar stands in the hotel building had been the subject of frequent changes of ownership, the court said that, before the cigar stands could be carried off as removable fixtures, it must be shown that the property in the fixtures was, at the expiration of each tenancy of the cigar stands, by agreement between the lessee of the house and the tenant of the cigar stands, reserved to the latter; and that, at the expiration of each demise of the house itself, the landlord of the tenant of the house assented to this continuance of the property in the fixtures in the tenants or subtenants.

In an early special term case in New York, Devin v. Dougherty, 27 How. Pr. 455,

glass cupboards chandeliers, and gas fixtures, etc. Shortly before the expiration of this lease negotiations were entered into between him and the then owner of the said premises, Ellen Kelly, for a new lease for the term of five years from September 1, 1893, at the monthly rental of \$75 per month. This new lease, however, was not executed until November 1, 1893, although the possession of said Burke was not interrupted. Ellen Kelly died testate June 21, 1896, and thereafter, March 1, 1897, plaintiffs were appointed executrices of her will. There being no appeal from the judgment,—which was entered some four years before the appeal from the order denying defendants' motion for a new trial was taken,—the sufficiency of the complaint or

findings to support the judgment or conclusions of law cannot be considered. The only question demanding consideration on this appeal is whether the evidence is sufficient to support the findings.

The appellants contend that the articles in controversy were affixed for the purposes of trade; that is to say, were trade fixtures, and were removable by the tenant, Burke, as belonging to him. The reply of respondents to this is that, conceding them to be trade fixtures, they must be removed before the expiration of the lease during the term of which the fixtures were annexed to the freehold. The evidence shows, and the court finds, that these fixtures were put in, or annexed to the building in question, before the expiration of the first lease; and it would

it was held that a tenant might move away a wood shed put up by him during his first term, although he had taken a new lease silent on the subject. The court held that the new lease was intended merely to provide for further occupation of the same premises for the same purposes, and that it was unnecessary for the tenant to reserve a right to a thing which was his own; that he was hiring the landlord's premises, and not also property on the premises belonging to himself. This, however, appears to be an outcast among the New York decisions, and was not noticed until long after the court of appeals had announced the opposite rule.

Sanitary District v. Cook, 169 Ill. 184, 39 L. R. A. 369, 61 Am. St. Rep. 161, 48 N. E. 461, is the leading case in Illinois on the subject. It held that the right of a tenant to certain buildings as fixtures was lost by the taking of a new lease simply containing covenants binding the lessees to keep the premises in good repair, and to deliver them up in as good condition as they were in when entered upon. The court said the great weight of authority was in favor of this rule. The reason given was that fixtures on the premises at the time of the lease were part of the thing demised, and that the tenant, by accepting a new lease without reserving his right to fixtures, acknowledged the right of his landlord to them, which he was afterwards estopped from denying.

In *Gauggel v. Ainley*, 83 Ill. App. 582, the rule was regarded as settled by the last-mentioned case.

And in *Smyth v. Stoddard*, 105 Ill. App. 510, it was held that the right of a tenant to move off a corn crib put up by him was lost by the taking of a new lease in which no mention was made of the crib and no reservation of any rights to remove buildings. The decision was affirmed in 203 Ill. 424, 96 Am. St. Rep. 314, 67 N. E. 980, but this point was not touched upon.

In *Hedderich v. Smith*, 103 Ind. 205, 53 Am. Rep. 509, 2 N. E. 315, the court, assuming that a tenant had the right to re-

move fixtures during his first term, held that it was lost by the taking of a new lease upon different terms in which the right of removal was not reserved. Without question, the court said, if there had been nothing but an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease upon different terms was, however, the creation of a new tenancy. The acceptance of the new lease was an effectual surrender of the old, together with the estate and all other rights which the old lease secured to the tenant. Thenceforth he was in as of a new estate which was to be measured by the condition of things existing when it commenced, and by the covenants, conditions, and reservations contained in the new lease, from which the rights of the parties must be determined and regulated.

In *Unz v. Price*, 22 Ky. L. Rep. 791, 58 S. W. 705, it was held that the right of a tenant to remove improvements, expressly reserved in the first lease, was lost by the taking of new leases at different rentals, silent upon the subject of improvements. If left to conjecture, said the court, we might expect that at the termination of the first lease the improvements were valued and paid for, or the rent reduced, to compensate for them. In the absence of proof, we must hold the improvements to be a part of the realty, and the right to remove them lost or waived, if not satisfied.

The question was said to be a new one in Maryland, in *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301. In that case it appeared that a tenant wanted to remove certain buildings, structures, and fixtures put up by him under a tenancy from year to year. After notice to quit, he took a written lease of the premises "together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining," without reserving the right to remove the fixtures. It was held that the right was lost by the acceptance of the written lease. The court said that all the elementary writers agreed that the

seem that the matter of the fixtures was in the minds of the parties to the second lease at the time it was entered into. The defendant Burke, in his testimony in reference to the negotiations with Mrs. Kelly, says: "She said she would consider the matter, and after a time said to me, 'So far as I am concerned, you are a very good tenant, and I have not anything to object to in you;,' and she said, 'In order to have you not leave and move the fixtures out, you can stay there at the old rental, \$75 a month.' And thereupon we entered into the lease set forth in paragraph 4 of plaintiffs' complaint." The fact that defendant Burke did not exercise his right, under the old lease, of having a renewal at the rental of \$100 per month, with the privilege of removing his

fixtures, but entered into the lease under consideration at the reduced rate of \$75 per month, without any reservation whatever of the right to remove the fixtures, would seem to show that the rent was reduced in view of having the fixtures remain as a part of the premises. Unless there is some understanding, express or implied, between the lessor and the lessee in the second lease, at the time it was executed, as to the fixtures, the rule of law is, as contended by the respondents, that the tenant, entitled to remove trade fixtures, must avail himself of that right before the expiration of the term of the lease during which they are affixed. In *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, the court says: "When the same tenant continues in pos-

tenant's right was gone in such a case, notwithstanding his actual possession had been continuous.

This case was followed in *George Bauernschmidt Brewing Co. v. McColgan*, 89 Md. 135, 42 Atl. 907, in which the dispute over the fixtures was between the landlord and a purchaser from the tenant. The fixtures had been put in under a prior lease. The court said that the tenant, if he had stood upon his rights under the first lease, might have held over under it, but that, as he did not do so, but surrendered the first lease and all the rights he had under it, and accepted a new lease, which made no reference to the first, nor contained any reservation whatever of any interests he may have had in the fixtures, the right to sell them was lost.

In *Shepard v. Spaulding*, 4 Met. 416, a tenant for years reconveyed to the owner of the soil by lease like that under which he held, without reserving the right to take away a movable house which he had put up. He then took a new lease of the same premises. The court held the conveyance by the tenant to the landlord to be a surrender, and that the house, by the surrender and conveyance without reservation, became permanently annexed to the freehold as effectually as if it had been built by the owner of the soil; and that the new lease was a demise of the whole estate, including the building.

In *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, a leading authority for the rule, it was held that when the same tenant continues in possession under a new lease containing different terms and conditions making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term, and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition, this was not an extension of, or holding over under, an existing lease, but the creation of a new tenancy. The court said it followed that whatever was a part of the freehold when the lessee accepted and began

his occupation under the new lease must be delivered up at the end of the term, and could not be severed on the ground that it was put in as a trade fixture under a previous lease which had expired. The dispute was over the removal of a bank vault. The case was said by the court to differ from that of *Shepard v. Spaulding*, last mentioned, only in the fact that in the former case there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the court held that the acceptance of the new lease and the occupation under it were equivalent to a surrender of the premises at the end of the term.

The failure of the lessee to exercise the right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed, which have become part of it. *Ibid*.

In *McIver v. Eastabrook*, 134 Mass. 550, leased premises were surrendered upon which a building of the tenant, used as a trade fixture, still stood. The landlord took possession, and, soon after, the tenant again hired the premises. It was held that the latter had lost the right to take away the building, and the court said the fact that the landlord knew and assented to the erection of the fixtures could afford no inference that he had agreed that it should not be a fixture.

The Missouri decisions are in favor of the rule. In *Williams v. Lane*, 62 Mo. App. 66, it was held that the right of a tenant to carry off shelving put up during the first term was lost by accepting a new lease silent on the subject.

In *Anthony v. Rockefeller*, 102 Mo. App. 326, 76 S. W. 491, it was held that, although a tenant for a certain term might remove fixtures put up by himself if he did so during his term, or while he held as tenant, if he took a new lease from another landlord without reserving the right, he lost it. The court said it had been disputed whether this rule was sound where the new lease was a

session under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term, and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition,—this is not the extension of, or holding over under, an existing lease. It is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new

contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed, which have become part of it." This case is cited with approval in *Marks v. Ryan*, 63 Cal. 107. In *Marks v. Ryan* this court, after referring to the cases of *Merritt v. Judd*, 14 Cal. 60, and *Jungerman v. Bovee*, 19 Cal. 355, said: "According to the doctrine of those cases, upon the execution of a new lease, the lessee 'is in the same situation as if the landlord, being seised of the land, had leased both land and fixtures to him.' In that case we do not think that anyone would claim that the lessee could remove the buildings, or that they were not fixtures annexed to the land."

Under the evidence and findings of the court, the fixtures attached by the lessee to the leasehold property became a part of the

mere renewal and continuation of the same landlord and tenant, citing *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, *infra*; but that there was no ground to question it where the lease was an independent contract with a new landlord.

In *Champ Spring Co. v. Roth Tool Co.* 103 Mo. App. 103, 77 S. W. 344, the reason for the rule was said to be that the new lease evidenced a new contract of tenancy defining the mutual rights and obligations of the lessor and lessee.

To the same effect is *St. Louis v. Nelson*, 108 Mo. App. 210, 83 S. W. 271. The court said that the acceptance of the new lease in that case was equivalent to a surrender of the possession to the landlord, and the re-entry under the new, in lieu of the old, tenancy. A lessee's right of removal of improvements attended the life of the lease creating it and expired with the lease; and that, under a new lease, where such right was not reserved, it could not subsist.

In *Gerbert v. Sons of Abraham*, 59 N. J. L. 160, 69 L. R. A. 764, 59 Am. St. Rep. 578, 35 Atl. 1121, it was held that, upon the renewal of a lease without any provision as to buildings put up by the tenant, such buildings became incorporated with the real estate, and were then the property of the lessor and remainderman.

And in *Spencer v. Commercial Co.* 30 Wash. 520, 71 Pac. 53, it was held that the right of a tenant to take away a hydraulic press, certain floors and partitions, put in under an old tenancy, was destroyed by the taking of a new lease not mentioning fixtures.

b. The contrary doctrine.

Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362, is the leading case on the other side of the question. The dispute there was over the removal of certain tenant's buildings. The second lease was, for some reason, given to cover the same term as the first; and in the report of the case it is not 1 L.R.A. (N.S.)

said whether the right of removal was reserved, but it probably was not. It was not disputed that, as between landlord and tenant, the buildings would in general have been removable. The contention, however, was between the tenant and a mortgagee of the landlord. It was claimed that, by taking the new lease, the old leases were, in contemplation of law, surrendered, and, the tenants not having asserted and exercised a right to remove erections made previously, they had abandoned them to their landlord. In discussing the question, Judge Cooley, after calling attention to the rule which permitted a tenant to remove his fixtures before surrendering possession and during the time he has a right to regard himself as occupying in the character of a tenant, said: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should, in effect, say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'" He also said that, unless the new lease in terms, or by necessary implication, included the buildings, it was begging the whole question to assume that the lease included the buildings as part of the realty.

The reasoning in the Michigan case is approved in *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514, which holds that, where it is understood that trade fixtures are to be the sole property of the tenant, the right to remove them is not lost

realty, and remain so until severed. *San Francisco Breweries v. Schurtz*, 104 Cal. 421, 38 Pac. 92; *Commercial Bank v. Pritchard*, 126 Cal. 605, 59 Pac. 130, and cases there cited; Civil Code, §§ 658, 660. At the time the said lease between Ellen Kelly and defendant Burke was entered into, the fixtures sought to be removed in this case, and to prevent which the injunction was granted, were part of the realty, and when Burke accepted said lease, as lessee, he covenanted to "well and sufficiently keep in repair the said premises, with their appurtenances, when and as often as the same shall require, damages by fire alone excepted, and that at the expiration of said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and

wear thereof will permit [damages by the elements excepted]." And the lease, as already stated, contained no covenant or agreement permitting the lessee to sever and remove the fixtures from said premises.

The order appealed from is affirmed.

We concur: Beatty, Ch. J.; McFarland, J.; Henshaw, J.; Angellotti, J.

Shaw, J., dissenting:

I dissent. I think, in substance, the new contract was a renewal of the old lease, and was so understood and intended.

Lorigan, J., dissenting:

I concur in the dissent of Justice Shaw, for the reason given by him.

by the signing of a new lease silent on the subject. The plain intention of the parties, the court holds, must rule.

The Michigan and Wisconsin cases were approved in *Wittenmeyer v. Board of Education*, 10 Ohio C. C. 119, where the right to remove school buildings was held not to have been lost by the acceptance of a new lease of the premises by the school board. In this case the board wished the new lease expressly to reserve the right to the buildings, and, the agent of the landlord not having authority on that part, the question was left open. The lease contained no covenant to leave the premises in the same condition in which they were at the time of assigning of the new lease, and in this respect the court distinguished the case from *Laughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, and *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694.

But the Ohio cases are not in harmony. In *Cook v. Scheid*, 6 Ohio Dec. Reprint, 867, it was held in the Superior Court of Cincinnati that the right of a tenant to take away an engine boiler which he had put up during his term under a written lease was lost by parol renewals silent as to fixtures. The court refused to follow *Kerr v. Kingsbury*, but fell in line with the authorities the other way. This case was dismissed, for the want of preparation, by the supreme court commission, in 1884.

In *Union Terminal Co. v. Wilmar & S. F. R. Co.* 116 Iowa, 392, 90 N. W. 92, the court said it seemed to be the rule in some states that the renewal of a lease terminated the right to remove the fixtures erected during the original terms; but that it had not yet been adopted in Iowa, citing *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104 *infra*. The point was, however, not directly decided in either case.

III. Effect of special covenants in new lease.

In deciding whether a tenant loses the right to carry off his fixtures by a new letting of the premises, the courts have been 1 L.R.A. (N.S.)

moved somewhat by the effect of special covenants in the new lease.

In *Thresher v. East London Waterworks Co.* 2 Barn. & C. 608, it appeared that, after two lime kilns had been put up on ground held under an old lease, tenants, under a new letting, covenanted to repair, uphold, and maintain the ground, erections, buildings, etc., and to leave and yield up at the end of the term. The last tenants pulled down the buildings, and were sued for a breach of the covenants in the new lease, and the case turned upon the construction of the lease. The court said that under such a lease, containing no exception, the buildings erected for purposes of trade could not be removed, and that this was highly reasonable, because the expectation of buildings to be erected during the term, and to be left at its expiration, was often one of the inducements to the granting of a lease, and formed a considerable ingredient in the estimate of the rent to be reserved; and that, if buildings for trade erected during a lease could not be removed without breach of such covenant, neither could the buildings erected before and existing at the date of a lease be removed without a breach of the covenant, unless there should be very special matter to take them out of the operation of the covenant; and that the lessees under the new letting, having accepted a lease of ground and buildings thereon, could not be allowed to say that the ground only, and not the buildings, should be deemed to pass by that lease.

In *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, the court said that a covenant in a new lease to surrender the premises at the end of the term in as good state and condition as reasonable use, etc., would permit, included the buildings then on the premises, put up by the tenant, and not reserved by the new letting. The court said it followed that the tenant, becoming a party to the lease and occupying under it, was estopped from claiming the buildings as his own. Such was also, the implied undertaking of a tenant taking a new lease by parol.

In *Jungerman v. Bovee*, 19 Cal. 355, it was held that the right of a tenant to remove buildings under a written lease was lost by the taking of a new lease, by which the premises were to be surrendered at the end of the term, "reasonable use and wear thereof and damages by the elements excepted."

And in *Sanitary District v. Cook*, 169 Ill. 184, 39 L. R. A. 369, 61 Am. St. Rep. 161, 48 N. E. 461, the court, after holding that the tenant's right to certain buildings was lost by accepting a new lease, stated that a covenant in the new case, binding the lessees to keep the premises in good repair and deliver them up in as good condition as they were in when entered upon, would seem to put the question beyond the realm of reasonable controversy. The case of *Thresher v. East London Waterworks Co.*, *supra*, was said to be directly in point.

In *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301, there was no express covenant on the part of the lessee of a new term to keep the premises in repair and restore them in good condition; but this did not take the case out of the general rule. The court held it to be well settled that, independently of any express agreement on the part of the tenant to that effect, and in the absence of the landlord's undertaking to repair, the law imposed upon every tenant, whether for life or for years, the obligation to treat the premises in such a manner that no substantial injury should be done to them, so that they would revert to the lessor at the end of the term, unimpaired by any wilful or negligent conduct on his part.

In *George Bauernschmidt Brewing Co. v. McColgan*, 89 Md. 135, 42 Atl. 907, the decision that the tenant's right to fixtures was lost by the new letting was partly put upon the ground that the new lease contained a covenant to surrender the premises in the same order and condition "as they now are, wear and tear excepted;" and also that all improvements, alterations, and repairs which might be put on the premises should become the property of the lessor at the expiration of the term.

In *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, however, the court said the fact that the lease provided that all improvements, alterations, repairs, and additions upon the premises by the tenant should be left for the benefit of the landlord at the end of the term made no difference.

IV. Construction of leases and agreements, intention of parties.

Some of the cases have gone on the construction of special agreements, and of the terms of the new leases; and in others the intention of the parties gathered from the circumstances of the case has been given effect.

Fitzherbert v. Shaw, 1 H. Bl. 258, decided in 1789, which is often cited as the earliest authority on the general subject of the note, 1 L.R.A. (N.S.)

turned upon the effect to be given a special agreement for an extension of the term. It there appeared that the purchaser of land gave notice to a year-to-year tenant upon it to quit, and brought ejectment against him. The parties then agreed that judgment should be signed for the plaintiff, with a stay until the Michaelmas following, until which the defendant was to keep in. No mention was made of fixtures. Before the stay expired the defendant took off certain movable buildings which he had put up, and the question was whether he had the right to do so. The court held the agreement to mean that the tenant, while holding under it, should do no act to alter the premises, and should deliver them up in the same situation they were in when the agreement was made.

And in *Heap v. Barton*, 16 Jur. 891, after ejectment had been brought against a tenant, he entered into an agreement with the landlord by which, in consideration of the tenant's not appearing in the action, the landlord extended the time he might occupy the premises. In this agreement nothing was said about certain buildings and other trade fixtures of the tenant, and the court held that the right to remove them was gone.

In *Mansfield v. Blackburne*, 6 Bing. N. C. 426, where a tenant took a new lease in renewal of the old, the new lease containing a demise of all salt works, buildings, and other things enumerated, it was held that salt pans and pipes put in by the tenant passed to the landlord so that the tenant lost the right to remove them.

In *Sharp v. Milligan*, 23 Beav. 419, tenants in possession under a parol lease took a contract for a written lease for the same premises, "with steam engine and engine and gas houses, out buildings, and appurtenances of the same belonging and as the same are now occupied by them," etc. The tenants wanted a schedule of their own fixtures put into the lease so that they could remove them at the end of the term. The court would not order the exception, saying that the tenants ought to have put exceptions into the contract for the lease, if they intended that only a part of the fixtures were to be treated as the landlord's property.

In *Thorpe v. Milligan*, 5 Week. Rep. 337, where a tenant, who had put up certain gas works on the premises, entered into an agreement with his landlord for a new lease at a rack rent of the mill and factory and the steam engine, gas house, out buildings, and appurtenances to the same belonging, it was held that the words "gas works" which had been put up by the tenant were properly added to the lease.

In *Ex parte Hemenway*, 2 Low. Dec. 496, Fed. Cas. No. 6,346, the question was whether certain fixtures which could have been taken out during the term of the tenant who put them in, and who held under a written lease, could be claimed by a tenant's assignee in bankruptcy under a parol renewal.

After the written lease had run out, several tenants held under parol tenancies without any agreement with the landlord as to the fixtures. Each tenant transferred the fixtures to his successor by a bill of sale. It was held that the right of removal continued under the parol renewals of the first lease. The case turned upon the evident intent of the parties, which was found from the fact that there had been no agreement between the landlord and a succeeding tenant as to the fixtures, and that the fixtures had been passed from one tenant to another without notice to the landlord.

In *Jungerman v. Bovee*, 19 Cal. 355, it was held that the right of a tenant to remove buildings under a written lease was lost by taking a different lease for the accommodation of a new owner. The court said the inference from the new contract, and from the change of the terms of the old, was irresistible to show that the intent was to surrender the old lease. Effect could not otherwise be given to the express provisions of the last contract.

In *McCarthy v. Trumacher*, 108 Iowa, 284, 78 N. W. 1104, it was held that the tenant's right to certain buildings and fences put up during his first term under an oral agreement was not lost by signing a written lease without reserving the right to remove the improvements, because, by express agreement between the landlord and tenant, these improvements were determined to be chattel property with a right of removal in the tenant. The greater number of cases, the court said, held that the taking of a new lease which contained no agreement as to the fixtures operated as a surrender, and deprived the tenant of his right of removal, but that there were some well-considered cases the other way, citing *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 302, and *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514, *supra*. It was held that when the written lease was executed it covered only the realty, and no more included the improvements than any other personalty belonging to the tenant upon the demised premises at the time; that the taking of the new lease did not in any way wise affect the tenant's right to personalty belonging to him. This view, the court said, had direct support in *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907, *infra*.

The *Carlin and Bauernschmidt Cases*, *supra*, were distinguished in *O'Brien v. Mueller*, 96 Md. 134, 53 Atl. 663, in which it appeared that the landlord had sold the tenant certain fixtures, giving him at the same time the right to carry them off at the end of the term. In a new lease no reservation was made of the fixtures. In *Carlin's Case*, as well as *Bauernschmidt's*, said the court, the decision was made on the principle that a lease ordinarily carries with it whatever is attached to the property, and that, when a tenant accepts such a lease, he acknowledges the title of the landlord to both the building and fixtures, and is there-

fore estopped from controverting it thereafter; but that such an estoppel could not arise, obviously, where the landlord himself had done some act which admitted that the articles in question were not a part of the realty, but personalty belonging to the tenant. "If, on the one hand, a tenant may do some act which will prevent him from setting up a claim as against the landlord," continued the court, "on the other hand, the landlord may also, by his agreement, equally estop himself from claiming that the fixtures are a part of the realty." It was held that the acceptance of a new lease therefore did not affect the right to take away the fixtures.

In *Chaffee v. Fish*, 2 Ohio S. & C. P. Dec. 89, the question was as to the tenant's right to take away a temporary wire fence after he had accepted a second lease in which the fence was not mentioned. The court held that he could, because it was the plain intention of the parties from the beginning to the end that the fence was not to become a part of the realty. No authorities as to the effect of the taking of a new lease or the right to remove fixtures were referred to by the court.

In *Abell v. Williams*, 3 Daly, 17, it was held that, independent of the question of surrender, the right of a lessee to remove buildings was gone when he accepted a new lease expressly demising them to him, and not reserving to him the right to take them away. The court said that, when a tenant accepted a new lease, and the privilege to remove the fixtures was not given by it, the right was gone; and that he was in the same situation as if the landlord, being seised of the land and fixtures, had expressly demised both to him.

Livingston v. Sulzer, 19 Hun, 375, was said to be taken out of the rule laid down in *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, because the new lease excepted such portion of the property as was owned by the tenant.

In *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907, *Reversing* (Tex. Civ. App.) 27 S. W. 1024, it was held that, where the plain intention was that such structures as a house, railroad track, and coal chutes built on leased land should remain the property of the tenants, the right to remove them would not be lost by the acceptance of a new lease; and the court said that a tenant, making a new lease in lieu of a former one, might, as a part of the consideration proceeding from him, expressly or impliedly stipulate that fixtures theretofore or thereafter placed by him upon the land should, at the end of the term, become the property of the landlord. Where such was the proper construction of the contract, it was proper to hold that the tenant had surrendered his right to remove. "But," said the court, "whether it ought, as an original proposition, to have been held that the mere taking of a new lease without mention of the fixtures has such an effect, may be gravely doubted. There seems to be a vice in the

argument, for the reason that it assumes that the tenant, in leasing the land, thereby also leases the fixtures. So long as the tenant has the right of removal, the fixtures are his; and, to assume that, by leasing the land upon which they are placed, he leases them of his landlord, is to assume that he intends to lease his own property. Whether it is or is not the intention of the parties in any particular case to make them the property of the landlord is the very point to be determined. An intention on part of the tenant to surrender a valuable right ought not to be lightly implied, though such intention might be made manifest by the circumstances of the particular case." The court showed a decided leaning to the views of Judge Cooley in the Michigan case, but held it unnecessary to determine the question; stating that the rule must yield to the intention of the parties to the lease, and construing the lease in that case in favor of the tenant. In the court of civil appeals it was held that a tenant's right to remove fixtures was lost by the taking of the new lease.

In a later case, *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. 921, the lower court still adhered to the soundness of the rule laid down in the majority of the cases, but held that a tenant should be allowed to show that, by special agreement, he had the right to remove buildings which he had put upon the soil. Upon the main question, the court said: "As the rule that a lessee loses his right to remove his fixtures by renewing his lease without reserving the fixtures on the premises has come down to us from the year books, . . . one of the great sources of the common law, undisturbed until questioned in *Kerr v. Kingsbury*, and passed the opinion of the great judges in that case with increased force and strength, it is not for us, upon an intimation of its disapproval by the supreme court of this state, to give it question."

The court, in *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514, *supra*, said that there ought to be something more than the mere taking of a new lease extending the term to divest the tenant of his right to remove fixtures. If he accepted a lease which in express terms recognized the right of the landlord to the fixtures, and he agreed to pay rent for their use thereafter, and keep them in repair, and surrender their possession at the end of the new term, a strong case would be made out in favor of a surrender of the fixtures to the landlord by the acceptance of such new lease, and it would require very clear evidence that, notwithstanding the acceptance of such new lease, there was an agreement that the title to the fixtures should remain in the tenant; but it should be admitted that, if the general words of description in the new lease would, under ordinary circumstances, be deemed a lease of the fixtures as well as of the land and buildings, still the lease only raised a presumption that it was intended to cover the fixtures, and it was open to

proof whether it was in fact intended to cover such fixtures, or whether they were intended by both parties to be excepted therefrom.

For the other cases on the question of intention, see the following heading.

V. Renewal or extension of old term.

Where the new agreement does not amount to the making of a new lease, but is merely a continuation or renewal of the old tenancy, the tenant's right to remove fixtures survives.

In *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465, after certain fixtures had been put in, a lease was extended for four years by indorsement on the back of the instrument. During the running of the extension, a fire made it necessary to remodel the building, and a new lease was made out for the balance of the term. It was contended that the acceptance of the new lease by the tenant operated as an extinguishment of the first tenancy, a surrender of the premises to the landlord; that, having failed to remove the fixtures under the first lease, the right to do so was gone; that, immediately upon the surrender, they became part of the freehold, and were included in the second lease as the property of the landlord. The trial court found that the tenant's occupancy of the premises after the execution of the second lease was, in effect, merely a continuation of the old tenancy; and the appellate court refused to disturb it, holding that the tenant's right to the fixtures was therefore not lost.

In *Rovce v. Latshaw*, 15 Colo. App. 420, 92 Pac. 627, it was also held, on the authority of *Ross v. Campbell*, *supra*, that a new lease was merely a continuation of the old tenancy; but the same question was not up, as the new lease gave the tenant the right to remove fixtures, and the dispute was between him and the purchaser at a foreclosure sale of the real estate under a trust deed executed before the second lease.

In *Baker v. McClurg*, 96 Ill. App. 165, it was held that where a partnership lease was canceled as to one partner, and a new lease, silent as to partnership fixtures, was made out for the balance of the term to the other partner, this amounted to a continuance of the old term; and that, therefore, the tenant's right to carry away the fixtures was not lost by accepting the new lease. The case was affirmed in 198 Ill. 28, 59 L. R. A. 137, 92 Am. St. Rep. 261, 64 N. E. 701, on the opinion of the court below.

In *Hedderich v. Smith*, 103 Ind. 205, 53 Am. Rep. 509, 2 N. E. 315, the court intimated that it would consider the rights of the parties to remain the same under an extension of the old lease upon the same terms.

In *Howe's Cave Asso. v. Houck*, 66 Hun. 205, 49 N. Y. S. R. 5, 21 N. Y. Supp. 40, Affirmed in 141 N. Y. 606, 36 N. E. 740, it was held that the right of a tenant to take off buildings put on the soil for trade purposes

was not lost by an extension of the letting, the case turning upon the construction of the terms of the lease. Nothing was said as to the continuation of the tenancy under a new lease.

In *Clarke v. Howland*, 85 N. Y. 204, it was held that the continuance in possession by a tenant after the expiration of a written lease and the acceptance of rent by the landlord was a recognition of the covenants of the written lease, and an implied renewal of it; and that the tenant's right to remove buildings, reserved in the first lease, continued.

In *Radey v. McCurdy*, 209 Pa. 306, 67 L. R. A. 359, 103 Am. St. Rep. 1009, 58 Atl. 558, it was held that, where a tenant "took an extended and renewed lease" of certain premises, the right to take away trade fixtures was not destroyed. The court said that abandonment of fixtures was a question of intention, and that, under the undisputed facts of the case, the tenants had never intended to abandon their trade fixtures. To have removed them one day, said the court, and put them back the next, would have been a vain and useless thing which the law required of no one; and it offended reason to say that the landlord had a right

to regard his tenant's property as abandoned to him because one of two tenants who was to continue as such for another year, needing the same fixtures in his unchanged business, had not, when the lease was extended and renewed, inserted a clause giving the tenants the right to remove the fixtures at the end of the extended term. The case was decided partly on the authority of the following stray statement of the court in *Davis v. Moss*, 38 Pa. 346: "If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year; and I take it he would be entitled to remove fixtures during the year."

In *Young v. Consolidated Implement Co.* 23 Utah, 586, 65 Pac. 720, it was held that the right of the tenant to remove improvements was not lost where the new agreement did not amount to the making of a new lease. It was an extension merely of the terms and conditions of the old lease for a longer period of time. The facts of the case, the court said, took it out of the rule laid down in *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173.

H. C. S.

1 L.R.A. (N.S.)

RÉSUMÉ

GIVING a brief and comprehensive view of the points of special interest and importance in this volume.

- I. PUBLIC MATTERS AND RELATIONS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; NUISANCE.
- VII. PROPERTY RIGHTS.
- VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC MATTERS AND RELATIONS.

Appropriation of public money. A novel case involving the validity of legislative appropriation of money to pay the expense of attendance by the whole body of the Pennsylvania legislature on an excursion to New York to attend the dedication of the Grant monument held it valid. 409.

Branding or labeling goods. The California statute requiring fruit packed for shipment to be marked or branded to show the locality of its growth was held unconstitutional because not properly within the police power. It is in harmony with the cases in the note therewith. 184.

Conflict of laws. An attempt to enforce the exemption law of another state was unsuccessful in a West Virginia case, on the ground that such a law pertains to remedy. The note to the case shows that it is in accordance with the weight of authority, though there are some decisions to the contrary. 195.

Drains and sewers. The rule exempting municipalities from liability for consequential damages from its sewerage system held not to apply where the system was not constructed according to any regularly and properly adopted plan. 952.

Elections. The failure to number ballots under the Alabama statute requiring it is held not fatal; and this is in harmony with decisions in other states. 656.

Eminent domain. The irrigation of private lands is held, in Utah, to be a public purpose, for which land may be taken by condemnation. As shown by the note, this goes beyond the decisions in most other jurisdictions. 206. Another case in the same state holds that the construction of mining roads and tramways is also a public use.

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On this the authorities are divided, as shown by the note. 977. Power to confer the right of eminent domain to secure a right of way for a private railway is denied in a North Carolina case. 969. See also *infra*, III., *Corporations*.

Fire escapes. The effect of an official certificate of approval of fire escapes is held conclusive in favor of the property owner, as against civil liability to a person injured on account of alleged defects in them; and the weight of authority seems to support it. 1091.

Food. Police regulations to preserve the purity of milk appear in a series of St. Louis cases. One fixed the standard or quality of milk sold at 7-10 of 1 per cent ash. This was upheld, and the note shows it fully supported by the authorities. 918. Another provision of the ordinance prohibits the sale of milk with less than 3 per cent by weight of butter fat, to be estimated by a specified process. This was upheld; and the note shows other cases upholding the validity of particular tests. 926. The prohibition of preservatives in milk, though not deleterious to health, is also sustained. 928. Regulating the kind of food that cows may be fed, as a condition of the sale of their milk, is also sustained. 932. As one of the means of proper regulation of milk supply, it is also held that milk dealers may be compelled to register and pay the registration fee. The authorities are well agreed on this point. 936.

Intoxicating liquors. An attack on local-option law on the ground that its taking effect could not be made to depend upon a popular vote was unsuccessful, as it was held to become effective, by its enactment.

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and not by a vote. 483. Questions as to possession of liquor as evidence of intent to sell, and of sales on vessels engaged in commerce, appear *infra*, IX.

License. A physician's claim that his license to practise could not be constitutionally revoked was unsuccessful in a Kansas case; and the decision logically follows from those in the note to the case, which upheld statutes requiring physicians to obtain a license. 811. The right of a city to require a license for the use of streets by a telephone company is denied in Wisconsin, where the statute authorizes the company to use the streets. 581. The revocability of a license to erect a building is denied in a Massachusetts case, in the absence of any reservation of such right; and the authorities in the note are to the same effect. 458. A New York case denies that the licensing of theaters and ticket brokers imposes any duties upon the one, or confers any rights upon the other, with reference to tickets, in addition to those conferred by the contract under which the ticket is sold. 1188.

Municipal corporations. Municipal power to legislate on subjects covered by statutes is denied in a Georgia case; but the note shows that the authorities are in hopeless conflict on the subject. 382. The right of local self-government in Rhode Island, which has been strongly urged in view of the peculiar origin of that state, is denied, as against the statute regulating the police force of the state. 512. The distinction between private and public functions of a municipality is considered in a Massachusetts case, which denies municipal liability for negligence of the city superintendent of the lamp department in respect to an unsafe lamp post. 664. An ordinance requiring certain kind of fenders on street cars, or some others, equally as good, approved by certain officials, is held invalid in Indiana because of the arbitrary discretion given to the officials. This seems to go somewhat further than the earlier decisions. 940.

Statutes. A statute to cure a constitutional defect in a previous statute is upheld in an Iowa case; and the cases in the note seem to support it in the main. 431.

An enactment that a C. O. D. sale of liquors shipped to a local-option territory shall be deemed to be made there is held void in Texas on the ground that the state Constitution, commanding the enactment of certain local-option law, impliedly prohibited further legislation on the subject. As to such implied prohibition by constitutional mandate, the note shows decided conflict in the cases. 489.

Taxes. The taxability of an easement acquired by laying pipes in a street under a franchise is upheld in a Maryland case, on the ground that the easement is property distinct from the franchise. Cases in the note show various instances in which similar easements are held taxable as real estate. 263. Probate fees based on the value of the estate are held unconstitutional in a Washington case. 152. The collateral inheritance tax is upheld in a Pennsylvania case as to real estate in other states, which the executors must sell to pay legacies. On the doctrine of equitable conversion, here applied, the decisions appear to be in conflict. 400. A suit against a state officer to cancel a tax title is held in a New York case to be within the rule that a state cannot be sued. 727. In opposition to the rule generally accepted, a Kentucky case holds that property of a water company owned by a city is not used for a public purpose, but is taxable. 766.

Water rates. Unpaid water rates of an occupant of premises were held in an Illinois case not to be collectible from a subsequent occupant after a lien therefor is lost. 770.

Waters. The power of the Federal government to grant tide lands lying between high and low water marks within a territory is sustained in a Washington case. 745. A consumer's right to maintain a suit to compel a water company to furnish water at rates stipulated in a contract with a municipality was upheld in a New York case. 958. That a water company may be compelled by mandamus to supply an individual applicant with water at reasonable rates is held in a Maine case. 963.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Failure to file bond. Recovery for threshing grain was denied for failure to file the bond required by the South Dakota statute, making it unlawful to use a threshing machine without executing and filing a bond. The note to the case shows a considerable conflict of authority on the general question as to the effect of failure to procure

a statutory license upon the validity of contracts. 1159.

Mutuality. A written contract, signed by both parties, appointing plaintiffs defendant's exclusive agents to sell the latter's product held not wanting in mutuality as to prevent an action for damages for its breach. 445.

Rescission. The general rule requiring a party, seeking to rescind a contract for non-performance by the other, to restore or tender back what has been received from the latter, held not to apply where defendant agreed to teach plaintiff, and, after beginning the course of instruction, refused to proceed further. 379.

Duress. Refusal to pay money admitted to be due, except upon receiving a certain kind of receipt, held not to constitute such duress as to render the receipt void. 867.

Services by relative. An exception to the rule denying an implied contract to pay for services rendered to relatives was made in case of a woman claiming against her brother's estate for nursing and other menial services performed for him, after he had been taken into her home, without benefit to her. 819.

Banks. A claim of preference on account of a special trust fund held by an insolvent bank was denied because the only cash assets in the bank at the time it closed its doors were the identical currency and checks received from depositors on that day. 252. A gift *inter vivos* held not to be established by depositing a fund in a bank with the statement that it was intended for the donee, and the delivery to the latter of a certificate of deposit with an indorsement indicating that it was his. 790. The right of a bank to apply to the personal obligations of a commission merchant money received for produce sent him for sale and deposited by him in his general account in the bank was denied in a Wisconsin case. 1110.

Bills and notes. The rule making certainty as to payment a condition of negotiability was applied by denying the negotiability of a note payable upon the confirmation by Congress of a certain land grant. 1120. A purchaser of an interest-bearing certificate of deposit payable to and indorsed by one as "trustee" held, under uniform negotiable instrument law, to be *prima facie* and presumptively charged with actual knowledge of the trustee's want of authority to dispose of the paper for his own benefit. 188. One whose indorsement was secured upon a note by the trick of inducing him to sign his name to a paper placed upon the note in such a way that the ink penetrated through to the note was held not to be liable. 1075.

Bill of lading. A bank purchasing a draft with bill of lading attached making goods deliverable to order of consignor held to have assumed the obligation of the seller to deliver the property, according to the contract, to the drawee of the draft. 242.

Carriers. What is a reasonable time to keep a station platform lighted prior to the 1 L.R.A. (N.S.)

arrival of a train held to present a question for the jury. 851. Injuries caused by gross negligence held to be included in a release, by a sleeping car porter, of the railroad company from liability for negligent injury. 674. A railroad company was held liable to a passenger thrown to the ground by the starting of a freight train with a jerk while he was on the platform, to which, with the knowledge of the conductor, he had gone for a necessary purpose, the conductor having neither warned him of the danger, nor taken any measures to prevent the starting of the train. 1145. A father paying full fare was allowed to recover for loss of articles of his infant child, packed and carried with his baggage, although the child paid no fare. 353. The approval by the state commission of a freight rate based upon limited valuation of the property held not to have absolved the carrier from liability for full value of the property if lost through its negligence. 985.

Guaranty. A guaranty of payment for property shipped held not to be effected by a warehouseman's reply to a letter requesting information about a broker, that he considered him reliable,—especially as all shipments would come to the warehouse, and payment "would be made by us to you for all sales." 305.

Insurance. A marine underwriter held not liable for a loss occurring through the deliberate act of the master in pushing through dangerous ice for the purpose of reaching his destination quickly. An exhaustive note as to the effect of voluntary exposure to peril upon liability under a marine insurance policy is added to this case. 1095. An injury to the hand, superinduced by numbness resulting from using it as a head-rest during sleep, held to be covered by insurance against injuries through external and accidental means. 422. The right of the holder of an assessment policy from a company having the right to issue policies on both the assessment and reserve plans, to require the company to continue the issuance of assessment policies, is denied in a North Carolina case. 623. The adoption of a by-law by a fraternal insurance order, excluding from membership persons engaged in the sale of intoxicating liquors, held not to avoid the certificate of a member already engaged in that business, and who continued therein after the adoption of the by-law. 1064.

Judgment. An assignment of judgment held not to carry with it a right of action against an officer and sureties on his bond for failure properly to return a forthcoming bond upon the judgment. 149.

Partnership. An agreement by a partner that the goods of the firm may be paid for

by the customer in commodities furnished for the partner's own benefit held to be void as beyond the scope of the partner's apparent authority. 650. An exception to the rule denying a surviving partner compensation for his services applied by holding that he is entitled to compensation for the part of the work in completing a construction contract which the deceased, according to the agreement between them, would have contributed had he lived. 643.

Property in custody of law. A sale under a power in a chattel mortgage while the property was in the custody of sheriff, under levy made after advertisement of the mortgage sale, held to be void and ineffectual. An exhaustive note on the right to sell property while in custody of law is appended to this case. 1055.

Sale. Notice of the failure of a machine to work was held to be waived by the continued efforts of the seller's agent to make the machine work after the expiration of the time limited for the notice. 142.

Salvage. The owners of a tug, whose fault caused the wreck of its tow, were denied salvage for services rendered by another vessel belonging to them, in raising and bringing the wreck into a port of refuge. 873.

Theater tickets. A right of action for trespass for failure to provide the seat called for by a theater ticket was denied in a Pennsylvania case upon the ground that the owner of the theater was under no implied obligation to serve the public, and that the only remedy was assumpsit for breach of contract. 1184. A New York case holds that the licensing of theaters and ticket brokers imposes no duties upon one, and confers no rights upon the other, with reference to tickets, in addition to those

conferred by the contract under which the ticket is sold. The last case also holds that a condition of a theater ticket, that it will not be honored if sold on the sidewalk, is not against public policy. 1188.

Time. The word "noon," denoting the beginning and termination of risks under an insurance policy, was, in accordance with the prevailing custom in the community, interpreted by standard, and not by sun, time. 364. The legal fiction that there are no fractions of a day held to have no application to cases where the statute expressly requires that notice shall be taken of the precise time an official act is done, and a record thereof made. 835.

Trademark. A trademark held not to be assignable apart from the good will of the business to which it was attached. An exhaustive note on the subject of sale of trademarks is appended to the case. 704. A limitation upon the right of one to use his own name in his own business was applied in a California case, holding that one who had established a business under a particular name, which he placed on the hats of his agents to inform customers that they were his representatives, could enjoin another of the same name, engaged in the same business, from using such name as a hat label in substantially the same way as the former, so as to deceive the public. This limitation of the right to use one's own name in his business seems to be sustained by the authorities. 660.

Umpire's decision. Fraud or mistake on the part of an umpire, so great and palpable as to imply bad faith, or his failure fairly and honestly to perform the function assigned to him, held to invalidate his decision. 1050.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations. A North Carolina case upholds the right to take, by eminent domain, the stock of dissenting stockholders in a railroad company for the purpose of effecting a consolidation of the road with others to create a through line. An exhaustive note on the condemnation of shares of minority stockholders is appended to the case. 604. One who organized a corporation for the transaction of his personal business was held personally liable for money received by him for investment, in return for which he delivered a worthless obligation of the corporation. 176. A stockholder, who was also a secretary of a corporation, was denied the right to recover against other officers for representations by which he was induced to dispose of his stock 1 L.R.A. (N.S.)

at a loss. 258. The constitutionality of a statute requiring foreign corporations doing business within the state, and nonresident domestic corporations, to appoint the auditor as attorney to accept service of process and notice, is, in accordance with the weight of authority, upheld in a West Virginia case. 558. A Kansas case holds that contracts made with a foreign corporation before it has obtained permission to do business in a state are not, for that reason, invalid, or subject to cancellation at suit of one of the contracting parties. 1041. The right of a state to revoke the license of a foreign insurance company for refusal to perform its agreement not to remove suits against it to the Federal courts is upheld in a Kentucky case; and, as shown by the

(DOMESTIC RELATIONS—FIDUCIARY RELATIONS—TORTS; NEGLIGENCE; NUISANCE.)

note to the case, this appears to be in harmony with the position of the Federal Supreme Court. 1019. An unconstitutional impairment of contract was held to be effected by a change of the law permitting individual creditors of a corporation to en-

force their claims against individual stockholders, so as to provide one suit in equity in behalf of all creditors, to which all stockholders may become parties, and abate suits pending under the former law. 1171.

IV. DOMESTIC RELATIONS.

Legitimation. That illegitimate children were the result of adulterous intercourse was held not to prevent the subsequent intermarriage of their parents, and their acknowledgment by their father, from effecting their legitimation under the Illinois statute; and it was further held that the acknowledgment by the father, required by

the statute, was not necessarily such as to show an intention to include the children among his heirs. 773.

Infant's contract. A minor was held bound by a stipulation that suit for breach of contract to transmit telegram must be brought within sixty days. This appears to be a case of first impression. 525.

V. FIDUCIARY RELATIONS.

Executors; trust. A right of action for negligently killing a person held, in accordance with the preponderance of authority, to be an asset of his estate, sufficient to warrant appointment of an administrator. 885. That nonresidents may be denied permission to act as executors of local estates is affirmed in an Illinois case (341); but a Michigan case holds that a nonresident alien is not an incompetent executor, under a statute which provides that, if any executor shall reside out of the state, the court may remove him (349). An exhaustive note on the right of nonresidents to act as executors or administrators is appended to the Illinois case. The right of equity to change the number of trustees from that designated by the creator of the trust, when changed conditions render it necessary, is upheld in a New Hampshire case. The note to this case discloses a decided conflict of authority upon the question. 802.

Power of attorney. The common-law rule that notice to the agent is necessary to re-

voke a power of attorney to convey real estate is held not to be abrogated by the Wisconsin statute merely authorizing the recording of such power, and providing that, if recorded, the instrument of revocation must also be recorded to be valid. 577.

Principal and agent. The right of an agent, in the absence of objection by the principal, to enforce a contract made in his own name for an undisclosed principal, was upheld, notwithstanding that the signature to the contract was actually affixed by a subagent. 303. The authority of an agent to collect a mortgage indebtedness was held, presumptively and in the absence of anything appearing to the contrary, to continue until he obtained the money, the securities having remained in his possession. 891.

Commission merchant. The right of a bank to apply to the personal obligations of a commission merchant money received by him for produce sent him for sale, and deposited by him in his general account in the bank, was denied in a Wisconsin case. 1110.

VI. TORTS; NEGLIGENCE; NUISANCE.

Electric wires. The violation of a municipal ordinance as to the manner of stringing the electric-light wire which charged a broken telephone wire, or the imperfect insulation of the wire, held not to be the proximate cause of an injury to a boy who seized the broken telephone wire to receive a shock. 822.

Death. It is held, under the Minnesota statute, that an action for the death of a minor child must be for the sole benefit of the father, although he has deserted the family, to whose support the deceased was, 1 L.R.A. (N.S.)

at the time of his death; contributing. The note shows that there are but few cases directly in point. 1161.

Enticement. Hiring, at his own request, without notice of the father's objection, a minor who has been hired out by the father to work for another, was held not to support an action for enticement. 205. The right of a woman residing with her husband to maintain an action for the enticement of her minor child was denied. 302.

Assault. Assisting in the elopement of a minor girl held not to justify the father in

administering a whipping to the one so doing, after the lapse of a sufficient cooling time. 137.

Fires. The owner of a threshing-machine engine was held not to have fulfilled his duty to guard against fires by merely adopting a spark arrester in general use, where he had been in the habit of using an additional spark arrester, which he had allowed to become out of order at the time the fire occurred. 530. A railroad company was held liable for setting fire to lumber stacked with its consent on its right of way at the place usually occupied by lumber awaiting transportation, although the lumber in question had not been delivered to it for that purpose. 533.

Railroad crossings. An overhead bridge crossing of a highway held to be within a statute requiring signals to be given when a train approaches a place where the railroad crosses a highway. 307.

Surgeon. A surgeon who had undertaken to perform an operation upon a patient's right ear held to be liable for injuries resulting from the performance of an operation on her left ear, which he deemed to be in greater need of an operation than the right ear, unless he had her express or implied consent; and whether she had impliedly consented was for the jury. 439.

Nuisance. The power of the legislature to authorize a railroad company to create a private nuisance with immunity from liability to the owners of property damaged thereby is denied in two Tennessee cases. 49, 97. A contrary position is taken in a Kansas case. 113. A note to the first case shows a great conflict of authority and divergence of views on this important subject. A public official, intrusted with the custody of a government building, held to be bound to obey the provisions of a statute forbidding the emission of dense smoke from chimneys. 878.

Escape of water. The owner of an irrigation ditch was held not exempted from liability, under the Wyoming statute, for injury to adjoining land through seepage caused by negligence in constructing and grading the bottom of the ditch, because the statute contained no specific requirements in that respect. 596.

Manufacturer's liability. A company manufacturing and bottling a beverage held to be liable to one injured by swallowing pieces of glass while drinking from one of such bottles, which he procured from a merchant, who had purchased the same from the manufacturer. 1178.

Liability of proprietor of place of enter-
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tainment. The measure of duty of the owner of a place of amusement with respect to safety of places provided for the patrons is declared to be the exercise of reasonable care, and not the high degree of care analogous to that which a carrier is bound to exercise at common law. 427.

Fellow servants. The assignment of servants of the same master to separate departments of the same general enterprise held not to affect their relation as fellow servants, unless the departments are so far disconnected that each may be regarded as a separate undertaking. 682. The degree of care which a master is required to use to keep himself informed as to the habits and characters of servants employed with due care is declared by the circuit court of appeals. 288. It was held in a Massachusetts case that a master's direction to a servant to do a certain act obviously dangerous to fellow servants, unless preceded by an adequate notice, must be interpreted as a direction to perform the act in a proper way; and that the failure of the master to warn the servant of the necessity of giving such notice did not render him liable to a fellow servant injured in consequence of the failure to give the notice. 669. Railway employees engaged in operating a steam shovel in a gravel pit held not to be engaged in operating a railway within a statute abrogating the fellow-servant rule. 696. A barnman of a street railway company, charged with the duty of substituting a perfect car for one which has become disabled, held not to be a fellow servant of the conductors on the road. 670.

Assumption of risk. One who engages to work in saving property from the *débris* left by a fire held to assume the risk of injury from falling walls where the peril is open and obvious. 272. A youth sixteen years old held to have assumed the risk of injury plainly apparent from coming in contact with exposed gears, though not expressly warned of the danger. 278.

Contributory negligence. An engineer of a work train held not to be guilty of contributory negligence, as a matter of law, in placing his engine on the main track on the time of a fast train. 1014.

Duty to furnish and inspect appliances. A railroad company which purchased lantern globes of standard make from reliable manufacturers held not bound to inspect them to protect employees from injuries by their breaking while being cleaned. 944. The right of an employee to hold his master liable for injuries caused by the latter's breach of duty to furnish an independent

contractor with safe appliances for the performance of the work was denied in a Washington case. 283.

Automobiles. Various questions respecting the statutory and common-law rights,

duties, and liabilities of persons operating automobiles are discussed and decided in an Illinois case and an Indiana case, and an exhaustive note on the subject is appended to the first case. 215, 238.

VII. PROPERTY RIGHTS.

Bankruptcy. A discharge in bankruptcy held not to release an unliquidated liability for damages for abandoning a leased house without locking the doors, so that it was entered and damaged by a stranger. 201. It is held that the Federal courts, in a bankruptcy case, will apply the general rule that a loan by a wife to her husband upon her separate estate creates an equity in her favor notwithstanding decisions of the local state courts to the contrary. 321. An adjudication of bankruptcy, upon a petition alleging that the debtor had made an unlawful preference to a firm held not to estop the firm, in a subsequent suit by the trustee in bankruptcy, to show that, prior to the bankruptcy proceedings, they sold certain goods to the bankrupt relying on representations made by him, and, upon discovering that they were false, rescinded the sale and retook their goods. 386.

Adverse possession. A grantee from a mortgagor who took possession of a strip beyond the true boundary line was held not to be in adverse possession as against the mortgagee until the mortgage became due. 1036. Inclosure of a right of way held not sufficient possession to ripen into an adverse title. 565.

Finder. Property hidden in the earth near a marked tree was held not to have been lost, so as to vest title in the finder as against the owner of the soil, although it had remained so long as to indicate that the owner was dead or had forgotten it. 477.

Homestead. A constructive trust held not to have arisen under a deed, by a man to his wife, of the homestead property, with a proviso that after her death it was to go to another, she being entitled, on his death, to the absolute title to the property by right of survivorship. 312.

License. Right to display a sign on the wall of a building, given in writing for a definite time for a valuable consideration, was held not to be revocable at will. 359.

Deeds. The naming, as grantee, of a partnership the members of which had died, but the name of which had been perpetuated and the property kept together by consent of all parties interested, held not to render a deed void. 157. It was held in a California case that no estate is granted by a clause in a deed, which, after granting a life estate, declared that it was the purpose of 1 L.R.A. (N.S.)

the grantor that, after the death of the life tenant, the lands should become and be the property of a certain institution. 315. A grant to the "heirs" of a living person construed as meaning his children. 318. Property conveyed to a railroad company for a right of way, by a general warranty deed, held to revert to the adjoining owner upon the abandonment of its use for that purpose. 806.

Mortgage. The right of a purchaser at a foreclosure sale to the income of the property before the title became perfect in him was denied, notwithstanding a stipulation in the mortgage that, in case of foreclosure, "a receiver shall be appointed to collect the income, which shall be paid to the person entitled to a deed under the certificate of sale." 1079. That an assignment of real estate in the nature of an equitable mortgage may, by agreement of the parties, be kept alive after payment, so as to be valid security for a larger loan subsequently made, is affirmed in a Pennsylvania case. 405. Taking possession of after-acquired stock in trade, under a chattel mortgage, held to give the mortgagee precedence on a subsequent attachment. 451.

Fraudulent conveyance. The right to cancel a voluntary conveyance of real estate, made to place it beyond the reach of a judgment in an anticipated action, was denied as against the heirs of the grantee, although the threatened action had no foundation in law, and the grantee upon being notified of the conveyance, promised to reconvey on demand. An exhaustive note on the recovery of nonexempt property conveyed to avoid nonexistent or unfounded demands is appended to this case. 1007.

Landlord and tenant. One who took possession of premises under an arrangement with the grantor, and subsequently agreed to pay rent to the grantee for a certain period, held not to be estopped to deny liability to the latter for rent after the expiration of the term of such agreement although he remained in possession of the premises. 1181. A tenant was held to have lost his right to remove trade fixtures placed on the premises by entering into a new lease containing no recognition of his title to the fixtures, and binding him to surrender the premises in as good state and condition as reasonable use and wear would permit. An

exhaustive note as to the effect of renewing tenancy without reserving the right to remove fixtures is appended to this case. 1192.

Wills. That there may be a valid devise to one for life with power of disposition, which will not affect the remainder over unless the power is exercised, is held in a Maryland case. This, as shown in the note, is in accord with the great weight of authority. 782. The right of an heir, under a will directing the residue to be divided between the testator's heirs, held not to be cut down by a subsequent codicil giving him a specific legacy, "and no more." 397. A vested remainder held to be created by a will giving the testator's widow authority to spend the principal and income, and providing that, at her death, all of the testator's property which she may possess shall be disposed of equally among his surviving children. 1005. The California statute providing that foreign wills admitted to probate in other states may be allowed probate in the county in which the testator left real estate held not to permit the will of a resident to be probated in another state, and then brought into California for secondary or ancillary administration. 996. Attestation of a will in another room, out of range of the testator's vision, held not to be within a statutory requirement that it shall be

in his presence; and the defect is not cured by the subsequent acknowledgment by the witness, or ratification and approval by the testator. 393.

Waters. The unrestrained exercise, for thirty years, of the right to cast sawdust in a stream, held to create no prescriptive rights which will restrict the public right to regulate the use of the stream for such purpose, in order to preserve food fishes. 752. Water flowing in one direction over the surface without a well-defined channel, from a swamp fed by springs, to the channel of a stream, held to be a water course which cannot be diverted to the injury of a riparian owner. 756. An important decision is rendered in Nebraska, to the effect that the title to the bed of a navigable river is in the state, and the rights of the riparian owner are bounded by the banks of the river. The note calls attention to the tendency to ignore the distinction between navigable and tidal rivers. 762.

Street railway. The laying of a street-railway track under municipal authority so near a sidewalk, at a point where the streets intersect at an acute angle, that passing cars will overhang it a few inches, held to give an abutting owner no right of action, the title to the street being in the municipality. 981.

VIII. CIVIL REMEDIES; PRACTICE AND PROCEDURE.

Appeal; review. An exception to the general rule that an appeal does not lie from a decree for costs applied in case of a decree for costs not in the discretion of the court. 1083. The right to supersedeas pending appeal held not to extend to an appeal from an order enjoining continued operation of a shooting gallery. 554. A supplemental bill in the nature of a bill of review held to be a proper proceeding to bring before the court new matter discovered by defendant while the decree is in process of execution. 1029. The failure of the court, in a criminal case, to interpose objections to improper questions made by a journeyman, held not to be necessarily reversible error in the absence of objection or exception by counsel. 839.

Evidence; witnesses. Rule *res ipsa loquitur* held not to make a prima facie case, or raise a presumption of negligence, but merely to furnish an element to be considered by the jury as a part of the plaintiff's case. This case observes distinction often overlooked by the courts. 298. A deduction that declarations were made under a sense of impending death, without hope of recovery, held to be warranted, although they were made several hours after the

statement of the declarant that he did not believe he could get well, he having grown continually weaker in the meantime. 419. A waiver with respect to confidential disclosures made to physician by insured concerning his last sickness held to have been effected by a stipulation in a contract of life insurance to the effect that proofs of death shall consist in part of the affidavit of attending physician, which shall state the cause of his death, and such other information as may be required by the insurer. 1068.

Pleading. Naming defendant individually in the title, and stating a cause of action against him as trustee, held to render the complaint demurrable. 161.

Damages. Evidence that a boy injured by another's negligence was obedient and economical held admissible upon the question of damages. 198. Evidence of earnings of persons proficient in trade held not admissible upon question of damages for negligently killing an apprentice. 1150. A bank guilty of negligence in making a collection so that the rights on the paper are lost held not to be liable for the face of the paper.

but only for the amount lost through the neglect. 246.

Replevin. A seller held to have the right to maintain replevin against the purchaser on the ground of special ownership and right of possession, where the property has been set apart and identified, and the title vested in the purchaser, whose tender of the balance due on the purchase price is insufficient in amount owing to fraud or mistake in measurement; but further held that the seller cannot maintain such action under the claim of absolute ownership, without rescinding the contract of sale, and tendering back the amount paid. 474.

Judgment; divorce. A decree of divorce rendered against a nonresident on service by publication held to be void and subject to collateral attack where the record failed to show that there was an affidavit of nonresidence, as required by statute. 740. A decree of divorce held not to be subject to be vacated after the death of one of the parties. 551.

Preference; exemptions. The state held to have no preference over other creditors for payment of losses and unearned premiums out of assets in hands of receiver of an insolvent insurance company. 254. The right to have personal property exempted from forced sale held not to be forfeited on the ground of nonresidence until removal has commenced, although the intention to leave the state permanently has been formed, and the property delivered for shipment to a point outside the state. 778.

Limitation of actions. A legacy reciting that it was in consideration of the legatee's care for the testator's invalid mother held not to be an acknowledgment of a legal obligation which would remove the bar of the statute of limitations. 1117. A holder of a demand certificate of deposit issued by a bank held to be under no obligation to demand payment within the period of the statute of limitations. 1130. The statute of limitations held not to begin to run against an unpaid subscription until demand is made for payment, where, by the terms of the contract, it is not payable until called for. An exhaustive note on the question as to when the statute of limitations begins to run against the unpaid balance of a stock subscription is added to this case. 900. A statute providing that no action shall be brought on a claim for usury after two years from the time the cause of action arose, held not to affect rights of action which accrued prior to its passage. 528.

Injunction. The jurisdiction of civil courts over injunction proceedings instituted to protect personal rights is declared in terms, in a Louisiana case. The note shows that, while the contrary declaration is common

ly made by courts and text writers, such jurisdiction has not infrequently been exercised in actual cases. 1147. The power of a court of equity to prevent majority stockholders from exercising their statutory power to reduce the capital stock in order to relieve defaulting stockholders from meeting their obligations was asserted in a Wisconsin case. 571. An injunction to restrain a lessee from continuing to mine ores on the leased property after a forfeiture of the lease for breach of conditions was upheld, although the title was disputed, and no action had been instituted at law. 332. An exception to the rule that equity will not specifically enforce, as between parties *in pari delicto*, a contract which is opposed to public policy, was applied in a Washington case by restraining the breach of a contract to furnish a supply of electricity to a street car and electric lighting company upon the ground that such breach would result in a great public inconvenience. 1032.

Mandamus. Mandamus held to lie to compel payment of salary to a public officer alleged to have been removed from office. 588.

Prohibition. A writ of prohibition to prevent proceedings under a statute providing for the removal of an incumbent from a public office held not to be prevented by the fact that the statute is unconstitutional, relief having been denied petitioner in the lower court, and there being no other plain, speedy, and adequate remedy. 843.

Quo warranto. The district court held to have no discretion to refuse leave to the attorney general to file an information, in the nature of a quo warranto, directed to a municipal corporation, requiring it to show cause why its franchise should not be declared null and void. 826.

Removal of cause. A nonresident joined as defendant in an action to recover damages for negligence held to have no right to a removal of the case to the Federal court by putting in issue the fact of negligence on the part of his codefendant. 370. The state, and not the Federal, court, held to be the proper tribunal to determine the question of the right to remove to the latter an action begun in the former, against a nonresident railroad company and its resident employee jointly. 375.

Self incrimination. A witness was denied the privilege against self incrimination by virtue of a statute affording him a coextensive immunity from prosecution. 167.

Profert and oyer. The well-established rule that neither profert can be made, nor oyer demanded, of an instrument, is applied in a West Virginia case. 777.

RESUME.
(CRIMINAL LAW AND PRACTICE.)

IX. CRIMINAL LAW AND PRACTICE.

Imprisonment of person acquitted on ground of insanity. The constitutionality of a statute providing for the imprisonment of one acquitted of the charge of murder on the ground of insanity is upheld in a Washington case. An exhaustive note on the subject is appended to this case. 540.

Credit for good behavior. The authority conferred on a board of commissioners to fix the credits to be allowed to convicts for good behavior held to be an unconstitutional delegation of legislative power. 520.

Information. The power of the legislature to authorize the institution of prosecutions for common-law felonies by information without indictment is upheld in a Vermont case. 1153.

Contempt. The jurisdiction of a committing magistrate to punish for contempt a witness who refused to obey a *subpoena duces tecum* is denied in a South Dakota case. 1135.

Bail. The authority of a clerk of a district court to take a bail bond was denied in an Oklahoma case. 849.

Intoxicating liquors. The power of a state to require the keeper of a bar on a ferryboat making regular trips from another state, where it is owned, to pay a license tax for the privilege of selling liquors while the boat is in the former state, is upheld in a Tennessee case. 639. The constitutionality of a statute making the possession

of liquor prima facie evidence of intent to violate the statute against illegal sales is upheld in a North Carolina case. 626.

Bastardy. A dismissal, without prejudice, of a bastardy proceeding before a justice of the peace, held not to be a bar to a subsequent proceeding before another justice upon the same issue. 470.

Forgery. Uttering a letter with a forged signature for the purpose of falsely representing the bearer to be a friend of the writer, and giving him standing with persons to whom it may be presented, held to be forgery under the New York statute. 730.

Homicide. Mere violation of a statute making it a misdemeanor to hunt on another's property without a permit held not to be such an unlawful act as to render an accidental homicide committed while so doing a criminal offense. 991.

Larceny. One who induced another to part with money as a wager on a pretended event which was not to take place, with the intention of appropriating it to his own use, held to be guilty of larceny in making such appropriation. 862.

Robbery. Officers were held guilty of robbery where, after arresting a person, they forcibly searched him, and took from him valuables, with the intention of keeping them. 1024.

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making it unlawful to use such machine without executing and filing a bond cannot maintain an action to recover compensation for threshing grain, even for one having knowledge of such failure. *Johnson v. Berry* (S. D.) 1159

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- Husband or Wife, see **HUSBAND AND WIFE**, 3, 4.

- Father, for Loss of Child's Baggage, see **PARENT AND CHILD**, 1.

2. A contract made by an agent in his own name, without disclosing his principal, is not void, but may be enforced by the agent in the absence of objection by the principal; and it is immaterial that the signature to the contract is actually affixed by a sub-agent, where his act was authorized by all parties in interest. *Shelby v. Burrow* (Ark.) 303

3. A consumer may maintain a suit to compel a water company to furnish water at the rates stipulated in the contract between the company and the municipality, made at the time the right to lay mains in the streets was granted to the company. *Pond v. New Rochelle Water Co.* (N. Y.) 958

Conditions precedent.

4. A proceeding in equity to set aside the decision of an engineer, which, by the contract, is to be final and conclusive between the parties, is not a condition precedent to an action at law to recover the money due under the contract, where the work has been satisfactorily completed by the one party and accepted by the other. *Edwards v. Hartshorn* (Kan.) 1050

Election of remedies.

5. A theater ticket is a mere license, for the revocation of which before the holder has actually been given and has taken his seat, the only remedy is in assumpsit for breach of the contract. *Horney v. Nixon* (Pa.) 1184

6. One who sells goods in reliance upon material misrepresentations by the purchaser may, on rescinding the sale on discovery of the fraud, reclaim all the property which can be recovered, and he has a right of action against the purchaser as to 1229

that which he cannot recover, based on the theory of the conversion by the purchaser of the goods not found, or an action based on the contract implied by law, where the purchaser has disposed of the goods for money and the seller has waived the tort; but he cannot proceed both under the contract of sale and against it. *Silvey v. Tift* (Ga.) 386

7. If one of two contracting parties claims that the other has committed a breach of the contract, he cannot, in the same action, both treat the contract as rescinded and sue for the amount paid by him to the other party, and at the same time rely on the contract as existing. *Timmerman v. Stanley* (Ga.) 379

Joinder.

8. A railroad company may be sued jointly with the servant whose negligence caused an injury, although it was not independently at fault. *Illinois C. R. Co. v. Houchins* (Ky.) 375

9. A servant whose negligent act while conducting his employer's business causes injury to another, and his principal, may be sued jointly to recover damages for the injury. *Illinois C. R. Co. v. Coley* (Ky.) 370

10. Although a claim for expenses in attending school, expenses pending suit, and for delay in being prepared for business cannot be joined with a claim for the return of money paid on an agreement to teach the plaintiff in certain lines of instruction until he is proficient therein on the ground that such contract has been rescinded, the entire suit should not be dismissed, but such formal claims for damages should be stricken out, and the case left to stand on the suit for the return of the money so paid out. *Timmerman v. Stanley* (Ga.) 379

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11. Parties necessary to the administration of substantial justice may be directed to be brought in at any time, either before or after judgment. *Walker v. Miller* (N. C.) 157

12. A surety on a contract for the purchase of a machine is not a necessary party to proceedings by cross petition on behalf of the purchaser, when sued by an assignee on the purchase-money notes, to recover against the seller for breach of his warranty of the machine. *First Nat. Bank v. Dutcher* (Iowa) 142

Venue.

13. The residence of the personal representative of one killed by negligence, and not that of deceased, is referred to in a statute permitting an action for negligent injuries by a railroad company to be brought in the county of the plaintiff's residence if the carrier passes into it. *Illinois C. R. Co. v. Stith* (Ky.) 1014
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ADVERSE POSSESSION.

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1. Mere possession under a deed which includes a strip belonging to a stranger for a right of way, but which the grantor had a right to fence in, is not sufficient to ripen into an adverse title, since it is consistent with the title of the true owner. *Pritchard v. Lewis* (Wis.) 565

2. Where a mortgage is a mere security, a grantee, from a mortgagor, of land adjoining the mortgaged premises, who takes possession of a strip beyond the true boundary line, cannot be regarded as in adverse possession against the mortgagee until the mortgage becomes due. *Thornely v. Andrews* (Wash.) 1036

3. Where a mortgage is a mere security, the lien of which expires if not enforced or renewed in six years, failure to enforce the lien against the grantee, from the mortgagor, of land adjoining the mortgaged tract, who took adverse possession of a strip of the mortgaged property along the boundary between the two tracts, until the lien of the mortgage expires as to it, places the grantee in the same situation as though no mortgage had existed, and his possession is adverse from the time it begins, and not from the maturity of the mortgage. 1d.

ADVERSE USER.

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Question for Jury as to Care of Keeper, see TRIAL, 8.

1. Failure to provide around a band stand erected above the seats provided for patrons, by an amusement association, a barrier which will prevent articles falling therefrom, is not negligence as matter of law. *Williams v. Mineral City Park Asso.* (Iowa) 427

2. The owner of a place of amusement is

not liable for injury to a patron by a bottle carelessly dropped by a musician from a band stand erected over seats provided for patrons. *Id.*

3. Reasonable care is the measure of duty under which the owner of a place of amusement rests with respect to the safety of places provided for patrons. *Id.*

ANCILLARY PROBATE.

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ANTI-TRUST LAWS.

Due Process in Investigating Violations of, see CONSTITUTIONAL LAW, 16.
Privilege of Witness Subpoenaed to Testify as to Violations of, see WITNESSES, 1, 2.

1. The provision of the Kansas anti-trust law of 1897, § 5, that every person, company, or corporation violating any of the provisions of the act be denied the right of, and prohibited from, doing any business within the state, contemplates the prohibiting of the continuance of, or the engagement in, business, only when such business is in violation of the act. *State v. Jack* (Kan.) 167

2. The provision of the Kansas anti-trust law of 1897, § 7, that in any civil action there may be pleaded in defense that the plaintiff, or any person interested in the prosecution, has, within one year, been guilty of a violation of any of the provisions of the act, contemplates only civil actions relating to and growing out of transactions prohibited by the act. *Id.*

3. The Kansas anti-trust law of 1897 is not in contravention of the provisions of U. S. Const. 14th Amend., but is a valid exercise of legislative power. *Id.*

APPEAL AND ERROR.

What cases appealable.

1. Although an appeal will not ordinarily lie from a decree for costs only in a chancery suit, there are exceptions to the rule, depending on the question of the discretionary power of the trial court as to costs. *Nutter v. Brown* (W. Va.) 1083

2. A decree for such costs as are discretionary is not appealable; but a decree for costs not in the discretion of the court is appealable under W. Va. Const. art. 8, § 3, if they amount to more than \$100. *Id.*

3. A decree allowing expenses and compensation of a receiver out of the fund, with a provision that it shall ultimately be paid to the party entitled to the fund by his adversary, is appealable. *Id.*

4. Extraordinary costs, such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between 1 L.P.A. (N.S.)

party and party, are not discretionary, and a decree respecting such costs is appealable. *Id.*

Supersedeas.

5. The right to supersedeas pending appeal does not extend to an appeal from an order enjoining continued operation of a shooting gallery and mechanical musical instruments. *State ex rel. Gibson v. Pierce* County Super. Ct. (Wash.) 554

6. The filing of a supersedeas bond upon appealing from an order refusing to proceed with a case as an equitable action does not deprive the court of jurisdiction to proceed with the trial as one at law. *First Nat. Bank v. Dutcher* (Iowa) 142

Record on appeal.

7. An abstract of the declaration is included in a rule of court requiring an appellant to furnish the court with a complete abstract of the record. *Christy v. Elliott* (Ill.) 215

8. A statement in a proposed statement of facts for appeal that certain depositions or exhibits were offered in evidence is sufficient to permit their attachment to the statement as finally settled, under a statute which provides that written evidence on file shall be appropriately referred to in the proposed statement, and "when it is certified, the same or copies thereof, if the judge so directs," shall be attached to the statement and become a part thereof. *Thornely v. Andrews* (Wash.) 1036

Exceptions.

9. A general exception to a conclusion of law that plaintiff is entitled to judgment raises a question of law with respect to the right to maintain the action. *Falk v. American West Indies Trading Co.* (N. Y.) 704

10. A single exception to a refusal to give a number of requests to submit to the jury several propositions of law and of fact is futile, if any of those propositions is erroneous or inapplicable. *Southern P. Co. v. Hetzer* (C. C. App. 8th C.) 288

11. Exception to instructions stating the law to be as established by a statute raises the question of the constitutionality of the statute,—at least, if the instructions are expressly challenged on that ground on the motion for new trial,—so as to bring the appeal within the jurisdiction of the court taking cognizance of appeals involving constitutional questions. *Christy v. Elliott* (Ill.) 215

Presumptions on appeal.

12. The court of appeals will not presume that any fact was found not embraced within the scope of the pleadings, the findings, as they appear in the record, and the proofs upon which the decision was made, for the purpose of upholding a judgment, although it was a short decision, unanimously affirmed. *Falk v. American West Indies Trading Co.* (N. Y.) 704

13. That accused was found guilty of involuntary manslaughter does not show that an instruction was harmless which permitted

a conviction on an indictment for striking, wounding, and throwing the victim into a well, although the evidence shows the frightening of him into insanity so that he jumped into the well. *Gipe v. State* (Ind.) 419

What matters reviewable generally.

14. An appeal from an order denying a motion for new trial does not bring up for review the sufficiency of the complaint or findings to support the judgment or conclusions of law. *Wadman v. Burke* (Cal.) 1192

Questions not raised below.

15. A party cannot complain of the omission from an instruction, which is right so far as it goes, of elements which he deems material, unless he calls the court's attention thereto. *Williams v. Mineral City Park Asso.* (Iowa) 427

16. An award of damages, although erroneous according to the evidence, will not be disturbed on appeal if not complained of by the parties. *Harrington v. Demaris* (Or.) 756

Decisions on party's request.

17. A party cannot complain of the admission of evidence in response to his own questions. *Johnson v. Walker* (Miss.) 470

18. A party cannot complain of the giving of an instruction which is substantially similar to one requested by himself. *Illinois C. R. Co. v. Coley* (Ky.) 370

Abuse of discretion.

19. Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced where excessive, rests in the sound judicial discretion of the trial court, in reviewing which this court will be guided by the general rule applicable to other discretionary orders. *Mohr v. Williams* (Minn.) 439

20. An abuse of discretion in refusing to compel a production in court of articles alleged to have been injured by another's negligence is not shown, where defendant's witnesses have been permitted to examine them, and it is not clear that the jury would have been aided by personal examination of them. *Withey v. Pere Marquette R. Co.* (Mich.) 352

21. A provision in a decree for plaintiff, in a suit in equity in which a receiver has been appointed and ordinary costs awarded against all the defendants, that one of the defendants, who had claimed five sixths of the property in dispute, should pay the extraordinary costs of the suit, will not be disturbed on appeal, unless it appears that he has been required to pay more than his due proportion of costs. *Nutter v. Brown* (W. Va.) 1083

Review of facts.

22. A new trial will not be granted because the appellate court believes that the jury erroneously decided a question of fact on conflicting evidence. *Earle v. Berry* (R. I.) 867

23. The supreme court will weigh for itself the testimony in an equity case where it is practically undisputed, and draw its own conclusion as to the rights of the parties, notwithstanding the finding of the trial court. *Harris Bkg. Co. v. Miller* (Mo.) 790

Grounds for reversal.

24. Where a plaintiff set up in his petition three counts based on the same transaction, and at the close of the testimony elected to stand on one of the counts, and the case was submitted to the jury as a single cause of action, the refusal of the court to require an earlier election was not prejudicial error. *Edwards v. Hartshorn* (Kan.) 1050

25. Merely bringing the child into the court room in a bastardy proceeding is not reversible error, if it is immediately removed without the attention of the jury being called to it, or any reference to it being made in the presence of the jury. *Johnson v. Walker* (Miss.) 470

26. Where questions improper in form are asked of and answered by a witness in a criminal case, and no objection is made nor exception taken, no error is saved which is subject to review by an appellate court as a matter of right; and if such inquiries are made by a jurymen with the court's permission, failure of the court to interpose objections is not necessarily reversible error. *State v. Crawford* (Minn.) 839

27. Error, if any, in admitting testimony of the wife of one insured against accidents as to communications made to her by her husband in his last sickness, is not prejudicial where the matter was fully covered by other uncontradicted evidence, and the communication consisted simply of complaints of suffering from pneumonia, which would have been the same whether the disease was brought on by accident as alleged or otherwise. *Western Travelers' Acci. Asso. v. Munson* (Neb.) 1068

28. The admission in evidence of a memorandum of bills furnished a person for the detection of robbers, upon the trial of persons apprehended for that offense, is not reversible error where the identity of the bills found in possession of the accused with those taken from the person robbed is abundantly proved. *Tones v. State* (Tex. Crim. App.) 1024

29. Exclusion of testimony which is but a repetition of what has previously been admitted without objection is not reversible error. *Johnson v. Walker* (Miss.) 470

30. Refusal to admit evidence, in an action to recover for the conscious suffering prior to death of one injured by another's negligence, that members of the family had died of tuberculosis, for the purpose of raising the presumption that the injured person died of that disease, is not reversible error. *Dickinson v. Boston* (Mass.) 664

31. The exclusion, in a bastardy proceeding, of evidence that complainant denied up to the date of her confinement, that she was

pregnant, is not error. *Johnson v. Walker* (Miss.) 470

32. It is not reversible error to refuse to permit one accused of statutory rape to cross-examine the prosecuting witness as to promiscuous intercourse with other men for the purpose of affecting her credibility. *State v. Stimpson* (Vt.) 1153

33. When the recovery for the death of a minor child must, under the statutes, be for the sole benefit of the father, who has abandoned his family, it is reversible error to permit the jury to infer that the mother, to whose relief in supporting the family the deceased contributed, might share in the division of the recovery, and to refuse to charge the jury that no part of the recovery could be for her benefit. *Swift & Co. v. Johnson* (C. C. App. 8th C.) 1161

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ARBITRATION.

Conclusiveness of Umpire's Decision, see CONTRACTS, 9-12.

ASSAULT AND BATTERY.

Counterclaim in Action for Assault, see SET-OFF AND COUNTERCLAIM.

1. A civil action for an assault and battery may be maintained where it appears that the act complained of was unlawful, although no intent on the part of the defendant to injure the plaintiff was shown. *Mohr v. Williams* (Minn.) 439

2. An operation upon the left ear of a patient without her express or implied consent, after she had consented to an operation upon her right ear, was wrongful and unlawful, and constitutes in law an assault and battery. Id.

3. Assisting in the elopement of a minor girl will not justify the father in administering a whipping to the one so doing, which is the result of deliberation, after the lapse of sufficient cooling time. *Shoemaker v. Jackson* (Iowa) 137

ASSESSMENT POLICY.

Requiring Continued Issuance of, see INSURANCE, 1.

ASSESSMENTS.

For Public Improvement, see PUBLIC IMPROVEMENTS.

For Taxation, see TAXES, 4-7.

ASSETS.

Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 6-8.

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ASSIGNMENT.

Of Negotiable Instrument, see BILLS AND NOTES, 5.

Of Judgment, see JUDGMENT, 8.

Of Note Secured by Mortgage, see MORTGAGE, 2, 3.

Of Mortgage, Notice of, from Record, see REAL PROPERTY, 4.

Of Trademark, see TRADEMARK.

ASSUMPSIT.

Payment of water rates under protest, to avoid the shutting off of the water, which would be a great detriment to the property owner, is under duress, within the rule that payments so made may be recovered back. *Chicago v. Northwestern Mut. L. Ins. Co.* (Ill.) 770

ASSUMPTION OF RISK.

By Insured, see INSURANCE, 12.

By Servant, see MASTER AND SERVANT, 14-22.

ATTACHMENT.

Priority of Chattel Mortgage over, see CHATTEL MORTGAGE.

ATTESTATION.

Of Will, see WILLS, 1.

AUTOMOBILES.

Due Process in Limiting Speed of, see CONSTITUTIONAL LAW, 15.

Liability for Injury to One Riding with Negligent Driver, see NEGLIGENCE, 3.

Sufficiency of Title to Act Regulating Speed of, see STATUTES, 4.

1. The use of an automobile on a public highway is not negligence as matter of law. *Indiana Springs Co. v. Brown* (Ind.) 238

2. There may be a recovery for common-law negligence in handling an automobile on a highway, if properly pleaded, although the use of such vehicles has become a matter of statutory regulation. *Christy v. Elliott* (Ill.) 215

3. The driver of an automobile, and the driver of a horse upon a highway, are each required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury, as well as inflicting injury on another. *Indiana Springs Co. v. Brown* (Ind.) 238

4. The driver of an automobile, upon meeting upon the highway a horse which is frightened and in such a situation that its driver cannot extricate himself from danger unless the machine is stopped, is bound to stop, and will be liable for the injuries inflicted by his failure so to do. Id.

5. A statutory requirement that the driver of an automobile shall stop it upon approaching a horse which appears to be frightened will apply in case, "by the exercise of reasonable diligence on the part of the driver," it would have appeared that a horse was frightened. *Christy v. Elliott* (Ill.) 215

6. No signal from the persons in a carriage drawn by a horse, that the animal is about to be frightened by an approaching automobile, is necessary to charge the driver of the latter with the statutory duty to stop the machine, if it appears that a horse approaching on the highway is about to become frightened by the machine. *Id.*

BAGGAGE.

Of Wife, Husband's Right of Action for, see **HUSBAND AND WIFE**, 4.

Father's Right to Recover for Loss of, Child's, see **PARENT AND CHILD**, 1.

BAIL.

1. Under a statute vesting the power to take bail solely in persons or courts authorized by law to arrest and imprison persons charged with the commission of criminal offenses, a bail bond taken by the clerk of a district court, or his deputy, is void. *Territory ex rel. Thacker v. Woodring (Okla.)* 848

2. A statutory bail bond which is void for want of authority to execute it cannot be enforced as a common-law obligation. *Id.*

BALLOTS.

Unnumbered, see **VOTERS AND ELECTIONS**.

BANKRUPTCY.

Effect of Judgment in, see **JUDGMENT**, 5.

Instruction as to Consideration of Statement by Bankrupt, see **TRIAL**, 16.

1. Under a bankruptcy act allowing the presentation of equitable claims against bankrupt estates, the Federal courts will allow the presentation of a claim by a married woman for money loaned out of her statutory separate estate to a firm of which her husband was a partner, in bankruptcy proceedings against it, although the decisions of the state in which the bankruptcy was declared have denied the validity of such claims. *James v. Gray (C. C. App. 1st C.)* 321

2. A discharge in bankruptcy does not release an unliquidated liability for damages for abandoning a leased house without locking the doors, so that it was entered and injured by a stranger. *Winfree v. Jones (Va.)* 201

BANKS.

Purchase by, of Draft with Bill of Lading Attached, see **BILL OF LADING**.

Limitation of Action against Certificate of Deposit, see **LIMITATION OF ACTIONS**, 2-4.

Deposits in.

Gift of, see **GIFT**, 2.

Trust in, see **TRUSTS**, 2, 4.

1. A general deposit of money in a bank is not a loan. *Elliott v. Capital City State Bank (Iowa)* 1130
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2. Money received by a commission merchant for produce sent him for sale, and deposited by him in his general account in bank, belongs to the owners of the produce, and cannot be applied by the bank to the obligations of the merchant. *Boyle v. Northwestern Nat. Bank (Wis.)* 1110

3. A consignor, the proceeds of whose property have been deposited by a broker in his general bank account and checked against, can hold the bank liable only for the lowest amount remaining in the account at any time when he was the sole equitable owner of the account, as against the rights of other consignors, the proceeds of whose property subsequently swelled the account. *Id.*

4. Where funds belonging to several consignors are deposited by the broker in his general bank account, which is checked against, and thereby reduced below the aggregate amount of the claims, the claim represented by the last deposit which remains intact, except as to charges properly made against it at the time the fund is brought into court for distribution, is entitled to payment of its net balance in full. *Id.*

5. Funds in a bank account belonging to several beneficiaries, which were deposited by a trustee who reduced the account below the aggregate of the claims, will, except as to such deposits as remain intact, be distributed ratably. *Id.*

6. Money known to have been deposited by other parties on the day of the failure of the bank cannot be appropriated in repayment of a special fund which had been deposited by a customer to indemnify the bank for its guaranty of the performance of a contract by the one making the deposit. *Italian Fruit & I. Co. v. Penniman (Md.)* 252

7. Persons who have shipped grain to a commission merchant for sale, the proceeds of which he has deposited in his bank account, cannot, as equitable owners, reach the proceeds of property belonging to other consignors, which the merchant had transferred to the bank in payment of his own obligation prior to the receipt of the property of the complaining consignors. *Boyle v. Northwestern Nat. Bank (Wis.)* 1110

Collections by.

Allegations of Negligence in Making, see **PLEADING**, 11, 18.

Measure of Damages for Negligence in, see **DAMAGES**, 1.

8. Sending a check for collection to the drawee bank is prima facie negligence on the part of the collecting bank; at least, when it is a cashier's check on his own bank. *Jefferson County Sav. Bank v. Hendrix (Ala.)* 246

BAR.

Power of State to License, on Ferry Boat, see **LICENSE**, 3.

BASTARDY.

- Error in Bringing Child into Court Room, see **APPEAL AND ERROR**, 25.
- Exclusion of Complainant's Denial of Pregnancy, see **APPEAL AND ERROR**, 31.
- Evidence of Mother's Declaration During Travail, see **EVIDENCE**, 22.
- Dismissal of Proceeding as *Res Judicata*, see **JUDGMENT**, 3.
- Venue of Proceedings in, see **JUSTICE OF THE PEACE**.

The issue in a bastardy proceeding is properly made up when the affidavit and declaration charging defendant with being the father of the child are traversed by an affidavit filed by him. *Johnson v. Walker* (Miss.) 470

BATTERY.

- See **ASSAULT AND BATTERY**.

BENEVOLENT SOCIETIES.

- See **INSURANCE**, 6, 7.

BETS.

- Power of Municipality to Make Penal, see **CRIMINAL LAW**, 2.

BEVERAGE.

- Manufacturer's Liability for Injury from Swallowing Broken Glass in Bottle, see **NEGLIGENCE**, 2.

BILL OF LADING.

- 1. A bank which purchases a draft with bill of lading attached making the goods deliverable to the order of the consignor assumes the obligation of the seller to deliver, according to contract, the property represented by the bill of lading, to the drawee of the draft. *Haas v. Citizens' Bank* (Ala.) 242

- 2. Payment of a draft which is drawn for the price of goods, and attached to the bill of lading, to the bank which has purchased it, does not absolve the bank from its duty to deliver the property represented by the bill of lading. *Id.*

BILL OF REVIEW.

- See **REVIEW**.

BILLS AND NOTES.

- Liability of Purchaser of Draft with Bill of Lading Attached, see **BILL OF LADING**.
- Limitation of Action against Certificate of Deposit, see **LIMITATION OF ACTIONS**, 2-4.
- Assignment of Note Secured by Mortgage, see **MORTGAGE**, 2, 3.
- Payment of Indebtedness on Note Secured by Mortgage, see **MORTGAGE**, 6.

Consideration.

- Necessity of Alleging and Proving, see **PLEADING**, 8.

- 1. A non-negotiable instrument, not under seal, and containing no recital of a 1 L.R.A. (N.S.)

consideration, does not import a consideration. *Joseph v. Catron* (N. M.) 1120

Negotiability.

- 2. To constitute a negotiable instrument the fact of the maturity of the instrument at some time must be morally certain. *Id.*

- 3. An agreement to pay a specified amount upon the confirmation by Congress of a specified land grant is not negotiable, as it is not morally certain that the grant will ever be confirmed. *Id.*

- 4. That a land grant is, as a matter of fact, confirmed long after the making of an instrument agreeing to pay a specified amount upon the confirmation of such land grant, does not make the instrument negotiable, since certainty of maturity must be of the date of the instrument, and cannot derive support from any subsequent event. *Id.*

Rights of transferees.

- Evidence of Other Frauds in Securing Indorsements, see **EVIDENCE**, 43.

- 5. All defenses available between the original parties to a non-negotiable instrument are available against an assignee of such instrument. *Id.*

- 6. No liability attaches to one whose indorsement is secured upon a note by the trick of inducing him to sign his name to a paper placed upon the note in such a way that the ink penetrates through to the note without his knowledge and intent. *Yakima Valley Bank v. McAllister* (Wash.) 1075

- 7. The indorsement by a trustee, describing himself as such, of interest-bearing certificates of deposit payable to him as trustee, prima facie and presumptively fixes a purchaser with actual knowledge of the trustee's want of authority to dispose of the paper for his own benefit, within the meaning of the section of the negotiable instruments law which provides that, to constitute notice of infirmity in the instrument or defect in the title, there must be actual knowledge of such infirmity or defect,—at least where the certificates are not due, and the interest is payable only at maturity. *Ford v. Brown* (Tenn.) 188

BLANKS.

- In Sealed Instrument, Presumption as to Intent as to Filling, see **EVIDENCE**, 2.

- In Mortgage, see **MORTGAGE**, 1.

BLASTING.

- 1. A railroad company is not relieved from liability for injuries to adjoining property and the health of its occupants by blasting for its right of way, by the fact that it is a quasi public corporation authorized by the legislature to condemn, take, and use land for railroad purposes and works of public improvement, even if the work can be and is done without negligence. *Gossett v. Southern R. Co.* (Tenn.) 97

- 2. Blasting which causes loud noises and unusual and unpleasant concussions of

air, and renders adjoining property untenable by reason of the fact that its occupants are inconvenienced, frightened, and made restless and that their health is affected, is a nuisance. *Id.*

BOARDING HOUSE.

Rates for Water Supplied to, see *WATERS*, 22.

BOARDS.

Of Medical Examination, Conclusiveness of Findings of, see *COURTS*, 3.

BONA FIDE PURCHASER.

Of Mortgage, see *MORTGAGE*, 2, 3.

BONDS.

Statutory, Effect of Failure to File, on Right of Action, see *ACTION OR SUIT*, 1.

Supersedes Bond, see *APPEAL AND ERROR*, 6.

Bail Bond, see *BAIL*.

BOUNDARIES.

Adverse Possession beyond, see *ADVERSE POSSESSION*, 2, 3.

Title to Land under Water, see *WATERS*, 1-3.

BROKERS.

Trust in Deposit by, see *BANKS*, 2-4.

BUILDINGS.

Injury to Servant by Fall of Standing Walls, see *MASTER AND SERVANT*, 7, 8, 16, 17.

1. Under a provision in a statute requiring the placing of fire escapes on buildings, that it shall be the duty of certain officers to test escapes, and, if they prove satisfactory, to give a certificate of approval, such certificate, when properly issued, must be taken as conclusive evidence of compliance with the law. *Bonbright v. Schoettler* (C. C. App. 3d C.) 1091

2. The provision of a statute requiring fire escapes on buildings, that a certificate by the proper official approving a particular fire escape shall relieve the owner of the building from liability for the penalty provided for noncompliance with the statute, without any mention of civil liability, does not prevent its also relieving him from the latter. *Id.*

3. A provision in an act amending a statute requiring the placing of fire escapes on buildings, that nothing in the act shall interfere with fire escapes now in use, approved by the proper authorities, saves from the operation of the statute fire escapes which had been officially approved under the former statute. *Id.*

4. A certificate of approval of a fire escape granted to the owner of a building operates in favor of his successor in title. *Id.*

BY-LAWS.

Of Fraternal Society, see *INSURANCE*, 6, 7.

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CANCELATION.

Of Fraudulent Conveyance, see *FRAUD AND FRAUDULENT CONVEYANCES*, 2.

Of Abandoned Policy, see *INSURANCE*, 8.

CAPTAIN.

Of Revenue Cutter, Judicial Powers of, see *SALVAGE*, 5.

CARRIERS.

Husband's Right of Action for Loss of Wife's Baggage, see *HUSBAND AND WIFE*, 4.

Contract Releasing Railroad Company from Liability for Injury to Sleeping-Car Porter, see *MASTER AND SERVANT*, 1.

Father's Right to Recover for Loss of Child's Baggage, see *PARENT AND CHILD*, 1.

Injury to passenger.

1. What period of time will be reasonable for a railroad company which has agreed to stop a night train at a station where night trains are not scheduled to stop, to keep its station platform lighted for the accommodation of intending passengers prior to the arrival of the train, is for the jury to decide. *Abbot v. Oregon R. & Nav. Co. (Or.)* 851

2. A railroad company is liable for injury to a passenger on a freight train, who, to the knowledge of the conductor, has, in the absence of a closet, gone to the platform to answer a call of nature during the stopping of the train upon a trestle, where the conductor neither warns him of the danger, nor takes any measures to prevent the starting of the train with a jerk while he is in a dangerous position, in consequence of which he is thrown to the ground and injured. *Rodgers v. Choctaw, O. & G. R. Co. (Ark.)* 1145

3. That no express contract between a railroad and sleeping car company is shown, does not prevent the railroad company from taking the benefit of a provision in a contract between the sleeping car company and its employees releasing railroad companies over whose tracks the cars are drawn from liability for negligent injuries to such employees. *Chicago, R. I. & P. R. Co. v. Hamler (Ill.)* 674

Negligence of passenger.

4. A passenger is guilty of contributory negligence which will bar his recovery for injuries received by a fall from a station platform, where, having been provided by the carrier with a well-lighted car in which to await the arrival of his train, he leaves it on a very dark night to walk, merely for exercise, on an unlighted platform, knowing that the slope of the land is such that some portions of the platform must be some distance above the ground. *Abbot v. Oregon R. & Nav. Co. (Or.)* 851

Freight.

Presumption that Loss Due to Negligence, see *EVIDENCE*, 4.

5. The approval by the state commis-

sion of a freight rate based on limited valuation of the property does not, although the carrier is bound to transport at that rate, absolve it from liability for full value of the property if it is lost through its negligence. *Everett v. Norfolk & S. R. Co.* (N. C.) 985

CERTIFICATE.

Of Approval of Fire Escape, see BUILDINGS.

CERTIFICATE OF DEPOSIT.

See also BILLS AND NOTES, 7.

Limitation of Actions against, see LIMITATION OF ACTIONS, 2-4.

CHATTEL MORTGAGE.

Sale by Mortgagee After Levy by Third Person, see CUSTODY OF LAW.

1. Taking possession of after-acquired stock in trade covered by a chattel mortgage, according to its provisions, will give the mortgagee, precedence on a subsequent attachment, although the property was not purchased with the proceeds of stock sold, and the mortgagor did not expressly assent to such possession after acquiring the property. *Burrill v. Whitcomb* (Me.) 451

2. The doctrine that taking possession of after-acquired chattels according to the provisions of a mortgage covering them gives precedence of liens over a subsequent attachment is not affected by a statute providing that no mortgage of chattels is valid against strangers, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded. Id.

CHECKS.

Damages for Negligence in Collection of, see DAMAGES, 1.

CINDERS.

From Railway Engine, as Nuisance, see NUISANCES, 3, 7.

CLASSIFICATION.

Of Property for Taxes, see TAXES, 6.
For Purposes of Water Rates, see WATERS, 19.

CLERKS.

Power to Take Bail Bond, see BAIL, 1.

An arbitrary standard for the measurement of the value of services of the clerk of the probate court according to the value of the estate to be administered cannot be adopted by the legislature. *State ex rel. Nettleton v. Case* (Wash.) 152

CLOUD ON TITLE.

Lease of Mine as, see EQUITY, 4.
Cancellation of Tax Sale to State as, see STATE.

1. A mortgage which includes a strip of land the title to which is in a third person for right of way, but which the mortgagor has the right to fence in, is a cloud on the title of the true owner, which entitles him 1 L.R.A. (N.S.)

to equitable relief. *Pritchard v. Lewis* (Wis.) 565

2. Although equity will not enforce a forfeiture, it may remove a lease as a cloud on title after it has been declared forfeited, and the aid of the court is sought to prevent a threatened continuous trespass upon the property, which will tend to its destruction. *Big Six Development Co. v. Mitchell* (C. C. App. 8th C.) 332

C. O. D.

Where Sale C. O. D. Made, see INTOXICATING LIQUORS, 2.

When Title Passes to Liquor Shipped, see SALE, 3.

CODICIL.

See WILLS, 5, 6.

COLLATERAL ATTACK.

On Appointment of Administrator, see EXECUTORS AND ADMINISTRATORS, 1.

On Divorce Granted in Other State, see JUDGMENT, 7.

COLLATERAL INHERITANCE TAX.

See TAXES, 8.

COLLECTIONS.

By Bank, see BANKS, 8.

Damages for Negligence in Collection of Check, see DAMAGES, 1.

COMMISSIONERS.

A board of commissioners having authority to determine what streams contain fish of sufficient value to warrant the prohibition of casting sawdust into the stream for their preservation are not bound to act on sworn evidence. *Com. v. Sisson* (Mass.) 752

COMMISSION MERCHANTS.

See FACTORS.

COMMITTEE.

Of Legislature, see LEGISLATURE, 1.

COMMON COUNTS.

Recovery under, see PLEADING, 10, 11.

COMPARATIVE NEGLIGENCE.

See NEGLIGENCE, 1.

COMPENSATION.

On Abatement of Nuisance, see NUISANCES, 8.

Of Receiver, see RECEIVERS, 2.

COMPROMISE.

An acknowledgment in writing that an amount received is all that is due, after a dispute as to what is due, is binding as a compromise. *Earle v. Berry* (R. I.) 867

CONCLUSIONS.

Pleading, see PLEADING, 4.

CONDITIONS PRECEDENT.

See ACTION OR SUIT, 4.

CONFIDENTIAL COMMUNICATIONS.

See EVIDENCE, 25-27.

CONFLICT OF LAWS.

Where Sale of Liquor Deemed to be Made, see INTOXICATING LIQUORS.
See also INJUNCTION, 11, 12.

The exemption law of another state pertains to remedy, and will not be enforced in West Virginia. *National Tube Co. v. Smith* (W. Va.) 195

CONGRESS.

Power of, as to Tide Lands, see WATERS, 1.

CONSENT.

To Robbery, Effect on Criminal Liability, see CRIMINAL LAW, 1.
To Discharge Water on One's Property, Evidence as to, see EVIDENCE, 33.
Of Patient to Performance of Surgical Operation, When Implied, see PHYSICIANS AND SURGEONS, 2.
Of Patient to Operation, Question for Jury as to, see TRIAL, 3.

CONSEQUENTIAL INJURIES.

Right to Recover for, see EMINENT DOMAIN, 8, 9.

CONSIDERATION.

For Note, see BILLS AND NOTES, 1.
For Contract, see CONTRACTS, 2.
Admission of, by Pleading, see PLEADING, 5.

CONSOLIDATION.

Of Railroad, Estoppel to Attack, see ESTOPPEL, 1.
Of Railroad Companies, see RAILROADS, 1-3.

CONSPIRACY.

Evidence of Declarations of Coconspirators, see EVIDENCE, 19, 20.

CONSTITUTIONAL LAW.

Power of Legislature to Prohibit Sales of Liquor Outside of Local Option Districts, see INTOXICATING LIQUORS.

Privilege of Witness, see WITNESSES, 1-3.

1. Where the legislature has exercised control over the police of a municipal corporation, the further right to do so is not denied by the adoption of a constitutional provision that it shall continue to exercise the powers it has hitherto exercised. *Horton v. Newport* (R. I.) 512

Ex post facto or retrospective laws.

See also DRAINS AND SEWERS, 1, 2.

2. Where the statute prescribes the qualifications of a physician, and proscribes the grossly immoral, and authorizes the cancellation of any certificate issued to such persons, the application of this law to one whose habits were grossly immoral before the passage of the law is not in the 1 L.R.A. (N.S.)

nature of a punishment, and therefore the statute is not *ex post facto*, but has in view only the qualifications of the physician and the protection of public morals. *Metfert v. Packer* (Kan.) 811

3. A provision in a statute of limitations that it shall not affect pending actions is nugatory, since the legislature has no right to interfere with rights of action after suit has been brought on them. *Slover v. Union Bank* (Tenn.) 528

Delegation of power.

4. The taking effect of a law cannot be made to depend upon the vote of the people under a constitutional provision that the taking effect of no law shall be made to depend upon any authority, except as provided by the Constitution, which merely authorizes the ratification by the people of the bill adopted by the legislature. *Fouts v. Hood River* (Or.) 483

5. The intentional omission of prohibitory liquor laws from the list of laws the taking effect of which the Constitution permits to depend upon the vote of the people does not prevent the legislature from passing a statute providing the machinery by which license laws may be suspended by vote of the people. Id.

6. A statute providing the machinery by which the suspension of the law providing for the issuing of licenses for the sale of intoxicating liquor in cities and in incorporated towns may be secured, so that a majority of the voters of the precinct, ward, or district involved may determine that such sale shall be absolutely prohibited in the district, becomes effective by the act of the legislature, and not by the vote of the people, and is not, therefore, prohibited by a constitutional provision that no law shall be passed the taking effect of which shall be made to depend upon any authority except as provided by the Constitution. Id.

7. The legislature may delegate to a board having peculiar knowledge upon the subject the selection of the streams in which fish are of sufficient value to warrant the prohibition of the casting of sawdust into the stream. *Com. v. Sisson* (Mass.) 752

8. The legislative power to fix the boundaries of taxing districts for the construction of local improvements may be delegated to minor municipalities. *Ross v. Wright County Supers.* (Iowa) 431

9. Conferring on a board of commissioners the power to fix the credits which shall be allowed convicts for good behavior is an unconstitutional delegation of legislative power. *Fite v. State ex rel. Snider* (Tenn.) 520

Local self-government.

See also *supra*, 1.

10. The right of local self-government is not infringed by a statute regulating the police force of a city. *Horton v. Newport* (R. I.) 512

11. Legislative control of the local police, and requiring the payment of their

salaries out of local funds, are not forbidden by the provisions of the 14th Amendment of the United States Constitution. *Id.*
Usurpation of judicial power.

12. A statute making possession of more than one quart of liquor *prima facie* evidence of intent to violate the statute against illegal sales is not unconstitutional as invading the province of the judiciary and depriving accused of the presumption of innocence, or as making *prima facie* evidence of guilt a fact which has no relation to, or does not tend to prove, the criminal act. *State v. Barrett* (N. C.) 626

Equal protection; discrimination.

Uniformity in Taxation, see **TAXES**, 1, 2.

13. The equal protection of the laws is not denied to citizens of a certain county by a statute providing that having in possession in that county more than a quart of liquor without license to sell the same shall be deemed *prima facie* evidence of intent to make an illegal sale thereof. *Id.*

14. The provision of W. Va. Acts 1905, chap. 39, p. 401, requiring every foreign corporation doing business in the state, and every nonresident domestic corporation doing business in the state, to appoint the state auditor its attorney in fact to accept service of process and notice in the state for it, is not invalid as taking property without due process of law, or as denying such corporations the equal protection of the law. *State v. St. Mary's Franco-American Petroleum Co.* (W. Va.) 558

15. That a statute limiting speed on the highways applies only to horseless vehicles does not render it void under a constitutional provision that no one shall be deprived of liberty or property without due process of law, as making an unjust discrimination against the manufacturers and owners of such vehicles. *Christy v. Elliott* (Ill.) 215

Due process of law.

Necessity of Indictment, see **CRIMINAL LAW**, 4.

In Removal of Officer, see **OFFICERS**, 2.
 See also *supra*, 14, 15; *infra*, 18.

16. A proceeding before the district court, or a judge thereof, upon the written application of the county attorney, or attorney general, under Kan. Laws 1897, chap. 265, § 10b, Kan. Gen. Stat. 1901, § 7873, to subpoena witnesses to testify of their knowledge of violations of provisions of the anti-trust law, is of the nature of an investigation or preliminary proceeding, and is a valid exercise of judicial power; the procedure being due process of law within the meaning of the 14th Amendment to the United States Constitution. *State v. Jack* (Kan.) 167

17. Refusing a judicial review of the action of the board of supervisors of a county in including land in a drainage district does not offend the constitutional provision forbidding deprivation of property without due process of law. *Ross v. Wright County Supers.* (Iowa) 431
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Police power.

Prescribing Qualifications of Physicians, see **PHYSICIANS AND SURGEONS**, 1.

See also **FOOD**, 3.

18. The provision of U. S. Const. art. 14, § 1, against any state depriving any person of life, liberty, or property without due process of law, is not a limitation upon the police power of the state to pass and enforce such laws as, in its judgment, will inure to the health, morals, and general welfare of the people. *Meffert v. Packer* (Kan.) 811

19. Seizure of necessary milk for inspection without a warrant may be authorized under the police power. *St. Louis v. Liesing* (Mo.) 918

20. The police power of the state extends to the prohibition of the sale of milk from cows fed by still slop, although there is nothing to show that such milk is not a pure and wholesome article of food, since the court may assume that the legislature had sufficient information to justify the belief that milk from cows fed on such food had ample opportunity to become impregnated with elements dangerous to public health. *Sanders v. Com.* (Ky.) 932

21. Requiring milk dealers to register with the health commissioner and pay a registration fee is a valid police regulation. *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

22. The police power extends to the prohibition of the sale of milk containing any preservative, although there may be preservatives which are not deleterious to health. *St. Louis v. Schuler* (Mo.) 928

23. The marking of fruit packed for shipment, with the locality in which it is grown, cannot be required under the police power of the state. *Ex parte Hayden* (Cal.) 184
Impairing obligation of contracts.

24. An alteration of the charter of a corporation, impairing the obligation of the contract, is not effected by authorizing a majority of the stockholders to consolidate with another, and acquire the interests of dissenting stockholders under the right of eminent domain. *Spencer v. Seaboard Air Line R. Co.* (N. C.) 604

25. An unconstitutional impairment of contract is effected by the change of a law permitting individual creditors of a corporation to enforce their claims against individual stockholders to double the par value of their stock, so as to provide one suit in equity in behalf of all creditors, to which all stockholders may become parties, and abate suits pending under the former law. *Myers v. Knickerbocker Trust Co.* (C. C. App. 3d C.) 1171

CONSTRUCTION.

Of Contracts, see **CONTRACTS**, 5, 6.

CONSTRUCTIVE TRUST.

See **TRUSTS**, 3.

CONTEMPT.

Mandamus to Compel Punishment for, of Witness Failing to Produce Papers, see **MANDAMUS**, 1.

1. A committing magistrate has no jurisdiction to punish for contempt a witness who refused to obey a *subpoena duces tecum*. *Farnham v. Colman* (S. D.) 1135

2. A statute permitting a magistrate to punish a witness for refusal to testify does not authorize him to punish for failure to obey a *subpoena duces tecum*. *Id.*

CONTINGENT REMAINDERS.

See **WILLS**, 8-11.

CONTRACTS.

Right of Action on, see **ACTION OR SUIT**, 1, 2.

By Agent, Who May Sue on, see **ACTION OR SUIT**, 2.

Impairing Obligation of, see **CONSTITUTIONAL LAW**, 24, 25.

With Foreign Corporation, see **CORPORATIONS**, 4-6.

Injunction against Breach of, see **INJUNCTION**, 5.

Performance of Contract under Which Theater Ticket Sold, see **THEATERS**, 1.

For Water Supply, Binding on Water Company, see **WATERS**, 16-22.

Implied contracts.

1. A woman taking her brother into her home, and, without benefit to herself, nursing and performing other menial services for him during his last illness, is entitled to an allowance of their value out of his estate, although there was no express contract that payment should be made. *Mark v. Boardman* (Ky.) 819

Consideration.

2. Continued employment as a porter on a sleeping car is a sufficient consideration for the signing of a release of liability for personal injuries caused through the negligence of the railroad company hauling the car. *Chicago, R. I. & P. R. Co. v. Hamler* (Ill.) 674

Mutuality.

3. A written contract, signed by both parties, whereby a corporation appoints certain persons its exclusive agents for a definite term to sell 85 per cent of its entire pack of fish at an agreed commission, and such persons obligate themselves to use their best efforts to sell such pack, in pursuance of which they in fact perform services and incur expenses in introducing and selling it, is not invalid for want of mutuality of obligation; and an action for damages will lie upon an unjustifiable breach of such contract. *Emerson v. Pacific Coast & N. Packing Co.* (Minn.) 445

Statute of frauds.

4. A promise by one who has given the obligation of a corporation of which he is president, for his own debt, to pay the same, is not void under the statute of frauds, as 1 L.R.A. (N.S.)

a promise to pay the debt of another. *Donovan v. Purtell* (Ill.) 176

Construction.

5. A confirmation of a land grant for allotments merely, with a rejection of claims for outlying pasture lands, is a "confirmation" within the meaning of an agreement to pay a specified amount upon the "confirmation" of such land grant. *Joseph v. Catron* (N. M.) 1120

6. A confirmation of a land grant by the court of private land claims created by an act of Congress is a confirmation by Congress, within the terms of an agreement for the payment of a specified amount upon the confirmation of such land grant by Congress. *Id.*

Validity.

For Release from Injury by Future Negligence, see **NEGLIGENCE**.

See also *infra*, 9.

7. A contract by one employed as porter on a sleeping car to release railroad companies, which may haul such car, from liability for injuries which may result to him from their negligence, is valid. *Chicago, R. I. & P. R. Co. v. Hamler* (Ill.) 674

8. A condition upon a theater ticket that the ticket will not be honored if sold on the sidewalk is not against public policy. *Collister v. Hayman* (N. Y.) 1188

Conclusiveness of umpire's decision.

Decision as Condition Precedent to Action, see **ACTION OR SUIT**, 4.

9. A provision in a contract between a principal contractor and a subcontractor for the grading of a railroad that the work should be done under the supervision of the chief engineer of the former, who should make estimates as a basis for the payment of the work done; and that his decision as to all matters of dispute which arise between the parties should be final and conclusive,—is valid; and the decision of such an umpire is *prima facie* conclusive upon all matters submitted to and fairly and honestly decided by him. *Edwards v. Hartshorn* (Kan.) 1050

10. The decision of a chief engineer whose estimates are made final and conclusive by the contract will have no binding force where there is fraud or mistake so great and palpable as to imply bad faith, or he fails fairly and honestly to perform the functions assigned to him. *Id.*

11. The decision of a chief engineer whose estimates are made final and conclusive by the contract will not be binding if, by subsequent agreement of the parties, such decision is not to be relied on, but other full and correct estimates are to be made. *Id.*

12. The fact that a person whose decision is, by the contract, made final and conclusive in case of dispute between the parties, is an employee of one of them, does not, of itself, weaken the force of his decision; but the law requires of a person so situated the utmost diligence and good faith in the performance of his duties. *Id.*

Rescission.

Remedy on, see **ACTION OR SUIT**, 5-7.

13. The general rule that where one party asserts a right to rescind a contract for nonperformance of his covenant by the other, the party seeking rescission must restore or tender back to the other party what has been received from him, so as to restore the *status quo*, does not apply to a case where one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded, and brings suit to recover the amount which he has paid under the agreement. *Timmerman v. Stanley* (Ga.) 379

14. If one agreed to teach another in certain lines of instruction until the pupil was proficient in them, and, after beginning the course and receiving payment in full, abandoned the contract and refused to teach the student longer, the latter would have a right to treat the action of the teacher as a rescission, and bring suit for the amount which had been paid by him. *Id.*

CONTRIBUTION.

Between Legatees, see **WILLS**, 14, 15.

CONTRIBUTORY NEGLIGENCE.

Of Servant, see **MASTER AND SERVANT**, 23-25.

CONVICTS.

Delegation of Power to Fix Credits for Good Behavior, see **CONSTITUTIONAL LAW**, 9.

Deduction from Sentence of, for Good Behavior, see **CRIMINAL LAW**, 8.

CORPORATIONS.

Authorizing Consolidation with Another as Impairment of Obligation of Contract, see **CONSTITUTIONAL LAW**, 24.

Provision as to Enforcing Stockholder's Liability as Impairment of Obligation, see **CONSTITUTIONAL LAW**, 25.

Taking Minority Stock under Eminent Domain, see **EMINENT DOMAIN**, 1.

Jurisdiction of Suit on Stock Subscription, see **EQUITY**, 2, 3.

Consolidation of, see **ESTOPPEL**, 1.

Dividends on Stocks and Bonds as Decedent's Assets, see **EXECUTORS AND ADMINISTRATORS**, 8.

Insolvent Insurance Company, Priority of State, see **INSURANCE**, 2.

Fraud in Inducing Purchase of Stock, see **FRAUD AND FRAUDULENT CONVEYANCES**, 1.

When Limitation Begins to Run on Unpaid Stock Subscription, see **LIMITATION OF ACTIONS**, 5, 6.

Consolidation of Railroad Companies, see **RAILROADS**, 1-3.

Taxation of, see **TAXES**.

1. That one owns all the stock of a corporation does not make him the owner of its property. *Louisville v. McAteer* (Ky.)

2. Equity will interfere to prevent the majority stockholders of a corporation from exercising their statutory power to reduce its capital stock, where the purpose is to relieve defrauding stockholders from meeting their obligations on the theory that they have been overreached in a contract by which full-paid stock was issued for patent rights. *Theis v. Durr* (Wis.) 571

3. A person who, upon receiving a security for collection and reinvestment, uses the money for his own purposes, and delivers to his customer a worthless obligation of a corporation of which he is president, and which he organized for the transaction of his personal business, is personally liable to return the amount so received. *Donovan v. Purtell* (Ill.) 176

Foreign corporations.

Due Process of Law as to, see **CONSTITUTIONAL LAW**, 14.

Injunction against, see **INJUNCTION**, 6.

Revocation of License of, see **INSURANCE**, 3.

Repeal of Statute Exempting Actions against, from Operation of Statute of Limitations, see **STATUTES**, 9.

4. Contracts made with a foreign corporation before it has obtained permission, under the provisions of Kan. Laws 1898, chap. 10, and Kan. Laws 1901, chap. 125 (Kan. Gen. Stat. 1901, §§ 1259 et seq.), to do business in the state, are not, for that reason, invalid, or subject to cancellation at the suit of one of the contracting parties. *State v. American Book Company* (Kan.) 1041

5. The regulation of foreign corporations under Kan. Laws 1898, chap. 10, and Kan. Laws 1901, chap. 125, (Kan. Gen. Stat. 1901, §§ 1259 et seq.), devolves upon the state, and a private individual cannot interfere, except in the single instance of the failure of the corporation to file its annual statement, and then only to the extent of abating a suit against him until such statement shall have been filed. *Id.*

6. The negotiations of a foreign corporation with the state school text-book commission, resulting in a contract and bond to supply the public schools with text-books, does not constitute the doing of business within the state by such corporation within the meaning of Kan. Laws 1898, chap. 10, and Kan. Laws 1901, chap. 125 (Kan. Gen. Stat. 1901, §§ 1259 et seq.) *Id.*

COSTS.

Appealability of Decree for, see **APPEAL AND ERROR**, 1-4.

Review of Discretion as to, see **APPEAL AND ERROR**, 21.

Finding on Motion for Security for, as *Res Judicata*, see **JUDGMENT**, 4.

1. Costs cannot be awarded against the state in civil actions, in the absence of express statutory authority. *State v. Williams* (Md.) 254

2. Extraordinary costs, such as allowance of expenses and compensation of re-

ceivers, may, in a proper case, be provisionally allowed to the receiver out of the fund and ultimately decreed to be paid to the party entitled to the fund by his adversary. *Nutter v. Brown* (W. Va.) 1083

COUNTS.

Pleading in Different Counts, see PLEADING, 9.

COURTS.

Usurpation of Province of, see CONSTITUTIONAL LAW, 12.

Discretion of Supreme Court as to Granting Writ of Quo Warranto, see QUO WARRANTO, 2.

Removal of Cause to Federal Court, see REMOVAL OF CAUSES.

Review of Assessment by, see TAXES, 7.

Relation to other departments.

1. The legislative determination as to what is a public use for the exercise of the right of eminent domain is not conclusive. *Cozad v. Kanawha Hardwood Co.* (N. C.) 909

2. Courts have a right to determine whether or not ordinances sought to be upheld as police regulations were in fact passed for the purpose of raising revenue. *Wisconsin Teleph. Co. v. Milwaukee* (Wis.) 581

3. A board appointed to hear and determine any complaint made against any person holding a physician's license, and revoke such license for specified causes, is, while so acting, not a judicial tribunal, nor governed by the technical rules applied to law courts; and its findings are, in the absence of fraud, corruption, or oppression, conclusive upon the court. *Meffert v. Packer* (Kan.) 811

Federal courts following state decisions.

4. The Federal courts will apply the general rule that a loan by a wife to her husband from her separate estate creates an equity in her favor, notwithstanding decisions of the local state court to the contrary. *James v. Gray* (C. C. App. 1st C.) 321

5. A Federal court, in determining the damages which can be assessed under a statute allowing compensatory damages for a wrongful death, will follow the general law applied in the Federal courts, which excludes all consideration of matters which rest in speculation, conjecture, or fancy, although the courts of the state where the statute was passed may permit the damages to be assessed by such methods. *Swift & Co. v. Johnson* (C. C. App. 8th C.) 1161

CRIMINAL LAW.

When New Trial Granted, see NEW TRIAL.

Criminal liability.

1. Consent to a robbery, so as to absolve the robber from criminal liability, is not shown by merely providing one's self with money which may be taken, and going where the deed may be done in anticipation of the 1 L.R.A. (N.S.)

commission of the crime, for the purpose of apprehending the criminal. *Tones v. State* (Tex. Crim. App.) 1024

Offense against city and state governments.

2. The maintenance of a place of any character where persons are allowed to bet, offer to bet, place an order for a bet, or telegraph or telephone bets, on races of any sort, cannot, in the absence of express legislative authority, properly be made penal by a municipal ordinance, as it is prohibited by Ga. Pen. Code 1895, § 398. *Thrower v. Atlanta* (Ga.) 382

Right to face witness.

3. The constitutional right of one accused of crime to meet the witnesses face to face is not infringed by refusal to compel the production of evidence before a committing magistrate. *Farnham v. Colman* (S. D.) 1135

Necessity of indictment.

4. Indictment is not required by a constitutional provision that no one shall be deprived of his liberty "except by the laws of the land," even in case of common-law felonies; and the legislature may therefore authorize the institution of prosecutions by information. *State v. Stimpson* (Vt.) 1153

Imprisonment.

Delegation of Power to Fix Credits for Good Behavior, see CONSTITUTIONAL LAW, 9.

5. Sentence to imprisonment according to the provisions of a statute that, when one is acquitted of the charge of murder on the ground of insanity, and that fact is stated by the jury, he may be sentenced to imprisonment, does not deprive him of his liberty without due process of law, nor of the benefit of the constitutional rights, to appear and defend in person or by counsel, and to trial by jury, where he has had a fair trial upon the issue of insanity, tendered by him in support of his plea of not guilty, and he has produced no evidence of a return of a lucid interval. *Ex parte Brown* (Wash.) 540

6. No cruel punishment is inflicted by committing one who has been acquitted of the crime of murder on the ground of insanity to prison, where it appears to the court that his discharge from custody will be manifestly dangerous to the peace and safety of the community. *Id.*

7. The committal of a person acquitted of murder on the ground of insanity to prison until the further order of the court is not void for uncertainty. *Id.*

8. The courts will not recognize a deduction from the sentence of a criminal of time for good behavior which has been allowed under authority of an unconstitutional statute. *Fite v. State ex rel. Snider* (Tenn.) 520

CROPS.

As Assets of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 7.

As a testamentary direction as to the

disposition of crops growing on the land in case testator's death shall occur within a specified year will cease to have any effect at the expiration of the year; and after that time the matter will be governed by the statute. *Gordon v. James* (Miss.) 461

CRUEL PUNISHMENT.

Imprisonment of Insane Persons on Acquittal, see CRIMINAL LAW, 6.

CURATIVE ACTS.

See DRAINS AND SEWERS, 1, 2.

CUSTODY OF LAW.

A sale of mortgaged chattels by the mortgagee under a power of sale contained in the mortgage, in pursuance of an advertisement for sale duly made, is void and ineffectual to pass title to the purchaser, where it is at the time held by virtue of a seizure under an execution levied thereon by a third person. *Fulghum v. J. P. Williams Co.* (Ga.) 1055

CUSTOM.

Evidence of, see EVIDENCE, 28.

As to System of Reckoning Time, see INSURANCE, 4.

Enlargement of Partner's Powers by Implication from, see PARTNERSHIP, 2.
For Reckoning Time, Question for Jury as to, see TRIAL, 6.

As to Rates Charged for Water, see WATERS, 19.

DAMAGES.

From Seepage from Irrigation Ditch, Evidence as to, see EVIDENCE, 34.

Resale at Profit as Bar to Recovery for Fraud in Original Sale, see EVIDENCE, 44.

Instructions as to Punitive Damages, see TRIAL, 17.

1. Credit, to the depositor, of a check received for collection, followed by negligence in making the collection, so that the rights on the paper are lost, does not make the bank liable for the face of the paper, but only for the amount lost through the neglect. *Jefferson County Sav. Bank v. Hendrix* (Ala.) 246

Personal injuries.

Federal Courts Following State Decisions as to, see COURTS, 5.

Evidence as to, see EVIDENCE, 30, 31, 36.
See also *infra*, 7, 8.

2. In fixing the damages for a personal injury, the jury may consider the testimony of plaintiff and some of his witnesses that his leg was injured, although there is evidence in the case that there was no injury to the leg further than an enlargement of glands in the groin. *Christy v. Elliott* (Ill.) 215

3. Ten thousand five hundred dollars is an excessive amount to be awarded for personal injuries inflicted by another's negligence, where the evidence leaves the extent of the injuries uncertain, and also the question as to what the condition of the injured person will be permanently. *Illinois C. R. Co. v. Houchins* (Ky.) 375
1 L.R.A. (N.S.)

Nuisances.

Evidence as to, see EVIDENCE, 40-42.

4. The measure of damages in case of injury to neighboring property by the careless operation of a railroad, so that the presumption is that the evil will be remedied and recurring damages for injuries to the use and enjoyment of the property may be recovered, is to be governed to a large extent by the rental value of the property, and to what extent that value is diminished. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.) 49

5. The injury to the fee or permanent value of the property is the proper measure of damages where neighboring property is injured by the location and operation of railroad terminals which are intended to be permanent, and, notwithstanding their careful and proper operation, constitute a nuisance diminishing the value of the property. Id.

6. The allowance of \$4,000 as damages for injury to the rental value of a \$7,000 house for thirty-two months by the maintenance of a nuisance in the vicinity is excessive. Id.

Mental suffering.

7. One who swallows several pieces of broken glass contained in a bottle of a beverage placed on sale, which are subsequently removed from his stomach leaving apparently no permanent injury, may recover from the manufacturer of the beverage for mental suffering caused by fear of death while the glass was in his stomach, but not for the vague fear, after the removal of the glass and his restoration to health, that at some time in the future he may again suffer as the result of his injuries. *Watson v. Augusta Brewing Co.* (Ga.) 1178

8. One suing for personal injuries may recover for the bodily suffering and mental pain which are inseparable, and which necessarily and inevitably result, from the injury, but not for the mortification and distress of mind from the contemplation of his crippled condition and its effect upon the esteem of his fellows, as it is too remote, indefinite, and intangible. *Southern P. Co. v. Hetzer* (C. C. App. 8th C.) 288

Loss of profits.

Evidence as to, see EVIDENCE, 35.

9. The damages for breach of a contract to appoint certain persons exclusive agents for a specified time to sell a designated per cent of the entire pack of fish of the other party at an agreed commission includes such loss of profits, past and future, as are shown to have approximately resulted from the breach of the contract, excluding all uncertain and conjectural profits. *Emerson v. Pacific Coast & N. Packing Co.* (Minn.) 445

DEATH.

Father's Sole Right to Recover for, see APPEAL AND ERROR, 33.

Of Party to Divorce, Effect of Right to Vacate Decree, see JUDGMENT, 9.

1. When the legislature has created a

right of action for wrongful death for the benefit of the next of kin of deceased, and has declared that the father, if living, is the next of kin of minor children who leave neither widow nor children, an action for the death of such child must be for the sole benefit of the father, although he has deserted his family, to whose support the deceased was, at the time of death, contributing, and has left the locality of their residence without apparent interest in what becomes of them. *Swift & Co. v. Jonnson* (C. App. 8th C.) 1161

2. No reasonable expectation that the continued life of a boy will be of pecuniary benefit to his father, so as to enable the latter to recover substantial damages for the wrongful killing of the child, under statutes limiting the recovery under such circumstances to the pecuniary loss inflicted, can be indulged, where the father had abandoned the child, and for a period of seven years had remained insensible to his parental obligation, although there is some slight evidence that they retained some affection for each other. *Id.*

3. Speculation as to the possibility of restoration of the natural relations between a father and his child, whom he had abandoned for a period of seven years, and compelled to assume the burden of his own support, cannot be made the basis of a recovery by the father of substantial damages for the wrongful killing of the child. *Id.*

DECLARATIONS.

Admissibility in Evidence, see EVIDENCE, 17-27.

DECREE.

See JUDGMENT.

DEEDS.

Parol Evidence as to, see EVIDENCE, 13, 14.

Mortgage, see MORTGAGE.

1. In construing a doubtful description in a conveyance, the court will keep in mind the position of the contracting parties, the circumstances under which they acted, and interpret the language of the instrument in the light of these circumstances. *Abercrombie v. Simmons* (Kan.) 806

Description of parties.

2. A grant to the "heirs" of a living person will be construed as having meant children, and upheld, if such plainly appears to have been the intention of the grantor. *Roberson v. Wampler* (Va.) 318

3. Naming as grantees in a deed of real estate a partnership the members of which have died, but the name of which has been perpetuated, and the property kept together by consent of all parties interested, after a sale of the business to strangers, for the purpose of collecting the accounts and settling up the partnership affairs, does not render the conveyance void. *Walker v. Miller* (N. C.) 157
1 L.R.A. (N.S.)

Description of property conveyed.

In Deed of Trust for Creditors, see INSOLVENCY, 2.

4. A deed to a railroad company describing the land conveyed as a certain part of a quarter section "lying within 50 feet of the main track of the railroad" is not void for indefiniteness in the description, where, at the time of its execution, the line of the road had been surveyed and staked out, and within a few days thereafter a map and profile of the railroad was made by the company and subsequently filed, although at the time of its execution no part of the railroad had been built. *Abercrombie v. Simmons* (Kan.) 806

What passes by.

By Deed of Trust for Creditors, see INSOLVENCY, 1.

See also REAL PROPERTY, 1.

5. No estate is granted by a clause in a deed which, after granting a life estate, declares that it is the purpose of the grantor, by this deed, that, after the death of the life tenant, "said described lands shall become and be the property of" an institution named. *McGarrigle v. Roman Catholic Orphan Asylum* (Cal.) 315

6. The fee will pass to the second grantee where, in one deed, land is granted to one person, "excepting and reserving" therefrom a strip of certain width, "to be used as a right of way," which strip is granted to another, reserving the timber thereon to the grantor; where it appears that the grantor removed the timber therefrom, the second grantee paid the taxes thereon, and the wife of the grantor refused to sign the first deed until the strip had been conveyed to the second grantee. *Pritchard v. Lewis* (Wis.) 565

7. A deed of trust signed by a man and his wife, conveying, all and singular, the real and personal estate, and all other property of every nature, kind, and description, "of us," is not limited to their joint estates, but will convey her separate property. *Roberts v. Roberts* (Md.) 732

DEFENSE.

To Instrument for Payment of Money, see BILLS AND NOTES, 5, 6.

DEFINITIONS.

Heirs, see DEEDS, 2.

Noon, see INSURANCE, 4.

Reservoir, see WATERS, 8.

Sum at Risk, see INSURANCE, 13.

An offense *malum in se* is one which is naturally evil as adjudged by the sense of a civilized community. *State v. Horton* (N. C.) 991

DELEGATION OF POWER.

See CONSTITUTIONAL LAW, 4-9.

DEMAND.

Necessity to Set Statute of Limitations Running, see LIMITATION OF ACTIONS, 7.

DEMURRER.

See PLEADING, 14-18.

DEPOSIT.

See BANKS, 1-6.

DESCENT AND DISTRIBUTION.

Inheritance by Illegitimate Child, see ILLEGITIMACY, 2.

DISCHARGE.

In Bankruptcy, see BANKRUPTCY, 2.

DISCLAIMER.

By State, of Title to Tide Lands, see WATERS, 2.

DISCOVERY.

Review of Discretion as to, see APPEAL AND ERROR, 20.

Compelling Production of Evidence before Committing Magistrate, see CRIMINAL LAW, 3.

DISMISSAL.

Judgment of, as *Res Judicata*, see JUDGMENT, 3.

Of Action as to Unnecessary Parties, see REMOVAL OF CAUSES, 1.

DISQUALIFICATION.

Injunction of Suit before Justice of the Peace for, see INJUNCTION, 13.

DITCH.

For Irrigation, see WATERS, 8-13.

DIVERSION.

Of Water Course, see WATERS, 5.

DIVIDENDS.

On Stocks and Bonds as Assets, see EXECUTORS AND ADMINISTRATORS, 8.

DIVORCE.

Effect of Void Decree on Property Rights, see JUDGMENT, 2.

Effect of Judgment in Other State, see JUDGMENT, 6, 7.

Power to Vacate Decree after Death of Party, see JUDGMENT, 9.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 11, 12.

DOMICIL.

1. One's character as a nonresident is not changed by coming into the state for the purpose of administering upon an estate, with the intention of remaining there as long as his duties may require, if he retains his domicile in another state. *Re Mulford* (Ill.) 341

2. A residence within the state, once acquired, continues until an actual or constructive residence elsewhere has been acquired. *Brown v. Beckwith* (W. Va.) 778

DOWER.

Right to, after Renouncing under Will, see WILLS, 12-14.

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DRAFTS.

With Bill of Lading Attached, see BILL OF LADING.

DRAINAGE DISTRICT.

See DRAINS AND SEWERS, 4.

DRAINS AND SEWERS.

Refusal of Judicial Review as to, see CONSTITUTIONAL LAW, 17.

Liability of City for Injury by Defective Sewer, see MUNICIPAL CORPORATIONS, 11-15.

1. Authority to continue existing proceedings for the construction of a drainage ditch, which have been declared void because of the invalidity of the statute under which they were instituted, for failure to provide for notice to owners of land not touched by the improvement, but which may be assessed for the cost, may be conferred by a statute correcting this defect by providing such notice, in the absence of any constitutional prohibition of retroactive laws. *Ross v. Wright County Supers.* (Iowa) 431

2. Pending proceedings for a drainage improvement need not be expressly legalized in order to permit their completion, by a statute enacted to provide for notice to persons liable to assessment, for want of which the statute has been held unconstitutional; it is sufficient if the statute assumes that the pending proceedings will continue, and would be idle and meaningless unless that intention was imputed to the legislature. *Id.*

3. Proceedings for the construction of a drainage ditch cannot be avoided by property owners properly served with notice because one owner of property affected was not served,—at least, where he subsequently appears, and presents and establishes his claim for damages by reason of the improvement. *Id.*

4. A landowner is not entitled to a hearing upon the question whether or not his land shall be included in a district which shall bear the cost of a drainage improvement, if provision is made for a hearing as to the assessment. *Id.*

DURESS.

In Payment of Water Rates, see ASSUMPSIT.

Refusal to pay money admitted to be due, except upon receiving a certain kind of receipt, does not constitute such duress as to render the receipt void. *Earle v. Berry* (R. I.) 867

DYING DECLARATIONS.

See EVIDENCE, 23, 24.

EJECTMENT.

An equitable title will support an action of ejectment. *Walker v. Miller* (N. C.)

ELECTION.

Between Counts, see **APPEAL AND ERROR**, 24.

Between Inconsistent Pleadings, see **PLEADING**, 15.

To Take under Will, see **WILLS**, 12-14.

ELECTION OF REMEDIES.

See **ACTION OR SUIT**, 5-7.

ELECTRICAL USES AND APPLIANCES.

Imperfect Insulation as Proximate Cause of Injury, see **PROXIMATE CAUSE**, 2.

ELECTRICITY.

Enjoining Breach of Contract to Furnish, see **INJUNCTION**, 5.

ELOPEMENT.

Assisting in, as Justification for Whipping, see **ASSAULT AND BATTERY**, 3.
Set-Off in Action for Assault by One Assisting in, see **SET-OFF AND COUNTERCLAIM**.

EMBLEMENTS.

Testamentary Direction as to Crops, see **CROPS**.

Crops as Assets of Decedent's Estate, see **EXECUTORS AND ADMINISTRATORS**, 7.

EMINENT DOMAIN.

Damages in Case of, see **DAMAGES**, 4, 5.

What may be taken.

1. The stock of dissenting stockholders in a railroad company may be taken by right of eminent domain upon payment of just compensation, for the purpose of effecting a consolidation of the road with others to create a through line and subserve the interests of the public. *Spencer v. Seaboard Air Line R. Co.* (N. C.) 604

For what purpose.

Conclusiveness of Legislative Determination as to, see **COURTS**, 1.

2. A statute granting the right of eminent domain will be upheld against a claim that it is for a private use, unless it clearly appears that the use is private and in no sense public. *Highland Boy Gold Min. Co. v. Strickley* (Utah) 976

3. The mere development of a locality by the establishment and maintenance of a private enterprise therein is not a public use for which the right of eminent domain may be exercised. *Cozad v. Kanawha Hardwood Co.* (N. C.) 969

4. The construction of roads and tramways for the development of the mining industries of a state is a public use for which the right of eminent domain may be exercised. *Highland Boy Gold Min. Co. v. Strickley* (Utah) 976

5. The reclamation of land by irrigation is such a public purpose that the legislature may rightfully authorize the condemnation of rights of way over private property, or through the ditches of private individuals, to R.A. (N.S.)

convey water for that purpose onto land belonging to a private individual. *Nash v. Clark* (Utah) 208

6. The right of eminent domain cannot be conferred to secure a right of way for a private railway to transport timber to market. *Cozad v. Kanawha Hardwood Co.* (N. C.) 969

7. The fact that only an easement for a limited time is to be taken for a private railway does not change the rule forbidding the exercise of the right of eminent domain for that purpose. *Id.*

Recovery for consequential injuries.

8. A property owner is not entitled to damages for every inconvenience or discomfort caused by the operation of a railroad near his property, even though it may be material or considerable; but he can recover only where the usable and rental or permanent value of his property is injured. *Louisville & N. Terminal Co. v. Lelleyett* (Tenn.) 49

9. Discomfort to the owner of a residence located near a railroad track, which is caused solely by the growth and increase of travel and traffic, gives him no right of action against the company. *Id.*

ENTICING.

Mother's Right of Action for, see **HUSBAND AND WIFE**, 3.

Of Minor Child, see **PARENT AND CHILD**, 3.

EQUAL PROTECTION OF THE LAWS.

See **CONSTITUTIONAL LAW**, 13-15.

EQUITABLE MORTGAGE.

Keeping Alive after Payment, see **MORTGAGE**, 8.

EQUITY.

Jurisdiction and Practice in Particular Cases, see **CLOUD ON TITLE; INJUNCTION**.

Relief in, against Fraudulent Reduction of Stock, see **CORPORATIONS**, 2.

See also **INJUNCTION**, 10.

Remedy at law.

1. An action for forcible entry and detainer to recover possession of property leased for mining purposes is not an adequate remedy, so as to defeat the jurisdiction of equity, where the mining operations are being carried on in such a way as to remove the supports of the surface and cause it to subside. *Bix Six Development Co. v. Mitchell* (C. C. App. 8th C.) 332

2. The right to maintain suits against the individual stockholders of an insolvent corporation to enforce their liability on unpaid stock subscriptions does not constitute such a plain, full, and adequate remedy at law as to defeat a suit in equity against all the stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of creditors. *Cook v. Carpenter* (Pa.) 900

3. The necessity of an accounting does

not determine equitable jurisdiction of a suit against the stockholders of an insolvent corporation to enforce payment of unpaid stock subscriptions as an asset for the benefit of creditors. *Id.*

Retaining jurisdiction.

4. Having acquired jurisdiction to prevent a destruction of mining property by wrongful methods of operating the mine under a lease, equity may retain the case, and cancel the lease as a cloud on title. *Big Six Development Co. v. Mitchell* (C. C. App. 8th C.) 332

ESTOPPEL.

1. A stockholder of a railroad company, dissenting from an attempt to consolidate the road with others, who, instead of taking prompt steps to prevent such consolidation waits until after it is an accomplished fact and vast public and private interests have attached under the new conditions, will not be permitted to come into a court of equity for a forfeiture of the corporate charter, the appointment of a receiver, and the rescission of the merger, but will be remitted to his action under the statute for compensation for his stock. *Spencer v. Seaboard Air Line R. Co.* (N. C.) 604

By relation of parties.

2. One who goes into possession of land as the tenant of another cannot set up title adverse to the landlord, from whom he thus obtained possession, until after he has surrendered the premises to the landlord. *Hodges v. Waters* (Ga.) 1181

3. A tenant in possession, who expressly agrees to pay rent to a third person for a given time, will be bound by such agreement for the time specified if founded upon a sufficient consideration; but, after the expiration of such time, no promise to pay rent will be implied, and he may deny liability for rent thereafter, although he still remains in possession of the premises as the tenant of the person who placed him in possession. *Id.*

EVIDENCE.

Order of Reception of, see TRIAL, 1.

Judicial notice.

1. Judicial notice will not be taken of municipal ordinances. *St. Louis v. Liessing* (Mo.) 918

Presumptions and burden of proof.

From Possession of Liquor, see CONSTITUTIONAL LAW, 12, 13.

See also TRIAL, 1.

2. The rule that where a person executes an instrument leaving blank spaces therein to be filled, and delivers it in such imperfect condition to another for use, he will be presumed to have intended, in the absence of anything to the contrary, to confer on such other person authority to complete the instrument, applies to instruments required by law to be executed under seal, and to be witnessed and acknowledged in order to be entitled to record, as well as to simple contracts. *Friend v. Ward* (Wis.) 891
1 L.R.A. (N.S.)

3. Mere proof of facts which call into action the rule *res ipsa loquitur* in an action for negligent injuries does not make a prima facie case, or raise a presumption of negligence, but merely furnishes an element to be considered by the jury as part of the plaintiff's case. *Ross v. Double Shoals Cotton Mills* (N. C.) 298

4. That loss of goods delivered to a carrier for transportation was due to its negligence will be presumed where the receipt of the goods and failure to deliver are shown, and both loss and responsibility are admitted. *Everett v. Norfolk & S. R. Co.* (N. C.) 985

5. A presumption of negligence arises from a violent impact of a train against another which it is following upon the same track, so as to telescope several cars, and start a conflagration which sets fire to neighboring property, which shifts the burden of showing care to the railroad company. *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* (C. C. App. 6th C.) 533

6. Setting fire by sparks escaping from a threshing-machine engine raises the presumption of negligence, and casts the burden of showing care upon the owner of the engine. *Martin v. McCrary* (Tenn.) 530

7. The official survey of government land will be presumed to be correct after the lapse of many years, where its disturbance would upset titles and destroy rights of those who have in good faith relied on it. *Kneeland v. Korter* (Wash.) 745

8. In a collateral proceeding, requisite notice to a ward to bind him by acts of his guardian in his behalf will be presumed to have been given. *Ross v. Wright County Supers.* (Iowa) 431

9. There can be no presumption in favor of an assessment for taxation which is arrived at, not by an exercise of judgment, but by an arbitrary manipulation of figures. *Consolidated Gas Co. v. Baltimore* (Md.) 263

10. A loan by a married woman to a firm of which her husband is a member, in the absence of any evidence as to its source further than that the loan was made, will be presumed to have come from her separate estate, where the statute provides that a woman's property shall, upon her marriage, remain her separate estate, and that she may receive property in the same manner as if she were sole. *James v. Gray* (C. C. App. 1st C.) 321

Documentary evidence.

Admission of Memorandum, see APPEAL AND ERROR, 28.

11. Evidence of professed tests printed in a book of instructions as to the use of a patent brake is not admissible upon the question as to the distance within which a train can be stopped. *Illinois C. R. Co. v. Stith* (Ky.) 1014

12. The American Table of Mortality is admissible in evidence upon the question of expectation of life. *Illinois C. R. Co. v. Houchins* (Ky.) 375

Parol evidence.

As to Intention of Testator, see **WILLS**, 16.

13. Where, by deeds executed the same day, land is granted to one person, "excepting and reserving therefrom a strip of land" of certain width, "to be used as a right of way," and this strip, "being the same premises as described in the other deed as a right of way," is granted to another, reserving the timber thereon, sufficient ambiguity exists as to grantor's intention to admit extraneous evidence in explanation. *Pritchard v. Lewis* (Wis.) 565

14. Parol evidence is admissible to identify the true owners of property granted by a deed in which a partnership is named as grantee. *Walker v. Miller* (N. C.) 157

15. That one who signed a contract to purchase a machine was a surety only may be shown by parol for the purpose of showing that he was not a necessary party to a cross petition by the purchaser when sued on the purchase-money notes, filed to bring in and hold the seller liable for breach of warranty of the machine. *First Nat. Bank v. Dutcher* (Iowa) 142

Opinion evidence.

16. Parties who have examined clothing injured through another's negligence, and who are familiar with the values of such articles, may state their opinions as to the proportion of damage done by the injury. *Withey v. Pere Marquette R. Co.* (Mich.) 352

Declarations generally.

For Purposes of Impeachment, see **WITNESSES**, 4.

17. Serving a notice of accident on a city, as required by statute, is not a bringing of an action, within the meaning of a statute permitting the admission of evidence of declarations of an injured person made before action brought. *Dickinson v. Boston* (Mass.) 664

18. An admission by a servant whose negligence caused injury to another, made long after the accident, is not admissible in evidence against the master, but is admissible against the servant himself. *Illinois C. R. Co. v. Houchins* (Ky.) 375

19. A conspiracy may be proved by showing the declarations, acts, and conduct of the conspirators. *State v. Ryan* (Or.) 862

20. Upon trial of one accused of getting money from another by means of a conspiracy to steal, evidence is admissible of declarations by one of the conspirators which induced the victim to go to the desired spot, where the others carried out the scheme, although no conspiracy was shown to have existed at the time they were made. *Id.*

21. Statements of fact fairly indicative of a relevant bodily condition of the declarant at the time of the declaration are admissible as evidence of the existence of such condition, although made a considerable time before.

after the injury was received. *Western Travelers' Acci. Asso. v. Munson* (Neb.) 1068

Dying declarations; during travail.

22. Declarations of the mother of a child, made during travail, as to its paternity, are admissible in support of her testimony in a bastardy proceeding. *Johnson v. Walker* (Miss.) 470

23. The conclusion of a trial court that dying declarations were admissible in evidence will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion. *Gipe v. State* (Ind.) 419

24. The deduction that declarations were made under a sense of impending death, without hope of recovery, is warranted where the person making them, after great shock and exposure, declared that he did not believe that he could get well, and made them several hours later, having been sinking all the time, and having reached a state of extreme weakness. *Id.*

Confidential communications.

Between Husband and Wife, Error in Admitting, see **APPEAL AND ERROR**, 27.

25. A waiver by the patient, under Neb. Code, § 334, of the prohibition in § 333 against a physician's testifying to confidential disclosures made to him in the course of his professional employment, may be included in, and made a part of, the contract sought to be enforced in the action in which such testimony is offered, and need not necessarily be made at the time of the trial. *Western Travelers' Acci. Asso. v. Munson* (Neb.) 1068

26. The prohibitions in Neb. Code, § 333, against a physician testifying to confidential disclosures made to him in the course of his professional employment, are for the benefit of the patient, who can, under the express provisions of § 334, waive the same. *Id.*

27. A stipulation, in a contract of life insurance, to the effect that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver within the meaning of said sections, and renders the attending physician a competent witness as to the confidential disclosures made to him by the assured concerning his last sickness. *Id.*

Relevancy and materiality.

Intercourse with Others, of Prosecutrix for Rape, see **APPEAL AND ERROR**, 32.

What Admissible in Rebuttal, see **TRIAL**, 1.

28. In determining the meaning of the word "noon" in a contract, evidence is admissible to prove the prevailing custom as to the system of reckoning time in the community where the contract was made. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* (Ky.) 364

29. In an action to compel the restoration of a building destroyed by fire,

tion of money by one to whom it was taken for investment, and who gave therefor worthless obligations of a corporation of which he was president, evidence is admissible of the confidence which the customer had in him, and of his method of transacting business in the name of corporations to avoid his personal obligations. *Donovan v. Purtell* (Ill.) 176

30. Evidence that a boy injured by another's negligence was obedient and economical is admissible upon the question of damages, in an action by him to recover for the injuries. *Cameron Mill & Elevator Co. v. Anderson* (Tex.) 198

31. The expectation of life of one injured by another's negligence may be shown as a basis for the estimation of damages. *Illinois C. R. Co. v. Houchins* (Ky.) 375

32. In an action to recover for the conscious suffering prior to death of one injured by another's negligence, evidence is admissible that he was suffering, and finally died, from an intercurrent disease. *Dickinson v. Boston* (Mass.) 664

33. The fact that plaintiff, an adjoining landowner, had not notified defendant, the owner of an irrigation ditch, of a claim for damages for casting water upon his property, is admissible in evidence upon a disputed question as to the existence of plaintiff's consent thereto. *Howell v. Big Horn Basin Colonization Co.* (Wyo.) 596

34. The fact that the injurious results of seepage from an irrigation ditch may be obviated by drainage may be shown, as affecting the measure of damages. Id.

35. Evidence of sales made subsequently to breach and during the pendency of the contract term, although made by the principal, through other agents than the plaintiffs, are admissible in evidence, and, under proper direction by the court, may be weighed by the jury in estimating prevented gains. *Emerson v. Pacific Coast & N. Packing Co.* (Minn.) 445

36. Evidence of the earnings of persons proficient in a trade is not admissible upon the question of damages for negligently killing an apprentice. *Central Foundry Co. v. Bennett* (Ala.) 1150

37. The general reputation of an employee among those acquainted with him or his work is competent, after proof of his incompetence has been introduced, to show notice to the master of his habit of incompetency; but reputation among a particular class, which obviously includes only a part of those who know his character or work, is inadmissible for such purpose. *Southern P. Co. v. Hetzer* (C. C. App. 8th C.) 288

38. Specific acts of negligence, lack of skill, or incompetence, of which the master had no notice, are inadmissible to prove the incompetence of a servant employed with due care; but the proper proof of habit and character in such a case is the testimony of witnesses qualified to speak of them, subject to proper cross-examination in relation to the facts upon which their testimony is based. Id.

39. Evidence of specific acts of negligence known to the master, and of acts of negligence like those which cause the death of passengers, so notorious that the master must have known of them if he had exercised reasonable diligence, is admissible to prove the habit or character for incompetence of a servant who is employed with due care. Id.

40. How other neighboring property was affected by the maintenance of a nuisance cannot be shown in an action to recover for injury to a particular tract. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.) 49

41. Upon the question of injury to property by the maintenance of a nuisance upon it, evidence is admissible to show that it is injuriously or prejudicially affected by similar causes from other sources, but not the effect thereof on other property near or contiguous to it. Id.

42. Upon the question of nuisance to adjoining property in the maintenance and operation of a railroad terminal, no comparison is proper between the noise in its vicinity and in other portions of the city; nor is evidence admissible that the city is generally a dirty, smoky, and noisy place. Id.

43. Upon the question of fraud in securing an indorsement upon a note by means of a trick, evidence is admissible that the same trick was employed by the same persons to secure the signatures of other persons, the effect of which is to show a general scheme to perpetrate this particular fraud upon the people of the neighborhood at the same time, to effect a common purpose. *Yakima Valley Bank v. McAllister* (Wash.) 1075

Sufficiency.

44. That stock was resold at a profit several months after it was purchased by one who is alleged to have acted fraudulently is not sufficient to show that it was worth that amount at the time of the alleged fraudulent purchase, for the purpose of forming a basis for damages. *Boulden v. Stilwell* (Md.) 258

Variance.

45. An indictment for killing by striking, wounding, and throwing the victim into a well is not supported by evidence of frightening him into insanity by an attempted burglary, so that he jumped into the well. *Gipe v. State* (Ind.) 419

EXCEPTIONS.

See APPEAL AND ERROR, 9-11.

EXECUTED TRUST.

See TRUSTS, 2.

EXECUTORS AND ADMINISTRATORS.

Claim for Services against Estate, see CONTRACTS, 1.

Testamentary Direction as to Crops, see CROPS.

Appointment; disqualification.

1. The appointment, by a court of com-

petent jurisdiction, of an administrator, is not open to collateral attack in a suit by the administrator to collect assets, on the ground that it was void because of lack of assets in the state. *Jordan v. Chicago & N. W. R. Co.* (Wis.) 885

2. The right to act as executor is not a privilege or immunity within the protection of the Federal Constitution. *Re Mulford* (Ill.) 341

3. Nonresidents may be denied permission to act as executors of local estates. *Id.*

4. A nonresident alien is not an incompetent executor under a statute which provides that if any executor shall reside out of the state, the court may remove him. *Re Breen* (Mich.) 349

5. Indebtedness to the estate does not disqualify one from acting as executor. *Id.* What constitute assets.

6. A right of action for negligent killing of a person is an asset of his estate, sufficient to warrant the appointment of an administrator. *Jordan v. Chicago & N. W. R. Co.* (Wis.) 885

7. Crops on the land at the time of the owner's death are assets for payment of debts, under a statute directing the executor to sell for cash such crops, and account for the proceeds as assets, notwithstanding his will may imply that they shall belong to the devisee; nothing short of an express direction will avoid the application of the statute. *Gordon v. James* (Miss.) 461

8. Dividends on stocks and bonds, declared after the death of the owner, belong to the specific devisee of the stocks and bonds, and are not assets for the payment of the debts of the estate, in the absence of statutory direction to the contrary. *Id.*

EXEMPTION.

Enforcing Law as to, in Other State, see CONFLICT OF LAWS.
See also LEVY AND SEIZURE.

EXHIBITS.

As Part of Record on Appeal, see APPEAL AND ERROR, 8.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 2.

EXTRAORDINARY COSTS.

See COSTS, 2.

FACTORS.

Application of Deposit by, see BANKS, 2-7.

FEDERAL COURTS.

Removal of Cause to, see REMOVAL OF CAUSES.

FEES.

Of Clerk, see CLERKS.
On Property Coming before Probate Court, see TAXES, 1.

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FELLOW SERVANTS.

See MASTER AND SERVANT, 5, 6, 10-13, 20-22, 26-33.

FENDER.

Ordinance Requiring Use of Particular Kind, see MUNICIPAL CORPORATIONS, 5.

FERRY.

License to Keep Bar on Ferry Boat, see LICENSE, 3.

FICTION.

As to Fraction of Day, see TIME.

FINDER.

Of Treasure-Trove, see TREASURE-TROVE.

FIRE ESCAPES.

See BUILDINGS.

FIRES.

Presumption of Negligence as to, see EVIDENCE, 5, 6.

Proximate Cause, see PROXIMATE CAUSE, 1.

Liability of Railroad Company for, see RAILROADS, 6.

Question for Jury as to, see TRIAL, 2.

1. One who has contracted to thresh grain with a steam thresher must, to avoid setting fires, use care commensurate with the risk or hazard. *Martin v. McCrary* (Tenn.) 530

2. The owner of a threshing-machine engine must make at least daily inspection of his spark arresters when he is working near combustible material. *Id.*

3. The owner of a threshing-machine engine does not fulfil his duty in regard to precautions to avoid setting fires by merely adopting a spark arrester in general use, and showing that the engine did not emit sparks any more copiously than was natural for an engine of similar kind and construction, where he had been in the habit of making use of an additional spark arrester when working near material of the kind to which fire was set, and which was allowed to become out of order at the time the fire occurred. *Id.*

FISHERIES.

Prohibition against Casting Sawdust into Stream, see COMMISSIONERS; CONSTITUTIONAL LAW, 7; WATER, 4.

1. The legislature may forbid the casting of sawdust into streams, for the preservation of the edible fish. *Com. v. Sisson* (Mass.) 752

2. The unrestrained exercise for thirty years of the right to cast sawdust into a stream gives no prescriptive rights which will interfere with the public right to regulate such use for the preservation of food fishes. *Id.*

FIXTURES.

Tenant's Right to, see **LANDLORD AND TENANT**.

FOOD.

Requiring Marking of Fruit Packed for Shipment, see **CONSTITUTIONAL LAW**, 23.

Regulation of, by Ordinance, see **MUNICIPAL CORPORATIONS**, 2, 6-8.

Milk.

License of Milk Dealers, see **LICENSE**, 4-6.

1. An ordinance forbidding the sale of milk containing less than seven tenths of 1 per cent of ash is not unreasonable or oppressive. *St. Louis v. Liessing* (Mo.) 918

2. Designating only one officer to determine whether milk reaches the required standard does not deprive the dealer of any constitutional right. *Id.*

3. The fact that selling milk is a lawful trade or business does not exempt it from reasonable police regulations. *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

FORCED SALE.

As Peril, within Marine Policy, see **INSURANCE**, 14.

FORCIBLE ENTRY AND DETAINER.

Right of Action for, Effect of, on Jurisdiction of Equity, see **EQUITY**, 1.

FORECLOSURE.

Rights of Purchaser on, see **MORTGAGE**, 9, 10.

Redemption from, see **MORTGAGE**, 11.

FOREIGN CORPORATIONS.

See **CORPORATIONS**, 4-6.

FOREIGN INSURANCE.

See **INSURANCE**, 12-17.

FOREIGN JUDGMENTS.

See **JUDGMENTS**, 6, 7.

FOREIGN WILLS.

See **WILLS**, 2-4.

FORFEITURE.

Enforcement of, in Equity, see **CLOUD ON TITLE**, 2.

Of Mining Lease, see **MINES**.

FORGERY.

Uttering a letter with a forged signature for the purpose of falsely representing the bearer to be a certain well-known person, friend of the writer, and giving him standing with persons to whom it may be presented, is forgery, under a statute declaring guilty of that offense any person who shall utter a letter purporting to have been signed by another, in which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented or otherwise injuriously affected; the latter phrase referring to character, interests, etc., and not to sentiments and opinions. *People v. Abeel* (N. Y.) 730
1 L.R.A. (N.S.)

FRACTION OF DAY.

See **TIME**.

FRANCHISE.

Taxation of, see **TAXES**, 3.

FRATERNAL SOCIETY.

See **INSURANCE**, 6, 7.

FRAUD AND FRAUDULENT CONVEYANCES.

Evidence as to, see **EVIDENCE**, 29, 43.

Resale at Profit as Rebutting Fraud in Original Sale, see **EVIDENCE**, 44.

Replevin by Seller for, see **REPLEVIN**.

In Measurement of Property Sold, see **SALE**, 2.

Rescission of Sale for, see **SALE**, 5.

1. The secretary of a corporation who is also a stockholder cannot maintain an action against the other officers for fraudulent representations upon which he acted, and which were alleged to have been made to induce him to dispose of his stock to them at a loss, where they amount merely to representations that the corporation was going down, that one had bought the other's shares and was going to run the business as a family affair, and would depose the secretary, and that this was his last chance to get his money out; and the fact that he was not permitted to keep the books down to date, so that he did not know the actual state of the business, is immaterial. *Boulden v. Stillwell* (Md.) 258

2. A voluntary conveyance of real estate to place it beyond the reach of a judgment in an anticipated action will not be canceled as against the heirs of the grantee, although the threatened action had no foundation in law, and the grantee, upon being notified of the conveyance, promised to reconvey on demand. *Carson v. Beliles* (Ky.) 1007

FRAUDS, STATUTE OF.

See **CONTRACTS**, 4.

FRIGHT.

Of Horse, see **AUTOMOBILES**, 3-6.

FRUIT.

Requiring Marking of, see **CONSTITUTIONAL LAW**, 23.

GAME.

Wild game is the property of the captor, and not of him on whose land it is taken. *State v. Horton* (N. C.) 991

GAMING.

Power of Municipality to Make Penal, see **CRIMINAL LAW**, 2.

GARNISHMENT.

Injunction of Garnishment Proceedings, see **INJUNCTION**, 11, 12.

GIFT.

1. Failure to establish a perfect gift *inter vivos* does not preclude the donee from

showing and having enforced a perfected, valid trust. *Harris Bkg. Co. v. Miller* (Mo.) 790

2. A gift *inter vivos* is not established by depositing a fund in bank with the statement that it is intended for the donee, taking back a certificate of deposit, and placing thereon an indorsement to pay the amount to the donee, handing the certificate to the donee to read, with the statement "It is yours," and then taking and retaining the certificate till death, to enjoy the use of it during life. *Id.*

GOOD BEHAVIOR.

Delegation of Power to Fix Credit for, see CONSTITUTIONAL LAW, 9.

Deduction from Sentence of Criminal for, see CRIMINAL LAW, 8.

GROSS NEGLIGENCE.

Release from Liability for, see RELEASE.

GUARANTY.

No guaranty of payment for property shipped is effected by a reply by a warehouseman to a letter requesting information about a broker, that he considered him reliable, with whom samples and sales would be safe, and doubly so, since all shipments would come to the warehouse, and payment for all such property "would be made by us to you for all sales." *Hughes v. Peper Tobacco Warehouse Co.* (N. C.) 305

GUARDIAN AND WARD.

Presumption that Requisite Notice given to Ward, see EVIDENCE, 3.

HEALTH.

Allegations of Injury to, in Complaint for Injury to Realty by Nuisance, see PLEADING, 7.

HEIRS.

Of Living Person, Construction of Grant to, see DEEDS, 2.

Of Fraudulent Grantee, Cancellation of Conveyance as against, see FRAUD AND FRAUDULENT CONVEYANCES, 2.

HIGHWAYS.

Negligent Use of Automobiles in, see AUTOMOBILES.

Limiting Speed of Automobiles on, see CONSTITUTIONAL LAW, 15.

Liability for Negligence of Independent Contractor in Making Excavation in, see MASTER AND SERVANT, 36.

License for Use of, for Telephone Poles, see MUNICIPAL CORPORATIONS, 9.

Laying a street railway track under authority of the municipal corporation so near a sidewalk the title to which is in the municipality, at a point where streets intersect at an acute angle, that passing cars will overhang it a few inches, gives no right of action to the abutting owner where his right of ingress to and egress from his property is not impaired. *Hester v. Durham Traction Co.* (N. C.) 981
1 L.R.A. (N.S.)

HOMESTEAD.

Constructive Trust in Deed of Homestead to Wife, see TRUSTS, 3.

HOMICIDE.

Variance Between Pleading and Proof as to, see EVIDENCE, 45.

When New Trial Granted to One Convicted of, see NEW TRIAL, 3.

1. Mere violation of a statute making it a misdemeanor to hunt on another's property without a permit is not such an unlawful act as to render an accidental homicide committed while so doing a criminal offense. *State v. Horton* (N. C.) 991

2. A statute forbidding hunting on another's property without a permit, under a penalty of not to exceed \$10 fine, cannot be presumed to have been passed for the protection of human life. *Id.*

HORSE RACE.

Power of Municipality to Punish Betting on, see CRIMINAL LAW, 2.

HORSES.

Fright of, see AUTOMOBILES, 3-6.

HUNTING.

Of Wild Game, see GAME.

Forbidden, Homicide during, see HOMICIDE, 2.

HUSBAND AND WIFE.

Admitting Confidential Communications between, see APPEAL AND ERROR, 27.

For Divorce, see DIVORCE.

Constructive Trust and Deed of Homestead to Wife, see TRUSTS, 3.

Wife's separate estate.

Wife's Claim against Bankrupt Husband's Estate, see BANKRUPTCY, 1.

Inclusion of, in Deed of Trust by Man and Wife, see DEEDS, 7.

Presumption of Loan from, see EVIDENCE, 10.

See also COURTS, 4.

1. Equity treats personal estate vested in a married woman in accordance with statutory provisions permitting her to receive and hold such estate for all substantial purposes the same as an estate vested for separate uses according to equity rules, and will protect it substantially to the same extent and in the same manner as it would the latter. *James v. Gray* (C. C. App. 1st C.) 321

2. A statute permitting a married woman to make contracts, except with her husband, the same as though sole, which does not relate to her separate estate, does not affect the equity rule governing contracts affecting separate estates. *Id.*

Actions.

3. A woman residing with her husband cannot maintain an action for the enticement from home of her minor child. *Seper v. Igo* (Ky.) 362

4. A man has such special interest in the property of his wife, which she had not

obtained from him but which is packed in trunks which he has contracted with a carrier to transport, as to entitle him to maintain an action for their value in case they are lost through breach of the contract. *Withey v. Pere Marquette R. Co.* (Mich.) 352

IDENTITY.

Parol Evidence to Establish, see EVIDENCE, 14.

ILLEGITIMACY.

1. That illegitimate children were the result of adulterous intercourse does not prevent their acknowledgment by the father, as provided by statute, from effecting their legitimation, unless the statute expressly excepts them from its provisions. *Miller v. Pennington* (Ill.) 773

2. Acknowledgment sufficient to show an intention to include illegitimate children among their father's heirs is not necessary to effect their legitimation under a statute which provides that illegitimate children shall be considered legitimate in case of marriage of their parents and acknowledgment of them by their father. *Id.*

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

See CONSTITUTIONAL LAW, 24, 25.

IMPEACHMENT.

Of Witness, see WITNESSES, 4.

IMPLIED CONTRACT.

See CONTRACTS, 1.

IMPRISONMENT.

For Crime, see CRIMINAL LAW, 5-8.

IMPUTED NEGLIGENCE.

See NEGLIGENCE, 3.

INCOME.

Right of Purchaser on Foreclosure to, see MORTGAGE, 10.

INCOMPETENT PERSONS.

Imprisonment of Insane Person Acquitted of Crime, see CRIMINAL LAW, 5-7.

INCONSISTENCY.

In Pleading, see PLEADING, 6, 15.
See also REVIEW, 2.

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, 4, 34-37.

INDICTMENT, INFORMATION, AND COMPLAINT.

Necessity of, see CRIMINAL LAW, 4.

A motion to quash an information charging violation of an ordinance in several particulars will not prevail if a good cause of action is stated as to either of the defaults complained of. *St. Louis v. Grafe-man Dairy Co.* (Mo.) 936
1 L.R.A. (N.S.)

INDORSEMENT.

Of Negotiable Instrument, see BILLS AND NOTES, 6, 7.

Of Note, Evidence of Other Frauds in Securing, see EVIDENCE, 43.

INFANTS.

Father's Right of Action for Death of Abandoned Child, see DEATH.

Assumption of Risk by, and Contributory Negligence of, see MASTER AND SERVANT, 18, 19, 23.

Question for Jury as to Master's Negligence towards, see TRIAL, 10.

See also PARENT AND CHILD.

A minor is bound by a provision in a contract for the transmission of a telegram, that suit must be brought for its breach within sixty days. *Western U. Teleg. Co. v. Greer* (Tenn.) 525

INFRINGEMENT.

Of Trademark, see TRADEMARK, 2.

INHERITANCE TAXES.

See TAXES, 8.

INJUNCTION.

Supersedes Pending Appeal from Decree, see APPEAL AND ERROR, 5.

1. The civil courts have jurisdiction in injunction proceedings instituted to protect a personal right. *Itzkovitch v. Whitaker* (La.) 1147

2. A ticket broker cannot enjoin the proprietor of a theater from warning intending purchasers that tickets purchased on the sidewalk in violation of the conditions printed thereon will not be honored, although such conduct interferes with his business and subjects him to loss. *Collister v. Hayman* (N. Y.) 1188

3. An injunction will be granted to prevent the photograph of an innocent person from being sent to the rogues' gallery. *Itzkovitch v. Whitaker* (La.) 1147

4. Injunction will lie to restrain a lessee from continuing to mine ores on leased property after a forfeiture of the lease for breach of conditions as to manner of performing the work, although the title is disputed, and no action has been instituted at law; since a continuation of the alleged wrongful acts will tend to destroy the property. *Big Six Development Co. v. Mitchell* (C. C. App. 8th C.) 332

Contract rights.

5. Although equity will not specifically enforce a contract to furnish a supply of electricity to a street car and electric lighting company, which creates a monopoly contrary to the terms of a franchise given the company which has contracted to furnish the power, it may enjoin the breach of the contract until such time as an adequate supply can be procured elsewhere, where such breach will result in great public inconvenience. *Seattle Electric Co. v. Snoqualmie Falls Power Co.* (Wash.) 1032

As to corporate matters.

6. After a foreign corporation has complied with the law, and has received permission to do business in the state, it cannot be enjoined, at the suit of the state, from performing contracts made before such permission was obtained. *State v. American Book Co.* (Kan.) 1041

As to trade names; unfair trade.

7. Insolvency of one attempting to make fraudulent use of another's trade name need not be shown to entitle the latter to an injunction. *Morton v. Morton* (Cal.) 660

8. One who has established a business under a particular name, which he places on the hats of his agents to inform customers that they are his representatives, may enjoin another of the same name, who has engaged in the same business, from using such name as a hat label in such a way as to deceive the public into believing that the one bearing it is connected with the former's business. *Id.*

9. An injunction to restrain a person and his agents from representing themselves to be connected with another's business, and from wearing his badge on their hats, is prohibitive, and not mandatory, and therefore may be granted *pendente lite*. *Id.*

As to legal proceedings.

10. The fact that a person is sued or garnished by different persons on distinct and separate demands having no connection, or the fact that the same question of law may arise in all the cases, does not give equity jurisdiction to enjoin the suits on the principle that equity takes jurisdiction to avoid multiplicity of suits. *National Tube Co. v. Smith* (W. Va.) 195

11. Injunction does not lie against a garnishment, in an action before a justice, of money owing by the garnishee to a nonresident debtor, on the ground that such money is exempt by the law of the state of residence of such debtor. *Id.*

12. Injunction will not lie to restrain the prosecution of a garnishment in an action for debt before a justice of this state on the ground that, in another state, an injunction is later sued out, and is pending, enjoining the garnishee from paying the money under any judgment of such justice. *Id.*

13. Equity has no jurisdiction to enjoin a justice of the peace from acting in an action before him, because of his interest in the result. *Id.*

INSANE PERSONS.

See **INCOMPETENT PERSONS.**

INSOLVENCY.

Of Insurance Company, Preference to State, see **INSURANCE**, 2.

1. A vested remainder will pass by a deed of trust for benefit of creditors of all the property of the grantor. *Roberts v. Roberts* (Md.) 782

2. A deed of trust for benefit of creditors L.R.A. (N.S.)

ors of, "all and singular, the real and personal estate" and "all other property, of every nature, kind, and description, wheresoever situate," of the grantors, signed by a man and wife, is sufficient to identify with reasonable certainty, as required by statute, a vested remainder belonging to the wife under a will. *Id.*

INSPECTION.

Of Milk, see **CONSTITUTIONAL LAW**, 10; **FOOD**, 2.

Of Spark Arrester in Threshing Engine, see **FIRES**, 2.

Master's Duty as to, see **MASTER AND SERVANT**, 3.

INSTRUCTIONS.

Sufficiency of Exception to, see **APPEAL AND ERROR**, 11.

Review of, on Appeal, see **APPEAL AND ERROR**, 13, 15.

See also **TRIAL**, 12-20.

INSULATION.

Defect in, as Proximate Cause of Injury to Boy, see **PROXIMATE CAUSE**, 2.

INSURANCE.

Stipulation for Affidavit of Attending Physician as Part of Proofs of Death, see **EVIDENCE**, 27.

1. One taking an assessment policy from a company having the right to issue life insurance under both the assessment and the reserve plans cannot, in the absence of express contract, require the company to continue the issuance of assessment policies. *Green v. Hartford L. Ins. Co.* (N. C.) 623

Insolvency of company.

2. The state has no preference over other creditors for payment of losses and unearned premiums out of the assets in the hands of a receiver of an insolvent insurance company with which it has insured state property. *State v. Williams* (Md.) 254

Revocation of foreign company's license.

3. A statute directing the revocation of the license of a foreign insurance company to do business within the state for refusing to perform its agreement not to remove suits against it to the Federal courts is not in conflict with the Federal Constitution. *Prewitt v. Security Mut. L. Ins. Co.* (Ky.) 1019

Termination of risk.

4. The word "noon" used to denote the beginning and termination of the risk under an insurance policy will be interpreted by standard, and not by sun, time, where the use of the former system of reckoning time has been the prevailing custom in the community for a long period. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* (Ky.) 364

5. The beginning of a fire in a building which contains insured property, before the policy expires, will, if it continues to burn until it destroys the property, render

the insurer liable for the loss, although the property is not actually destroyed before such expiration; but the same rule does not apply in case the property is merely imperiled at the time of the expiration of the policy, by a fire in an adjoining building, although it eventually reaches and destroys the property. *Id.*

By-laws of fraternal society.

6. The adoption, by a fraternal insurance order, of a by-law declaring that no person shall be admitted or retained as a member who is engaged in the sale of intoxicating liquors, does not, in the absence of a specific provision to that effect, avoid the beneficiary certificate of a member who is already engaged in that business in a state where it is not unlawful, who continues therein, and against whom no action is taken. *Grand Lodge A. O. U. W. v. Haddock (Kan.)*

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7. A by-law of a fraternal insurance order, which provides that any member who shall, after the date of its adoption, have entered, or who shall thereafter enter, into the business of selling intoxicating liquors, shall stand suspended from his rights to participate in the beneficial fund, and that his certificate shall become void from the date of his engaging in such occupation, does not, in terms, apply to a member who, before the adoption of such by-law, was engaged in such business, and who has remained in it continuously thereafter. *Id.*

Cancellation of policy.

8. One who voluntarily ceases to pay his insurance premiums and abandons his policy cannot maintain an action for damages for its cancellation. *Green v. Hartford L. Ins. Co. (N. C.)*

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Waiver.

9. Failure to give notice of loss within a reasonable time, as required by the terms of the policy, is not waived by subsequent denial of all liability on the ground that the loss is not covered by the policy. *Ætna L. Ins. Co. v. Fitzgerald (Ind.)*

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Cause of injury or loss.

10. An insurance against loss of business time resulting from bodily injuries effected through external, violent, and accidental means covers loss of time by disease, if it was proximately caused by a bodily injury through the stipulated means. *Id.*

11. Periostitis of the metacarpal bones, caused by placing the hand, during sleep, between the head and the edge of the bed rail, and using it as a headrest until it becomes numb and bruised, is covered by an insurance against injuries effected through external, violent, and accidental means. *Id.*

12. A marine underwriter is not liable for a loss occurring through the deliberate act of the master of the vessel, who represents the insured, in pushing through dangerous ice for the purpose of reaching his destination quickly, and thus realizing the object of his principal's undertaking. *Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. (C. C. App. 9th C.)*

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Extent of loss.

Question for Jury as to Whether Effort to Minimize Loss Sufficient, see *TRIAL*, 7.

13. The "sum at risk," in a marine insurance policy, is the valuation placed upon the property by the policy itself. *Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. (C. C. App. 9th C.)*

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14. To recover under a marine policy covering partial loss if it amounts to 50 per cent of the property covered, such loss must be shown to have resulted from a peril of the sea, and cannot be created by a forced sale. *Id.*

15. The cost of getting boats which are part of a vessel's cargo from the point where she is wrecked to a place of safety may be recovered under a marine insurance policy upon them, although they are not injured by the disaster, where the policy requires insured to labor to secure the property insured, and binds the insurer to contribute to the expense thereof in proportion as the sum insured is to the whole sum at risk, while the policy covers the whole value of the property. *Id.*

16. Rightful consumption of property covered by a marine insurance policy in salvage claims constitutes a total loss for which the insurer is liable. *Id.*

17. The owner of property covered by a marine insurance policy cannot claim a recovery as for a constructive total loss, although the property was in a situation where it might have been lawfully abandoned to the underwriter, if no attempt was made to abandon it, but it was sold as the property of the insured. *Id.*

INTEREST.

1. A surviving partner who continues a deposit of partnership funds in bank, awaiting a settlement of the partnership affairs, without realizing any interest or profit therefrom, is not liable for interest thereon. *Condon v. Callahan (Tenn.)*

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2. A municipal corporation is liable for interest where it wrongfully exacts money which it holds without just right or claim. *Chicago v. Northwestern Mut. L. Ins. Co. (Ill.)*

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INTOXICATING LIQUORS.

Delegation to People of Power as to Local Option Law, see *CONSTITUTIONAL LAW*, 5, 6.

Statute Making Possession of, Presumptive Evidence of Guilt, see *CONSTITUTIONAL LAW*, 12, 13.

Prohibition of Sale by Member of Fraternal Society, see *INSURANCE*, 6, 7.

Power of State to License Sale of, on Ferryboat, see *LICENSE*, 3.

When Title to Goods Shipped C. O. D. Passes, see *SALE*, 3.

Local Laws as to Traffic in, see *STATUTES*, 6.

1. Under a constitutional provision that

the people of any locality may prohibit the sale of intoxicating liquors "within the prescribed limits" of the precinct or county, the legislature cannot prohibit the sale, in other localities, of intoxicants to be shipped into territory which has adopted prohibition. *Keller v. State* (Tex. Crim. App.) 489

2. The legislature cannot enact that all C. O. D. sales shall be deemed to have been made at the place of destination, if it is local option territory, under a constitutional provision permitting the people of any locality to prohibit the sale of intoxicants within the limits of the town or precinct adopting the law. *Id.*

IRRIGATION.

Reclamation of Land by, as Public Purpose, see *EMINENT DOMAIN*, 5.
Liability for Injury by Water Escaping from Ditch for, see *WATERS*, 8-13.

JOINDER.

Of Causes of Action, see *ACTION OR SUIT*, 8-10.

JOINT TORT FEASOR.

Joint Suit against, see *ACTION OR SUIT*, 8, 9.

JUDGMENT.

1. It is not error to fail to provide, in a final decree, for a matter which has not been put in issue, and for the settlement of which the necessary parties are not before the court. *Roberson v. Wampler* (Va.) 318
Effect and conclusiveness.

See also *infra*, 6, 7.

2. A void decree of divorce will not affect the property rights of the parties. *Nolan v. Dwyer* (Wash.) 551

3. A dismissal, without prejudice, of a bastardy proceeding instituted before a justice of the peace, is no bar to a subsequent proceeding before another justice upon the same charge. *Johnson v. Walker* (Miss.) 470

4. A finding of nonresidence on a suggestion and motion to require security for costs in a pending action is not *res judicata* in another action between the same parties, as such a proceeding is a collateral one, not reaching the merits of the case. *Brown v. Beckwith* (W. Va.) 778

5. Where creditors filed a petition to have a debtor adjudged an involuntary bankrupt, alleging several acts of bankruptcy, among them being that, while insolvent, he made a preference to a firm, named as creditors, within four months before the filing of the proceedings, and, after adjudication in bankruptcy, the trustee brought suit against such firm, alleging that they received a preference with reasonable ground for believing that it was such, the adjudication in bankruptcy, duly made, was conclusive of the status of the bankrupt as such, but did not estop the defendants from setting up, by way of defense, that, some time prior to the 1 L.R.A. (N.S.)

proceedings in bankruptcy, they sold to the bankrupt goods, relying on certain representations made by him, and that they discovered that such representations were untrue, and rescinded the sale on account of fraud, and retook their goods. *Silvey v. Tift* (Ga.) 336

Foreign judgments.

Effect of Proving Will in Other State, see *WILLS*, 2-4.

6. The validity of a decree of divorce cannot be attacked in another state for absence of grounds of divorce, or for false allegations and proof, if the court had jurisdiction to enter it. *Forrest v. Fey* (Ill.) 740

7. Where the record of a divorce proceeding against a nonresident fails to show that there was an affidavit of nonresidence, which is by the statute a necessary prerequisite to publication of notice, and contains a form of affidavit neither signed nor sworn to, while there is no finding by the court that such affidavit was in fact made, the decree based on such published notice is void, and may be collaterally attacked in another state. *Id.*
Assignment.

8. The assignment of a judgment does not carry with it a right of action against an officer and the sureties on his bond for failure, prior to the assignment, properly to return a forthcoming bond upon the judgment, notwithstanding a statute making choses in action assignable, and authorizing the assignee to maintain any action which the original obligee might have brought. *Com. v. Wampler* (Va.) 149

Relief against.

9. A decree for divorce cannot be vacated after the death of one of the parties. *Nolan v. Dwyer* (Wash.) 551

JUDICIAL ACT.

Forbidding Casting of Sawdust into Particular Stream, see *WATERS*, 4.

JUSTICE OF THE PEACE.

Injunction of Garnishment Proceedings before, see *INJUNCTION*, 11-13.

Dismissal by, as *Res Judicata*, see *JUDGMENT*, 3.

A defendant may be tried in a bastardy proceeding by a justice of the peace in a district other than that of his residence, upon an affidavit made before still another justice, under a statute providing that the mother may make complaint before any justice of the peace of the county. *Johnson v. Walker* (Miss.) 470

JUSTIFICATION.

For Assault, see *ASSAULT AND BATTERY*, 3.

LANDLORD AND TENANT.

Abandonment of Leased House, see *BANKRUPTCY*, 2.

Estoppel of Tenant to Claim Adversely, see *ESTOPPEL*, 2, 3.

Enjoining Lessee of Mine from Continuing Work after Forfeiture of Lease, see **INJUNCTION**, 4.

Abandonment of Leased House as Proximate Cause of Fire, see **PROXIMATE CAUSE**, 1.

A tenant who has placed trade fixtures on the leased premises loses his right to remove them by entering into a new lease which contains no recognition of his title thereto, but which binds him to surrender the premises in as good state and condition as reasonable use and wear will permit. *Wadman v. Burke* (Cal.) 1192

LAPSE.

Of Legacy, see **WILLS**, 16.

LARCENY.

One who induces another to part with money as a wager on a pretended event which is not to take place, with the intention of appropriating it to his own use, is guilty of larceny in making such appropriation, notwithstanding the owner consents to part with the possession. *State v. Ryan* (Or.) 862

LEASE.

As Cloud on Title, see **CLOUD ON TITLE**, 2.

Of Mine as Cloud on Title, see **EQUITY**, 4.

Of Wall Space for Sign, Revocation of, see **LICENSE**, 1, 2.

Of Mine, see **MINES**.

LEGISLATURE.

Power to Prohibit Sale of Liquor Outside of Local Option Territory, see **INTOXICATING LIQUORS**.

Power to Declare Thing a Nuisance, see **NUISANCES**, 1.

1. Authority to contract for transportation and entertainment is conferred upon a legislative committee by a resolution, treated by the legislature as legislation, by which it decides to attend a public function in a body, and refers all matters pertaining to such attendance to the committee. *Russ v. Com.* (Pa.) 409

2. A resolution by a legislative body to attend a patriotic event at public expense does not contravene a constitutional provision fixing the salaries of the members, and ordaining that they shall receive no other compensation whatever. Id.

LEGITIMATION.

See **ILLEGITIMACY**.

LETTER.

As Subject of Forgery, see **FORGERY**.

LEVY AND SEIZURE:

Enforcing Exemption Laws of Other State, see **CONFLICT OF LAWS**.

Sale by Third Person of Property Levied on, see **CUSTODY OF LAW**.

Exemptions.

1. One who has acquired, under the provisions of W. Va. Code 1899, chap. 41, the right to have personal property exempted from forced sale, does not forfeit it on the ground of nonresidence until he begins to remove his person from his place of abode within the state to another state or country with intent to fix his residence in such other state or country, although he may intend to leave the state permanently, and has made complete preparation to do so, and has delivered his personal property and effects for shipment to a point outside the state. *Brown v. Beckwith* (W. Va.) 778

2. An order of attachment is "process" within the meaning of W. Va. Code 1899, chap. 41, §§ 23, 24, against which the right to exempt personal property may be exercised. Id.

3. An affidavit claiming an exemption, which establishes the claimant's character as a female parent and resident of the state, sufficiently specifies the character in which she claims, notwithstanding another allegation in the affidavit that she "is entitled to have and claims all the above-listed property claimed by her as husband and parent, exempt from execution or other process" in the cause. Id.

LICENSE.

From private persons.

Theater Ticket as, see **ACTION OR SUIT**, 5.

1. The right to display a sign on the walls of a building, given in writing for a definite time for a valuable consideration, is not revocable at will. *Levy v. Louisville Gunning System* (Ky.) 359

2. Failure to mention in a lease of a building a right which has been given to a third person to display a sign on its wall does not amount to a revocation of the right. Id.

From public.

To Foreign Insurance Company, Revocation of, see **INSURANCE**, 3.

For Telephone Poles in Street, see **MUNICIPAL CORPORATIONS**, 9.

Provision for Revoking Physician's License, see **PHYSICIANS AND SURGEONS**, 1.

Of Theater, see **THEATERS**, 1.

3. A state may, under its police power, require the keeper of a bar on a ferryboat making regular trips from another state, where it is owned, to pay a license tax for the privilege of selling liquors while the boat is within its jurisdiction. *Harrell v. Speed* (Tenn.) 639

4. Charter authority to make provision for the inspection of milk, and to license occupations, authorizes a municipal corporation to license milk venders as distinguished from general merchants. *St. Louis v. Grafe-man Dairy Co.* (Mo.) 936

5. Requiring payment of \$1 as a registration fee for milk dealers is not invalid as a tax. Id.

6. Prescribing a registration fee of \$1 per annum for milk venders, and an occupa-

tion tax of \$2.50 per wagon for each six months, and \$25 for wholesalers, does not render an ordinance regulating the sale of milk invalid. *St. Louis v. Liessing* (Mo.) 918

7. A license granted by the board of health, under statutory authority, for the erection of a stable without any limit as to time, cannot be revoked by such board in the absence of statutory authority, existing regulations of the board, or some provision in the license itself for its revocation. *Lowell v. Archambault* (Mass.) 458

LIFE TABLES.

Admissibility in Evidence, see EVIDENCE, 12.

Instructions as to, see TRIAL, 14.

LIGHT.

On Station Platform, see CARRIERS, 1.

LIMITATION OF ACTIONS.

Retrospective Statute of, see CONSTITUTIONAL LAW, 3.

Repeal of Statute as to, see STATUTES, 9.

When statute begins to run.

1. The statute of limitations does not begin to run against a right to recover usury, in case of a series of usurious transactions, until they are closed. *Slover v. Union Bank* (Tenn.) 528

2. A demand certificate of deposit issued by a bank is not a demand promissory note, within the rule that the statute of limitations begins to run upon it as soon as issued. *Elliott v. Capital City State Bank* (Iowa) 1130

Necessity of demand to set statute running.

3. Demand for payment of the amount due under a demand certificate of deposit issued by a bank is necessary to set in motion the statute of limitations,—at least where, by its terms, it is payable on its return properly indorsed. *Id.*

4. There is no obligation to demand payment of a demand certificate of deposit issued by a bank, within the period of the statute of limitations. *Id.*

5. Demand for unpaid stock subscriptions need not be made within six years to prevent the right to make the demand from being barred by the statute of limitations, under a contract of subscription to the stock of a corporation which is payable from time to time, as called for. *Cook v. Carpenter* (Pa.) 900

6. The statute of limitations does not begin to run upon an unpaid stock subscription until demand is made for payment, where, by the terms of the contract, it is not payable until called for. *Id.*

Removal of bar.

7. A legacy reciting that it is in consideration of the legatee's care for the testator's invalid mother many years preceding her death, and also for her care of the testator's infant son, is not an acknowledgment of a legal obligation, so as to remove the bar of the statute of limitations from an action to recover for such services, as it does not imply a debt, but a bounty. *McNeal v. Pierce* (Ohio) 1117

edgment of a legal obligation, so as to remove the bar of the statute of limitations from an action to recover for such services, as it does not imply a debt, but a bounty. *McNeal v. Pierce* (Ohio) 1117

LIMITATION OF LIABILITY.

See CARRIERS, 5; SALVAGE, 3.

LOAN.

General Deposit as, see BANKS, 1.

From Wife's Separate Estate, Presumption of, see EVIDENCE, 10.

LOCAL IMPROVEMENTS.

See PUBLIC IMPROVEMENTS.

LOCAL OPTION.

Delegating Power as to, to People, see CONSTITUTIONAL LAW, 5, 6.

See also INTOXICATING LIQUORS.

LOCAL SELF-GOVERNMENT.

See CONSTITUTIONAL LAW, 10, 11.

LOCAL STATUTES.

See STATUTES, 6.

LOSS OF PROFITS.

See DAMAGES, 9.

MAGISTRATE.

Power to Punish for Contempt, see CONTEMPT.

Committing, Power to Compel Production of Evidence before, see CRIMINAL LAW, 3.

Mandamus, to, see MANDAMUS, 1.

MALPRACTICE.

See PHYSICIANS AND SURGEONS, 2.

MANDAMUS.

1. Mandamus does not lie from a circuit court to compel a magistrate over whom it has no supervisory jurisdiction to compel by contempt proceedings, a witness to produce papers which he has been directed to produce by a *subpoena duces tecum*. *Farnham v. Coleman* (S. D.) 1135

2. Mandamus lies to compel a water company to supply an individual applicant with water at reasonable rates, as part of its public duties, although the relation between the water company and the town and its inhabitants has been the subject of contract. *Robbins v. Bangor R. & Electric Co.* (Me.) 963

3. Mandamus will lie to compel payment of salary to a public officer who is alleged to have been removed from office, since his right to the salary may be determined without any determination of the question of the right to the office as between him and his alleged successor. *State ex rel. Hamilton v. Grant* (Wyo.) 583

MANDATORY INJUNCTION.

See INJUNCTION, 9.

MANUFACTURER.

Liability for Mental Suffering of One Swallowing Broken Glass in Bottle of Beverage, see DAMAGES, 7.

Liability for Injury to Consumer Swallowing Broken Glass in Bottle of Beverage, see NEGLIGENCE, 2.

MARINE INSURANCE.

See TRIAL, 7.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Release from Liability for Injuries to Servant, see CARRIERS, 3.

Admissibility against Master of Servant's Admission of Negligence, see EVIDENCE, 18.

Removal of Joint Action against Master and Servant, see REMOVAL OF CAUSES, 2.

When relation exists.

1. A porter hired, paid, and subject to the orders of a sleeping car company is not the servant of the railroad company which hauls the car in which he works, within the rule that a contract between master and servant for release of liability for negligent injuries is void. Chicago, R. I. & P. R. Co. v. Hamler (Ill.) 674

Duty as to inspection and supervision.

2. A master is not bound to give continual attention to a servant to protect him from situations made dangerous by occurrences unusual and unexpected by either master or servant. Miller v. Moran Bros. Co. (Wash.) 283

3. A railroad company which purchases lantern globes of good and standard make, from reliable manufacturers, is not bound to inspect them to protect employees, to whom they are delivered for use, from injury by their breaking while being cleaned. Gulf, C. & S. F. R. Co. v. Larkin (Tex.) 944

Duty to warn servant.

4. A master is not bound to inform his servants that a portion of the work is under the charge of an independent contractor for whose conduct he is not responsible. Miller v. Moran Bros. Co. (Wash.) 283

5. Failure to warn a servant as to the danger of throwing an ice pick over a partition into a room where others are working without giving adequate notice, upon giving him a direction to do so, is not negligence on the part of the master which will render him liable for personal injuries caused by absence of such notice, since the servant had such knowledge, and the order must be interpreted as a direction to perform the service in a proper way. Desautels v. Cloutier (Mass.) 669

Duty as to place and appliances.

Question for Jury as to, see TRIAL, 10, 11.

See also *infra*, 35.

6. The master contracts to exercise reasonable care in the selection of his servant. L.R.A. (N.S.)

ants, and to furnish them all with a reasonably safe place in which to work, and reasonably safe materials, tools, and appliances with which to work, and is liable for injuries resulting from breaches of such duties, regardless of the ordinary duties, or the rank or grade, or department, of the servant to whom their performance has been delegated. Atchison & E. Bridge Co. v. Miller (Kan.) 682

7. That the cellar of a burned building was unsafe as a working place for salvors is not shown by the mere fact of the fall of a square brick stack placed in the building to provide safety vaults on the different floors, and which was left standing after the fire. Gans Salvage Co. v. Byrnes (Md.) 272

8. The mere fall of a square brick stack, erected in a building to provide safety vaults on different floors, after the building has been destroyed by fire and while salvors are at work in the *débris*, is not sufficient to show negligence on the part of the master salvor, so as to render him liable for injury thereby caused to his employee. Id.

9. Negligence of a street car company in delivering to a crew a car without any, or with a defective, controller handle, will render it liable for injuries thereby caused to an employee on the road. Chicago Union Traction Co. v. Sawusch (Ill.) 670

Duty as to selection and discharge of fellow servants.

Evidence as to Servant's Incompetency, see EVIDENCE, 37-39.

See also *supra*, 6.

10. It is the duty of the master to exercise reasonable care to employ competent servants; and, when he has exercised this care, this duty is discharged. Southern P. Co. v. Hetzer (C. C. App. 8th C.) 288

11. The reasonable diligence and care which a railroad company is required to exercise towards its employees in discharging an incompetent fellow servant is that degree of care which prudent railway officials charged with the duty of discharging servants employed with due care commonly exercise as soon as they know, or by the exercise of reasonable diligence would know, that such servants have become incompetent. Id.

12. The diligence required of the master to learn the habits or characters of servants employed with care is not of that degree demanded in his employment of servants, or in the inspection of machinery, as careful and skilful men grow more careful and skilful, and servants once competent are generally presumed to continue so; upon which presumption he is entitled to rely until he has notice or knowledge to the contrary. Id.

13. A master owes his employees the duty of discharging a servant when he knows, or by the exercise of reasonable diligence would know, that he has contracted the habit or character of negligence, drunkenness, or lack of skill, so that he is incompetent. Id.

Assumption of risk.

14. A servant assumes the risk of injury from remaining without necessity under a heavy steel plate while it is being hoisted in the air by means of a tackle. *Miller v. Moran Bros. Co.* (Wash.) 283

15. A servant cannot hold his master liable for injuries caused by the fact that the working place was unsafe, if he was in as good position to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, as the master. *Id.*

16. One who engages to work in saving property from the *débris* left by a fire assumes the risk of injury from falling walls, where the peril is open and obvious. *Gans Salvage Co. v. Byrnes* (Md.) 272

17. An employee of one engaged in salvaging property from the *débris* of a fire cannot hold his employer liable for injuries caused by falling walls; since, if the danger was obvious, he assumed the risk of injury; and, if it was not obvious, the master did not violate his duty to use ordinary care to provide a reasonably safe working place. *Id.*

18. A youth sixteen years old, upon taking employment in a mill, assumes the risk of injury which is plainly apparent from coming in contact with exposed gears upon machines adjoining a passageway, notwithstanding he is not expressly warned as to such danger. *Mundhenke v. Oregon City Mfg. Co.* (Or.) 278

19. A sixteen-year-old boy, in taking employment in a mill, assumes no risk of injury from defective machinery and passageways that would not have been avoided by the precaution common to other boys of like age and experience, and cannot be charged with negligence for conduct which is common to such boys. *Id.*

20. Fellow servants assume the risk of injury from each other in their common conduct of the master's work. *Atchison & E. Bridge Co. v. Miller* (Kan.) 682

21. Servants assume the risk of the occasional acts of negligence of their fellow servants, and the master is not liable for them; but the servants may, by notice, cast the risk of the habitual negligence of their coemployees upon the master. *Southern P. Co. v. Hetzer* (C. C. App. 8th C.) 288

22. A street car conductor does not assume the risk of injury from the failure of a barn man, charged with the duty of substituting a perfect car for one which has become disabled, to furnish a controller handle which fits the motor, so that the car is partially uncontrollable. *Chicago Union Traction Co. v. Sawusch* (Ill.) 670

Contributory negligence of servant.

See also *supra*, 19.

23. Want of care, precaution, and foresight will not, as matter of law, be imputed to a youth sixteen years old, who is employed in a mill to distribute bobbins into boxes which are in close proximity to exposed cog

gearing, when, in the performance of his work, he slips on the floor, which is covered with a variable quantity of grease from day to day, and falls against the uncovered gears, to his injury. *Mundhenke v. Oregon City Mfg. Co.* (Or.) 278

24. A railroad engineer who places his train on the main track on the time of a fast train having the right of way, after placing the proper signals to stop the train, may recover for injuries caused by a resulting collision if those in charge of the other train see, or by the exercise of ordinary care could see, the engine in time to avert the collision. *Illinois C. R. Co. v. Stith* (Ky.) 1014

25. An engineer of a work train does not, as matter of law, cut himself off from recovery for resulting injuries by placing his engine on the main track on the time of a fast train having the right of way, where he places the proper signals to stop the expected train, and, in his judgment, his course of action is necessary to protect the property and interests of his employer. *Id.*

Fellow servants.

See also *supra*, 5, 6, 10-13, 20-22.

26. A master is not absolved from liability for injury to an employee which would not have occurred without his negligence, by the fact that the negligence of a fellow servant of the injured person contributed to the accident. *Chicago Union Traction Co. v. Sawusch* (Ill.) 670

27. All employees of the same master, engaged in the same general business, and whose efforts tend to promote the same general purpose, and accomplish the same general end, are fellow servants. *Atchison & E. Bridge Co. v. Miller* (Kan.) 682

28. The assignment of servants of the same master to separate departments of the same general enterprise does not affect their relation as fellow servants, unless such departments are so far disconnected that each one may be regarded as a separate undertaking. *Id.*

29. It is not essential to the fellow-servant relation between employees of the same master that they should have an opportunity to become acquainted with each other, or to observe each other's conduct, or to take precautions against each other's negligence, or to influence each other in the formation of habits of foresight and care. *Id.*

30. The engineer in charge of the operation of a steam shovel in a gravel pit is a fellow servant of a pitman whose duty it was, with the assistance of other pitmen, to take up a 6-foot section of track from the rear of the outfit used in operating such shovel, and carry it forward and fasten it in position in front of the shovel as the work progressed. *Jemming v. Great Northern R. Co.* (Minn.) 696

31. Employees of a railroad company engaged in operating a steam shovel in a gravel pit, the outfit consisting of the shovel, the engine house containing the engine

operating the shovel, an engine tender, and a caboose, all located on a short track, taken up and relaid as the work progressed, and unconnected with any other track, are not engaged in operating a railway; and the danger to which such servants are subjected is not one of the hazards peculiar to the operation of a railroad, within Minn. Gen. Stat. 1894, § 2701, enacted for the purpose of abolishing, under certain conditions, the common-law rule exempting employers from responsibility for injuries due to the negligence of a fellow servant. Id.

32. A member of a pile-driving crew, engaged in driving piling for the erection of false work essential to the reconstruction of a bridge, is a fellow servant with a machinist employed by the same master to repair stationary engines located in the midst of the work upon barges, upon the bridge, and upon the false work, and used for hoisting material and driving piling in the progress of the general enterprise of building the false work. *Atchison & E. Bridge Co. v. Miller* (Kan.) 682

33. A barn man of a street car company, who is charged with the duty of substituting a perfect car for one which has become disabled during a run, represents the company so far as the selection of the car and its fittings is concerned, and is not a fellow servant of conductors on the road. *Chicago Union Traction Co. v. Sawusch* (Ill.) 670
Liability for acts of independent contractor.

34. The retention, by the master, of general supervision of the work to be performed by an independent contractor will not change the contractor's relationship to the work. *Miller v. Moran Bros. Co.* (Wash.) 283

35. An employee cannot hold his master liable for injuries caused by the master's breach of duty to furnish to one who has taken an independent contract to perform a certain portion of the work in which the master is engaged, safe appliances for the performance of such work. Id.

36. Letting work which involves a dangerous excavation in a public highway to an independent contractor will not absolve the principal from liability for injuries to a traveler, caused by the contractor's negligence in failing to maintain proper guards and lights. *Cameron Mill & Elevator Co. v. Anderson* (Tex.) 198

Liability of servant.

Joint Suit against Master and Servant, see ACTION OR SUIT, 8, 9.

37. One who takes an independent contract to perform a portion of the work which his employer has undertaken to do is responsible for injuries caused to the employer's servants by his negligent use of appliances in the performance of his work. *Miller v. Moran Bros. Co.* (Wash.) 283

38. A railroad engineer is personally liable for negligently running his engine against a traveler at a railroad crossing. *Illinois C. R. Co. v. Coley* (Ky.) 370
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MAXIMS.

1. Quod quilibet ignem suum salve. Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. (C. C. App. 6th C.) 533

2. Res inter alios acta quæ nemine nocere debet. *Silvey v. Tift* (Ga.) 386

3. Res ipsa loquitur. Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. (C. C. App. 6th C.) 533

Ross v. Double Shoals Cotton Mills (N. C.) 208

4. Respondeat superior. *Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co.* (C. C. App. 9th C.) 1095

5. Sic utere tuo. *Gossett v. Southern R. Co.* (Tenn.) 97

6. That will be considered certain which can be made certain. *Abercrombie v. Simmons* (Kan.) 806

7. The king can do no wrong. *Palmer v. District of Columbia* (D. C. App.) 878

MEMORANDUM.

Error in Admitting in Evidence, see APPEAL AND ERROR, 28.

MENTAL SUFFERING.

Damages for, see DAMAGES, 7, 8.

MILK.

See FOOD.

MINES.

Construction of Roads for Development of, as Public Use, see EMINENT DOMAIN, 4.

Jurisdiction of Equity to Prevent Removal of Surface Supports in, see EQUITY, 1.

Lease of, as Cloud on Title, see EQUITY, 4.

Enjoining Lessee from Continuing to Mine Ores after Forfeiture of Lease, see INJUNCTION, 4.

Receipt of rent under a mining lease does not waive a forfeiture of it for continuous failure to work it in a workmanlike manner, as required by the terms of the lease. *Big Six Development Co. v. Mitchell* (C. C. App. 8th C.) 332

MINORS.

See INFANTS.

MONOPOLY.

Enjoining Breach of Contract Creating, see INJUNCTION, 5.

MORTALITY TABLES.

Admissibility in Evidence, see EVIDENCE, 12.

Instructions as to, see TRIAL, 14.

MORTGAGE.

Adverse Possession against Mortgagee, see ADVERSE POSSESSION, 2, 3.

Chattel Mortgage, see CHATTEL MORTGAGE.

As Cloud on Title, see CLOUD ON TITLE, 1.

Deed of Trust for Creditors, see **INSOLVENCY**.

Notice from Record of, see **REAL PROPERTY**, 3, 4.

1. A mortgage executed with blank spaces therein requiring to be filled, and delivered to another in such imperfect condition, with authority in such person to complete the instrument, does not require re-execution or reacknowledgment after the filling of such blanks in order to give it full validity. *Friend v. Ward* (Wis.) 891

Assignment.

Notice of, from Recording, see **REAL PROPERTY**, 4.

See also *infra*, 8.

2. Where one, acting for himself or another, acquires for value a promissory note before maturity, secured by a mortgage on land, the title to such mortgage being taken in the name of another by his consent, evidenced by a general power of attorney, but without his knowledge as to the particular transaction; and such other person thereafter, by consent of the third person, evidenced by such power of attorney, but without his knowledge as to the particular transaction, assigns his security in writing to a fourth person, the assignment being neither witnessed nor acknowledged, the final holder of the legal title to the security can rely on the bona fides of the transaction between the vendor and the persons dealing with him in the first transaction. *Id.*

3. If a person acting for himself or another, for value acquires a promissory note before maturity, secured by a mortgage upon real estate, taking the title to such mortgage in the name of another by his consent, evidenced by a general power of attorney, but without his knowledge as to the particular transaction; and thereafter such other, by consent of such third person, evidenced by such power of attorney, but without his knowledge as to the particular transaction, assigns his security in writing to a fourth person, the assignment being neither witnessed nor acknowledged, the bona fides of the transaction as to the latter, or as to such first person, is not affected by the mere use of the third person's name as assignee and subsequently as assignor, nor by the fact that he was not pecuniarily interested in the transaction, nor by the circumstance that the second instrument of assignment was not so executed as to be entitled to record. *Id.*

Payment; satisfaction.

4. A person in possession of a note belonging to another, secured by a mortgage upon real estate, with authority to collect the same, cannot rightfully accept in payment anything but money; nevertheless, if such person takes from the mortgagor a new mortgage on the real estate covered by the first mortgage, for the purpose of providing means with which to pay off the latter, and thereafter, by the use of such second mortgage, he acquires such means before his

agency to collect is terminated, such authority is thereby executed, and the first mortgage indebtedness and lien extinguished. *Id.*

5. If a person intrusted with authority to collect a mortgage indebtedness enters upon the execution of such authority, and continues efforts in that regard until he obtains the necessary money therefor, nothing appearing to the contrary the agency to collect and possession of the securities by the agent is to be presumed to continue correspondingly; and the legal effect of obtaining the money is the extinguishment of the note and mortgage, regardless of whether such money in due course, or otherwise, reaches the rightful owner. *Id.*

6. Payment of an indebtedness on a note secured by a mortgage on real estate extinguishes the mortgage lien without any satisfaction thereof of record or in writing. *Id.*

7. A mortgage having been extinguished by payment of the indebtedness, it is not necessary to valid record evidence thereof that a satisfaction piece shall be executed by the actual or apparent owner of such indebtedness for delivery to the mortgagor, or that there should be such delivery. *Id.*

8. An assignment of real estate in the nature of an equitable mortgage may, by agreement between the parties, be kept alive after payment, so as to be valid security for a larger loan subsequently made, which will take priority over an assignment afterwards made to secure a loan from another person having notice of the prior agreement. *Girard Trust Co. v. Baird* (Pa.) 405

Rights of purchaser on foreclosure.

9. A purchaser at foreclosure sale under a mortgage of real estate is entitled to the rights conferred by the decree of foreclosure, and cannot claim additional rights under the provisions of the mortgage. *Schaeppel v. Bartholomae* (Ill.) 1079

10. A provision in a mortgage that, in case of foreclosure, a receiver shall be appointed to collect the income, which shall be paid to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money, in case the property is redeemed, does not, even in the absence of redemption, entitle a purchaser at foreclosure sale to the income of the property before the title becomes perfect in him. *Id.*

Redemption.

11. A notice of intention to redeem from a mortgage foreclosure sale as a judgment creditor, by one whose judgment was not docketed for four hours after the filing of such notice, does not entitle him to redeem; and an attempt to do so thereunder is void. *Brady v. Gilman* (Minn.) 835

MOTHER.

Right to Recover for Death of Child.
see **APPEAL AND ERROR**, 33.

Right of Action for Enticement of Child, see **HUSBAND AND WIFE**, 3.

MUNICIPAL CORPORATIONS.

Right to Local Self-Government, see CONSTITUTIONAL LAW, 10, 11.

Evidence of Method of Transacting Business in Name of, see EVIDENCE, 29.

Liability for Interest, see INTEREST, 2. License by, see LICENSE.

Quo Warranto to, see QUO WARRANTO.

Legislative functions; ordinances.

Power to Penalize Offense under State Statute, see CRIMINAL LAW, 2.

Court's Power to Examine Purpose of Ordinances, see COURTS, 2.

Judicial Notice of Ordinance, see EVIDENCE, 1.

As to Purity of Milk, see FOOD, 1.

1. The generality of the title of an ordinance is not objectionable so long as it is not made to cover legislation incongruous in itself. *St. Louis v. Liessing* (Mo.) 918

2. A provision requiring the registration of venders and the payment of a registration fee is within the title of an ordinance "regulating the sale of milk and cream." *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

3. The court will not examine provisions of an ordinance alleged to be invalid, where the section under which the prosecution is instituted is valid and severable from the rest. *St. Louis v. Liessing* (Mo.) 918

4. An ordinance requiring payment of a fee to the "city collector" is not void because the statute designates the one who is to receive it as the "license collector." *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

5. An ordinance requiring the use on street cars of a particular fender, or "some other fender equally as good, to be approved" by certain officials, is invalid as vesting an arbitrary discretion in the officials. *Elkhart v. Murray* (Ind.) 940

6. Provisions of an ordinance requiring milk dealers to register in the office of the health commissioner and pay a fee therefor, and those requiring them to pay a license fee, are severable, so that one may be sustained although the other fails. *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

7. A municipal ordinance prohibiting the sale of milk containing less than 3 per cent of weight of butter fat, to be estimated gravimetrically by the Adams paper-coil process, cannot be declared void for unreasonableness as matter of law. *St. Louis v. Grafeman Dairy Co.* (Mo.) 926

8. Charter authority to provide for the inspection of milk empowers a municipal corporation to require venders to register in the office of the health commissioner. *St. Louis v. Grafeman Dairy Co.* (Mo.) 936

9. The power to exact from a telephone company authorized by statute to erect its lines in the streets of a city a license fee for the use of such streets is not given to a municipal corporation by a charter conferring upon it general police power and the right to control and regulate its streets and 1 L.R.A. (N.S.)

prevent the encumbering of them. *Wisconsin Teleph. Co. v. Milwaukee* (Wis.) 581
Water supply.

Consumer's Right to Enforce Contract with Water Company, see ACTION OR SUIT, 3.

Taxation of Water Company, see TAXES, 2.

10. A municipal corporation engaged in the business of furnishing water to its inhabitants for pay cannot, after losing by lapse of time its lien on a parcel of property for water furnished thereon, compel its owner to pay for water furnished before he acquired title. *Chicago v. Northwestern Mut. L. Ins. Co.* (Ill.) 770

Liability for damages.

11. A city is not exempt from liability for injuries to private property produced by defects in its sewerage system, where such system was constructed by the city without any plan therefor, passed upon and adopted by its governing body. *Hart v. Neillsville* (Wis.) 952

12. A city which has, by its governing body, duly adopted a plan for a sewerage system, and executed the same, is not liable for injuries caused thereby to private property, not involving an unconstitutional taking thereof, produced by defects in such plans, as the due adoption of the plan requires the exercise by the governing body of discretionary authority of a quasi-judicial nature. *Id.*

13. Though a city is not liable for damages to private property caused by mere defects in the plan of its duly adopted and executed sewerage system, if it acquires knowledge of such defects, and that, unless they are remedied, they will produce direct injury to private rights, it should exercise ordinary care to prevent such a result, and is responsible for damages caused by failure in that regard. *Id.*

14. An injury to private property by the discharge thereon of water accumulated in a sewer with which it has been connected as a matter of right is a direct result of defects in the plan of sewerage, for which the city is liable, although such injury would not have occurred if the connection had not been made. *Id.*

15. Where, as a matter of right, a private drain is constructed, connecting private property with a main sewer through an opening left by the city therefor, and damages result to such property by accumulated sewage flowing from such sewer to such property, the mere circumstance that without such drain no such result would have happened will not save the municipality from liability for such damages. *Id.*

16. A superintendent of the lamp department of a city, whether appointed by the mayor or elected by the city council, is not a public officer, for whose negligence the city is not liable, where the maintenance of street lights is not required by statute, but is undertaken by the city for its own convenience. *Dickinson v. Boston* (Mass.) 664

17. A municipal corporation is liable for injuries caused by the negligent management by its agents of lamp posts erected for the lighting of its streets, where the duty of street lighting is not imposed by statute, but is undertaken under statutory authority, to lessen its liability to actions for unsafe highways. *Id.*

Taxes by.

Crediting Water Company on Tax Bills for Water Furnished City, see *WATERS*, 23.

18. The property of a water company the stock of which is all owned by the municipal corporation is subject to municipal taxation where the company was organized to sell water to private consumers, and the Constitution limits tax exemptions to public property used for public purposes, while the statutes provide for taxation of all property not exempted by the Constitution, and require municipal corporations to tax for local purposes all property subject to state tax. *Louisville v. McAteer (Ky.)* 766

Officers.

19. Appointment of a city chemist under a provision of a municipal ordinance requiring the approval of the board of health to the act of the mayor and common council is not ineffectual, although the charter places the appointing power in the mayor and council. *St. Louis v. Liessing (Mo.)* 918

20. The state may require municipal corporations to pay the salaries of local police officers, although such officers are officers of the state, and appointed under its authority. *Horton v. Newport (R. I.)* 512

MUTUALITY.

Of Contracts, see *CONTRACTS*, 3.

NEGLIGENCE.

By Owner of Amusement Park, see *AMUSEMENT PARKS*.

In Use of Automobile, see *AUTOMOBILES*.

In Collection by Bank, see *BANKS*, 8.

Towards Passenger, see *CARRIERS*, 1-3.

Contributory, of Passenger, see *CARRIERS*, 4.

Presumption of, see *EVIDENCE*, 3-6.

As to Fires, see *FIRES*.

Liability of Municipality for, see *MUNICIPAL CORPORATIONS*, 11-17.

Proximate Cause of Injury, see *PROXIMATE CAUSE*.

Release from Liability for, see *RELEASE*.

Question for Jury as to, see *TRIAL*, 8-11.

Correctness of Instruction as to, see *TRIAL*, 20.

In Escape of Water from Irrigation Ditch, see *WATERS*, 8-13.

1. No distinction between the degrees of negligence of which a railroad company is guilty can be founded on speculation, so as to avoid the effect of a contract releasing it from liability for negligent injuries in case the negligence is found to be gross. *Chicago, R. I. & P. R. Co. v. Hamler (Ill.)* 674

2. A manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not negligently to allow a foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when it is placed on sale; and one who, relying on this obligation, and without negligence on his own part, swallows several pieces of glass while drinking the beverage from a bottle, may recover from the manufacturer for injuries sustained in consequence. *Watson v. Augusta Brewing Co. (Ga.)* 1178

Imputed negligence.

3. That the driver of the vehicle in which plaintiff was riding was negligent at a time when plaintiff received personal injuries of which defendant's negligent handling of an automobile was the efficient cause will not defeat an action against defendant to recover for the injury. *Christy v. Elliott (Ill.)* 215

NEGOTIABILITY.

Of Instrument, see *BILLS AND NOTES*, 2-4.

NEGOTIABLE INSTRUMENTS.

See *BILLS AND NOTES*.

NEW TRIAL.

Matters Reviewable on Appeal from Order Denying, see *APPEAL AND ERROR*, 14.

Review of Discretion as to, see *APPEAL AND ERROR*, 19.

1. New trials should be granted only when the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. *State v. Crawford (Minn.)* 839

2. In criminal cases, the granting or refusing of a new trial for errors of law should not be determined by mere technical conformity with, or infringement of, rules of practice and evidence. *Id.*

3. A new trial of one convicted of murder in the first degree for killing a fellow traveler in a box car while defendant and another were engaged in holding up the inmates of such car, will not be granted because a juror was permitted by the court to ask a witness questions involving a conclusion or opinion as to whether defendant stepped aside to take aim at his victim, to which no objection was made and no exceptions taken, where four eyewitnesses to the shooting testified, without attack, impeachment, or inconsistency, to every detail of the homicide, the revolver from which the bullet was fired, and the bullet itself, which was taken from the brain of the murdered man was produced, identified, and connected with defendant, and he himself took the stand in

his own defense and admitted the robbery and shooting, although he denied an intent to kill. Id.

NONRESIDENT.

Retaining Character of, after Entering State while Retaining Foreign Domicil, see DOMICIL, 1.

Disqualification to Act as Executor, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Enjoining Garnishment of Debt Due to, see INJUNCTION, 11.

When Nonresidence Begins, see LEVY AND SEIZURE, 1.

NOON.

Determining Meaning of, see EVIDENCE, 28.

Meaning of, see INSURANCE, 4.

NOTICE.

Of Drainage Proceedings, Want of, see DRAINS AND SEWERS, 3, 4.

To Ward, Presumption of Giving of, see EVIDENCE, 8.

Serving Notice of Accident on City, as Bringing of Action, see EVIDENCE, 17.

Of Loss, see INSURANCE, 9.

Before Removal of Officer, see OFFICERS, 1-3.

Of Intention to Redeem from Foreclosure, see MORTGAGE, 11.

From Record of Mortgage, see REAL PROPERTY, 3, 4.

Of Breach of Warranty, Waiver of, see SALE, 7.

Of Precise Time When Official Act is Done, see TIME.

NUISANCES.

Measure of Damages for, see DAMAGES, 4-6.

Evidence as to Damage by, see EVIDENCE, 40-42.

Blasting, see BLASTING.

Allegations of Injury to Health in Complaint for, see PLEADING, 7.

1. A hearing is not necessary to enable the legislature, on a particular state of facts, to declare a thing to be a nuisance *per se*. Com. v. Sisson (Mass.) 752

2. The legislature cannot authorize railroad and terminal companies, in locating station houses, roundhouses, and terminal facilities, seriously to impair or destroy property not taken, but which becomes impaired or is destroyed by the use of that which is taken. Louisville & N. Terminal Co. v. Lellyett (Tenn.) 49

3. The owner of an authorized railroad properly conducted at an authorized place is not liable in damages to one whose residence is permeated by smoke, cinders, and gas emitted from its engines to such an extent as to be injurious to the health and comfort of the inhabitants, as such a business is not a nuisance. Atchison, T. & S. F. R. Co. v. Armstrong (Kan.) 113
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Remedies.

4. A terminal company, in exercising the discretion conferred by the legislature to locate its yards and terminal facilities, acts at its peril not to create a nuisance to neighboring property. Louisville & N. Terminal Co. v. Lellyett (Tenn.) 49

5. A landowner who is driven from his home by the maintenance of a nuisance on adjoining property, or whose comfort is so interfered with as to lessen the desirability and usable value of his home, is entitled to recover damages therefor. Gossett v. Southern R. Co. (Tenn.) 97

6. Mere occupants of property adjoining that where a nuisance is being maintained have no right of action, where they are merely disquieted and kept in a state of alarm and apprehension, if it does not result in sickness or physical injury. Id.

7. One whose residence is rendered uncomfortable or unhealthy to the occupants by smoke, cinders, and gas emitted from the locomotive engines of a railway company cannot recover damages therefor, in the absence of any special constitutional or statutory authority, where it appears that such company has not abused or exceeded its authority in locating or constructing its line, or in the operation of its engines. Atchison, T. & S. F. R. Co. v. Armstrong (Kan.) 113

8. Where, under the police power, a legislature declares a thing to be a nuisance *per se*, and orders it to be abated, no compensation is due. Com. v. Sisson (Mass.) 752

OFFER.

Of Compromise by Surviving Partner, see PARTNERSHIP, 7.

OFFICERS.

Fees of Clerk, see CLERKS.

Local, Legislative Control over, see CONSTITUTIONAL LAW, 10, 11.

Allowance for Expenses of Legislative Body, see LEGISLATURE, 2.

Mandamus to Compel Payment of Salary to, see MANDAMUS, 3.

Of Municipality, see MUNICIPAL CORPORATIONS, 19, 20.

Removal.

Prohibition against, see PROHIBITION.

Sufficiency of Title as to, see STATUTES, 2, 3.

1. Notice and opportunity to be heard are not necessary before the removal from office of a public officer, where the statute provides that the removal shall be made upon filing the reasons therefor in the office of the secretary of state. State ex rel. Hamilton v. Grant (Wyo.) 588

2. There is no property right in a public office, so as to require notice and a hearing before a removal therefrom, under a constitutional provision that no one shall be deprived of property without due process of law. Id.

3. A superintendent of a water divi-

sion, who is appointed by the governor with the consent of the senate, may be removed from office in any manner provided by law, under constitutional provisions for the impeachment of the governor and other state officers for high crimes and misdemeanors, or malfeasance in office, and that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office in such manner as may be provided by law. Id.

Liability.

Robbery by Officer, see ROBBERY.

4. A public official intrusted with the custody of a government building must obey the provisions of a statute forbidding the emission of dense smoke from chimneys into the atmosphere. *Palmer v. District of Columbia* (D. C. App.) 878

5. A public official charged with a violation of an act of Congress forbidding the emission of dense smoke from chimneys into the atmosphere cannot escape liability on the ground that Congress has not supplied him with the necessary apparatus to prevent such emission, if he has made no effort to procure it. Id.

6. That Congress has approved the estimate of a custodian of a public building for a supply of soft coal for a season does not absolve him from liability for violation of an act of Congress forbidding the emission of dense smoke from chimneys into the atmosphere. Id.

OPINION EVIDENCE.

See EVIDENCE, 16.

ORDINANCE.

Power of Courts to Examine Purpose of, see COURTS, 2.

See also MUNICIPAL CORPORATIONS, 1-9.

OYER.

See PLEADINGS, 2, 12.

PARENT AND CHILD.

Father's Sole Right to Recover for Death of Child, see APPEAL AND ERROR, 33.

Father's Right of Action for Death of Abandoned Child, see DEATH.

Mother's Right of Action for Enticement of Child, see HUSBAND AND WIFE, 3.

Legitimation of Illegitimate Child, see ILLEGITIMACY.

1. A father may recover upon the carriage contract for loss of, or injury to, articles of his infant child, packed and carried with his baggage, where he has paid full fare for his transportation, and the infant is below the age at which fare is customarily exacted. *Withey v. Pere Marquette R. Co.* (Mich.) 352

2. A father forfeits his right to his son's services by abandoning him and compelling him to assume the burden of his own support when far within his minority, the abandonment extending almost to cessation 1 L.R.A. (N.S.)

of communication between them. *Swift & Co. v. Johnson* (C. C. App. 8th C.) 1161

3. Hiring, at his own request, without notice of the father's objection, a minor who has been hired out by the father to work for another, for wages which the father is to receive, will not support an action for enticing the minor out of the father's service. *Kenney v. Baltimore & O. R. Co.* (Md.) 205

PARKS AND SQUARES.

For Amusement, see AMUSEMENT PARKS.

PAROL EVIDENCE.

See EVIDENCE, 13-15.

PAROL TRUST.

See TRUSTS, 4.

PARTIES.

To Action, see ACTION OR SUIT, 8-12.

To Deed, Description of, see DEEDS, 2, 3.

PARTNERSHIP.

Deed to, see DEEDS, 3; EVIDENCE, 14.

Interest against Surviving Partner, see INTEREST, 1.

Powers of partners.

1. An agreement between a customer and a member of a partnership, that its goods may be purchased and paid for by the customer in commodities furnished by him, for the private use and benefit of such member of the firm, is void, as being beyond the scope of the partner's apparent authority. *Eady v. Newton Coal & Lumber Co.* (Ga.) 650

2. Although articles of partnership may be enlarged by implication from a general custom of the firm, acquiesced in by all the partners, such a custom will not bind a partner who did not expressly authorize it unless the circumstances are such as to indicate that he not only knew of the course of dealing in particular instances, but contemplated and tacitly assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases. Id.

Division of profits.

3. Under a contract for the formation of a partnership to engage in railroad construction, which entitles either partner, under certain conditions, to subcontract portions of the work, in which case the one taking the subcontract should be dealt with as other subcontractors, the profit upon a subcontract taken by one of the partners is to be treated as profits of the partnership, and divided under the partnership contract. *Condon v. Callahan* (Tenn.) 643

Rights of surviving partner.

4. Where partners who have undertaken to perform a construction contract have agreed that each shall contribute his services without compensation, one who, upon the other's death, performs the entire work of supervision, is entitled to compensation

for that part of the work which deceased would have contributed had he lived. *Id.*

5. The rule that a surviving partner is not entitled to compensation for winding up the affairs of the partnership does not apply where the affairs are not immediately wound up, but the work in which the partnership was engaged is carried to completion with the consent of the personal representatives of the decedent. *Id.*

6. Personal representatives of a deceased partner in a firm which has taken a contract for railroad construction cannot compel the surviving partner to contribute the entire amount paid to the engineer of the railroad company for services rendered by him to the enterprise, where the services were engaged and utilized with knowledge of the deceased partner and of his representatives, and there was nothing in the transaction in violation of the rights of the railroad company, or without its consent. *Id.*

7. A rejected offer by a surviving partner to take a certain amount in payment for his services in completing the enterprise in which the partnership was engaged does not prevent his recovering a reasonable allowance therefor in case he applies to the courts, although it is in excess of the amount named in his offer. *Id.*

PASSENGERS.

Injury to, see **CARRIERS**, 1-4.

PAYMENT.

Recovery Back of, see **ASSUMPSIT**.

Of Mortgage, see **MORTGAGE**, 4-8.

PERSONAL INJURIES.

Measure of Damages for, see **DAMAGES**, 2, 3.

PHOTOGRAPHS.

Injunction against Sending to Rogues' Gallery, see **INJUNCTION**, 3.

PHYSICIANS AND SURGEONS.

Assault by, see **ASSAULT AND BATTERY**, 2.

Ex Post Facto Law as to, see **CONSTITUTIONAL LAW**, 2.

Conclusiveness of Findings of Examining Board, see **COURTS**, 3.

Evidence of Confidential Disclosures to, see **EVIDENCE**, 25-27.

Question for Jury as to Patient's Consent to Operation, see **TRIAL**, 3.

1. The state, in the exercise of its police power, in the interests of the health, good government, general welfare, and morals of the people may prescribe the qualifications of persons desiring to practise medicine, and may create a board whose duty it shall be to hear and determine any complaint made against any person holding a physician's license, and revoke such license for any cause provided for in the statute. *Meffert v. Packer* (Kan.) 811

2. Consent by a patient to the performance of a surgical operation may be im-

plied from circumstances. *Mohr v. Williams* (Minn.) 439

PLATFORM.

Duty to Keep Lighted, see **CARRIERS**, 1.

PLEADING.

When Issue in Bastardy Proceeding Made up, see **BASTARDY**.

Variance between Pleading and Proof, see **EVIDENCE**, 45.

Supplemental Bill in Nature of Bill of Review, see **REVIEW**.

1. Where a pleading is open to construction, that reasonable meaning which will support it should be adopted, rather than one which will defeat it. *Hart v. Neillsville* (Wis.) 952

2. Profert cannot be made, or oyer demanded, unless the declaration avers a sealed instrument. *Riley v. Yost* (W. Va.) 777

3. The plaintiff cannot rely on averments of the answer put in issue by his reply to support a judgment in his favor. *Joseph v. Catron* (N. M.) 1120

Conclusions.

4. The rule that permits conclusions of law to be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or defense is called in question has no application to conclusions of fact. *Western Travelers' Acci. Assn. v. Munson* (Neb.) 1068

Admissions by pleading.

5. A denial of the validity of an instrument sued on, agreeing to pay a specified amount upon the confirmation by Congress of a specified land grant, on the ground that such land grant had never been confirmed by Congress, is not an admission of a valuable consideration for such instrument. *Joseph v. Catron* (N. M.) 1120

Striking out.

See also **ACTION OR SUIT**, 10.

6. A claim for damages resulting from a breach of contract, treating it as of force, should, on demurrer, be stricken out as inconsistent with previous allegations of the declarations setting up a claim for an amount paid to defendant by plaintiff on the ground that the contract had been rescinded. *Timmerman v. Stanley* (Ga.) 379

Misjoinder.

7. Allegations of injury to health may be inserted in a complaint for injuries to real estate by the maintenance of a nuisance, as specifications of damage done to the property as a place of residence. *Louisville & N. Terminal Co. v. Lellyett* (Tenn.) 49

Sufficiency of plaintiff's pleadings.

8. Proper allegation and proof of a consideration are necessary to a recovery of a non-negotiable instrument not under seal, which contains no recital of a consideration. *Joseph v. Catron* (N. M.) 1120

9. A party cannot always anticipate what the testimony in a case may develop;

and, to meet the possible phases of the evidence, he may sometimes state his cause of action in different counts. *Edwards v. Hartshorn* (Kan.) 1050

10. A recovery under the common counts may be had against one to whom money has been delivered for investment, and who, after using it for his own benefit, delivers to the customer worthless obligations of a corporation of which he is president. *Donovan v. Purtell* (Ill.) 176

11. The liability of a bank for negligence in collecting a check deposited for that purpose cannot be enforced under the common counts. *Jefferson County Sav. Bank v. Hendrix* (Ala.) 246

12. The fact that a declaration makes profert does not alone make the writing part of the declaration, without a demand of oyer. *Riley v. Yost* (W. Va.) 777
Sufficiency of defendant's pleadings.

13. An accord and satisfaction cannot be set up under the general issue or plea of not guilty. *Gossett v. Southern R. Co.* (Tenn.) 97

Demurrer.

14. A demurrer to a declaration on the ground that no copy of the contract sued on was attached as an exhibit is not well founded, where it does not affirmatively appear that the contract was in writing. *Timmerman v. Stanley* (Ga.) 379

15. A demurrer to a declaration for inconsistency in joining certain claims which treat a contract as still in force with other claims previously made, and which it is claimed determine the character of the action as one in which the contract had been rescinded, does not put the plaintiff upon his election between the two. *Id.*

16. A pleading which alleges ultimate facts constituting a cause of action or defense is good as against a demurrer for insufficiency of facts to constitute a cause of action or defense; and the remedy is by motion if the facts as alleged do not make the pleading sufficiently definite and certain. *Western Travelers' Acci. Asso. v. Munson* (Neb.) 1068

17. Naming defendant individually in the title, and stating a cause of action against him as trustee, render the complaint demurrable. *Leonard v. Pierce* (N. Y.) 161

18. A complaint seeking to charge a bank with the amount of a check deposited for collection, which is not effected because of its negligence, cannot be upheld against demurrer on the theory that it cannot be deemed bad merely because it makes a claim of damages which is erroneous only as to amount and form, since the only damages to which plaintiff is entitled are those actually suffered by the bank's neglect, and the form of the complaint would authorize a recovery though no such damages were proved. *Jefferson County Sav. Bank v. Hendrix* (Ala.) 246
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POLES.

Telephone, License for Use of Streets, see MUNICIPAL CORPORATIONS, 9.

POLICE.

Legislative Right to Exercise Power over, see CONSTITUTIONAL LAW, 1, 10, 11.

Requiring City to Pay Salaries of, see MUNICIPAL CORPORATIONS, 20.

POLICE POWER.

See CONSTITUTIONAL LAW, 18-23.

PORTER.

On Sleeping Car, Release from Liability for Injuries to, see CONTRACTS, 2, 7.

Of Sleeping Car, as Servant of Railroad Company, see MASTER AND SERVANT, 1.

POSSESSION.

Of Liquor, Presumption from, see CONSTITUTIONAL LAW, 12, 13.

POWER.

Of Disposition by Will, see WILLS, 7.

POWER OF ATTORNEY.

Assignment of Mortgage by One Having, see MORTGAGE, 2, 3.

See also PRINCIPAL AND AGENT, 1.

PREFERENCE.

In Assets of Insolvent Insurance Company, see INSURANCE, 2.

PRESCRIPTION.

Prescriptive Right to Cast Sawdust into Stream, see FISHERIES, 2.

Prescriptive Rights as to Water, see WATERS, 14, 15.

PRESERVATIVES.

Prohibition of Sale of Milk Containing, see CONSTITUTIONAL LAW, 22.

PRESUMPTIONS.

On Appeal, see APPEAL AND ERROR, 12, 13.

See also EVIDENCE, 2-10.

PRINCIPAL AND AGENT.

Agent's Right to Enforce Contract, see ACTION OR SUIT, 2.

Mutuality of Contract Establishing Agency, see CONTRACTS, 3.

Personal Liability of Agent Acting as Corporation, see CORPORATIONS, 3.

Evidence as to Damages from Principal's Breach of Contract, see EVIDENCE, 35.

Assignment of Mortgage by One Having General Power of Attorney, see MORTGAGE, 2, 3.

Authority of Attorney to Collect Notes Secured by Mortgage, see MORTGAGE, 4, 5.

1. The common-law rule that notice to the agent is necessary to revoke a power of

attorney to convey real estate is not abrogated by a statute which merely authorizes the recording of such a power, and provides that, if recorded, the instrument of revocation must also be recorded to be valid; and, therefore, merely recording a revocation of a recorded power without notice to the agent does not revoke his authority. *Best v. Gunther* (Wis.) 577

2. The authority of an agent who sells a machine to waive a condition as to notice of breach of warranty is not destroyed by a provision of the contract that "no person has any authority to add to, or abridge, or change this warranty in any manner." *First Nat. Bank v. Dutcher* (Iowa) 142

PRINCIPAL AND SURETY.

Surety as Necessary Party to Suit, see ACTION OR SUIT, 12.

Parol Evidence of Suretyship, see EVIDENCE, 15.

PRIORITY.

Of Chattel Mortgagee over Attachment, see CHATTEL MORTGAGE.

PRIVATE LAND CLAIM.

What is a Confirmation of a Land Grant, see CONTRACTS, 5, 6.

PRIVATE RAILWAY.

Power to Condemn Land for, see EMINENT DOMAIN, 6, 7.

PRIVILEGE.

Of Witness, see WITNESSES, 1-3.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 25-27.

PROBATE.

Of Will, see WILLS, 2.

PROFERT.

See PLEADING, 2, 12.

PROFITS.

Loss of, see DAMAGES, 9.

PROHIBITION.

The fact that a statute providing for the removal of an incumbent from a public office is unconstitutional will not prevent the issuance of a writ of prohibition to prevent proceedings under it, if relief has been denied petitioner in the lower court, and there is no other plain, speedy, and adequate remedy. *Bell v. Esmeralda County First Judicial Dist. Ct.* (Nev.) 843

PROPERTY.

In Wild Game, see GAME.

Public Office as, see OFFICERS, 2.

PROXIMATE CAUSE.

1. Abandoning a leased house without locking the doors is not the proximate cause of its destruction by fire two or three weeks later by a trespasser.—at least where the owner is notified of the condition of affairs. 1 L.R.A. (N.S.)

and takes no steps to protect his property. *Winfree v. Jones* (Va.) 201

2. The act of a boy in seizing a broken telephone wire to receive a shock is the proximate cause of an injury resulting to him therefrom, and not the violation of the municipal ordinance as to the manner of stringing the electric light wire which charged the broken one, nor the fact that the wire was imperfectly insulated; and the fact that the boy was not aware of the risk is immaterial. *Stark v. Muskegon Traction & Lighting Co.* (Mich.) 822

PUBLICATION.

Sufficiency of Service by, to Support Judgment, see JUDGMENT, 7.

PUBLIC IMPROVEMENTS.

Delegating Power to Fix Boundaries of Taxing District, see CONSTITUTIONAL LAW, 8.

See also DRAINS AND SEWERS.

The completion of a public improvement is not a prerequisite to the levying of an assessment to pay for it. *Ross v. Wright County Supers.* (Iowa.) 431

PUBLIC LANDS.

Presumption of Correctness of Official Survey, see EVIDENCE, 7.

PUBLIC POLICY.

See CONTRACTS, 8.

PUBLIC PURPOSE.

What is, see EMINENT DOMAIN, 2-7.

PUNITIVE DAMAGES.

Instructions as to, see TRIAL, 17.

QUALIFICATION.

Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 2-5.

QUASHING.

Of Indictment, see INDICTMENT, ETC.

QUESTION FOR JURY.

See TRIAL, 2-11.

QUO WARRANTO.

1. The district court must grant leave to file an information in the nature of quo warranto as a matter of course, and direct a writ to issue when the attorney general of the state, acting in his official capacity as the chief law officer of the state, exhibits such an information, and asks that a writ issue, directed to a municipal corporation, requiring it to show cause why its franchise should not be declared null and void; but, upon the return, it is the duty of the court to try the issues of law and fact presented thereby, and to determine the same upon the merits according to the rules of law applicable thereto. *State ex rel. Young v. Kent* (Minn.) 826

2. The supreme court will, when an application for issuance of a writ of quo

warranto to a municipal corporation requiring it to show cause why its franchise should not be declared null and void is made to it by the attorney general, exercise the discretion given it by statute; and if, in its judgment, the application should have been made to the district court, will deny the information. *Id.*

RAILROADS.

Liability for Injury by Blasting, see **BLASTING**.

Measure of Damages for Operation of, see **DAMAGES**, 4, 5.

Sufficiency of Description in Deed to, see **DEEDS**, 4.

Condemnation of Land for, see **EMINENT DOMAIN**.

Taking Minority Stock in, under Eminent Domain, see **EMINENT DOMAIN**, 1.

Evidence as to Injury to Adjoining Property by Operation of, see **EVIDENCE**, 42.

Liability for Injury at Crossing, Personal Liability of Engineer, see **MASTER AND SERVANT**, 38.

Buildings and Operation of, as Nuisance, see **NUISANCES**, 2-7.

Consolidation.

Estoppel to Attack, see **ESTOPPEL**, 1.

1. The naming of one railroad corporation with which another is empowered by statute to consolidate does not preclude a consolidation with others, where the statute continues, "and any transportation company now or hereafter incorporated by the laws of the United States or any of the states thereof." *Spencer v. Seaboard Air Line R. Co.* (N. C.) 604

2. Authority of a railroad company to consolidate with another for the purpose of forming a through line across the state may be found in the provisions of the statute authorizing the latter company to form a consolidation with others, and need not of necessity be inserted in its own charter, or a statute passed with special reference to it. *Id.*

3. In determining whether or not a particular railroad company has been empowered to consolidate with others, the expressed purpose of the legislature to create a through line across the state, and to connect with roads in other states, is to be taken into consideration. *Id.*

Liability for injury at crossing.

Correctness of Instruction as to, see **TRIAL**, 19.

4. A railroad company must maintain a watchman or use some other precaution commensurate with the danger at a street crossing in a city, which is much used by travelers on the highway and also by the railroad, and which, by reason of obstructed view, is especially dangerous. *Illinois C. R. Co. v. Coley* (Ky.) 370

5. An overhead bridge crossing of a highway by a railroad track is within the provision of a statute requiring signals to be

given when a train approaches a place where the "railroad crosses any street, road, or highway." *Johnson v. Southern P. R. Co.* (Cal.) 307

Liability for fires.

Presumption of Negligence as to, see **EVIDENCE**, 5.

6. A railroad company is liable for negligently setting fire to lumber stacked with its consent on its right of way at the place usually occupied by lumber awaiting transportation, although it has not been delivered to it for that purpose. *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* (C. App. 6th C.) 533

RAPE.

Excluding Evidence of, Complainant's Intercourse with Others, see **APPEAL AND ERROR**, 32.

RATES.

For Water, see **ASSUMPSIT; WATERS**, 16-23.

REAL PROPERTY.

1. An instrument which is in form a general warranty deed, conveying a strip of land to a railroad company for a right of way for a railroad, will not vest an absolute title in the railroad company; but the interest conveyed is limited by the use for which the land is acquired, and, when that use is abandoned, the property will revert to the adjoining owner. *Abercrombie v. Simmons* (Kan.) 86

Record of title.

Necessity of Recording Satisfaction Piece, see **MORTGAGE**, 7.

2. A person, in dealing with another or respect to real estate, may rely upon the record title to the property, in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto. *Friend v. Ward* (Wis.) 89

3. A person, in taking a mortgage on real estate, may rely on the record of a satisfaction by the record owner of a prior mortgage on the same property, in the absence of knowledge, actual or constructive, of the ownership of such prior mortgage by some other person than such owner. *Id.*

4. The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another. *Id.*

REBUTTAL.

What Admissible in, see **TRIAL**, 1.

RECEIPT.

As Compromise, see **COMPROMISE AND SETTLEMENT**.

Duress in Requirement of, see **DURESS**.

RECEIVERS.

Appealability of Decree Granting Compensation to, see **APPEAL AND ERROR**, 3, 4.

Allowance of Compensation to, out of Fund, see COSTS, 2.
Right of Purchaser on Foreclosure to Income During Receivership, see MORTGAGE, 10.

1. When, in a suit in equity, the title to personal property of such character as renders sale thereof necessary for the adequate protection of the rights of the parties interested is involved, the court in which such suit is pending may properly appoint a receiver to take charge of it, and make sale thereof. *Nutter v. Brown* (W. Va.) 1083

2. Mere irregularities in the appointment of a special receiver, acquiesced in by the parties, will neither deprive such receiver of his compensation, nor the successful party of a decree over against his adversary for the amount thereof, when it has been allowed out of a fund belonging to the party so prevailing. Id.

RECORD.

On Appeal, see APPEAL AND ERROR, 7, 8.
Of Title to Land, see REAL PROPERTY, 2-4.

REDEMPTION.

From Foreclosure, see MORTGAGE, 11.

REGISTRATION.

Of Milk Dealer, see CONSTITUTIONAL LAW, 21; LICENSE, 5, 6; MUNICIPAL CORPORATIONS, 8.

RELATIVES.

Implied Contracts to Pay for Services to, see CONTRACTS, 1.

RELEASE.

In Bankruptcy, see BANKRUPTCY, 2.
From Liability for Injury to Sleeping-Car Porter, see CARRIERS, 3.
Sufficiency of Consideration for. see CONTRACTS, 2.
Validity of, see CONTRACTS, 7.
From Future Negligence. Contract as to, see NEGLIGENCE, 1.

Injuries caused by gross negligence are included in a release, by a sleeping-car porter, of the railroad company hauling the car on which he is employed, from liability for negligent injury to him. *Chicago, R. I. & P. R. Co. v. Hamler* (Ill.) 674

REMAINDERS.

See WILLS, 7-11.

REMEDIES.

For Nuisance, see NUISANCES, 4-8.

REMEDY AT LAW.

Effect of, on Jurisdiction of Equity, see EQUITY, 1-3.

REMOVAL.

Of Officers, see OFFICERS, 1-3; PROHIBITION.
Of Trustees, see TRUSTS, 5, 6.

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REMOVAL OF CAUSES.

Effect of Foreign Insurance Company's Refusal to Perform Agreement as to, see INSURANCE, 3.

1. If a resident of the state is joined as defendant in an action, to prevent its removal to a Federal court, the court should, as soon as it discovers that fact, dismiss the action as to him, with costs, and remove the case to the Federal court. *Illinois C. R. Co. v. Coley* (Ky.) 370

2. An action against a resident employee of a foreign railroad company and the company jointly is not removable by the latter to the Federal court, although a joint suit cannot be maintained in that court. *Illinois C. R. Co. v. Houchins* (Ky.) 375

3. A nonresident joined as defendant in an action to recover damages for negligence cannot secure a removal of the case to a Federal court by putting in issue the fact of negligence on the part of his codefendant. *Illinois C. R. Co. v. Coley* (Ky.) 370

What court determines removability.

4. The state, and not the Federal, court should determine the question of the right to remove to the latter an action begun in the former, against a nonresident railroad company and its resident employee jointly. *Illinois C. R. Co. v. Houchins* (Ky.) 375

5. The state court may determine whether or not a resident of the state has been joined in a suit to prevent its removal to a Federal court, and is not bound, at the instance of the nonresident defendant, to remove the case to the Federal court to permit it to determine that question. *Illinois C. R. Co. v. Coley* (Ky.) 370

RENUNCIATION.

By Widow, see WILLS, 12-14.

REPEAL.

Of Statute, see STATUTES, 9.

REPLEVIN.

Where the property has been set apart and identified, and title has been vested in the purchaser, who has paid part of the purchase price; but, because of fraud or mistake in the measurement, his tender of the balance due is not sufficient in amount,—the seller may recover possession of the property from the purchaser by an action in replevin, on the ground of special ownership and right of possession; but he cannot maintain such action under the claim of absolute ownership without rescinding the contract of sale and tendering back the amount paid. *Baker v. McDonald* (Neb.) 474

RESCISSION.

Of Sale, see ACTION OR SUIT, 6; SALE, 5.
Of Contract, see CONTRACTS, 13, 14.
Necessity of, before Seller Can Maintain Replevin. see REPLEVIN.

RESERVOIR.

What is. see WATERS, 8.

RESIDENCE.

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RES JUDICATA.

See JUDGMENT, 2-7.

RESUME.

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RETROSPECTIVE LAWS.

Constitutionality of, see CONSTITUTIONAL LAW, 3.

RETROSPECTIVE STATUTES.

See STATUTES, 8.

REVENUE CUTTER.

Judicial Powers of Captain, see SALVAGE, 5.

REVERSION.

Of Real Property, see REAL PROPERTY, 1.

REVIEW.

Judicial, Refusal of, as Deprivation of Property, see CONSTITUTIONAL LAW, 17.

1. A supplemental bill in the nature of a bill of review is the proper proceeding to bring before the court new matter discovered by defendant after answer, and after the passing of a decree referring the case to a master, and while such decree is in process of execution. *Hardwick v. American Can Co.* (Tenn.) 1029

2. A supplemental bill in the nature of a bill of review cannot be filed to bring to the attention of the court, in an action for breach of contract to purchase a certain quantity of manufactured articles in which the defense had been the unmerchantable character of the articles and consequent loss and injury to business credit and reputation, in attempting to dispose of them, matter showing a breach of the contract by the seller in selling the articles to other merchants within the territory which the contract awarded exclusively to the buyer. *Id.*

REVOCATION.

Of License, see LICENSE, 1, 2, 7.

Of Power of Attorney, see PRINCIPAL AND AGENT, 1.

RIPARIAN RIGHTS.

See WATERS.

ROBBERY.

Effect of Consent to, on Criminal Liability, see CRIMINAL LAW, 1.

Officers are guilty of robbery who, after having arrested a person, forcibly search him, and take from him valuables with the intention of keeping them. *Tones v. State* (Tex. Crim. App.) 1024
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ROGUES' GALLERY.

Injunction against Sending Innocent Person's Photograph to, see INJUNCTION, 3.

RULES.

Violation of, as Contributory Negligence, see MASTER AND SERVANT, 25.

SALE.

Of Property Covered by Bill of Lading with Draft Attached, see BILL OF LADING.

Of Property in Custody of Law, see CUSTODY OF LAW.

Manufacturer's Liability for Mental Suffering of One Swallowing Broken Glass in Bottle of Beverage, see DAMAGES, 7; NEGLIGENCE, 2.

Evidence of Sales by Other Agents, see EVIDENCE, 35.

Of Liquor, Where Deemed to be Made, see INTOXICATING LIQUORS.

Replevin by Seller for Fraud, see REPLEVIN.

When title passes.

1. The general rule is that, when the terms of sale of personal property have been agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. *Baker v. McDonald* (Neb.) 474

2. Where the amount to be paid is to be determined by measurement of the property, to be made by the parties, a measurement which is grossly unfair, as the result of fraud or mistake, is not binding, and a tender based thereon does not entitle the purchaser to possession. *Id.*

3. The sale is completed where the order is received and filled, where a person in one place sends an order for intoxicating liquor to another place, to be sent C. O. D. *Keller v. State* (Tex. Crim. App.) 489

Rights and remedies of parties.

Remedy on Rescission for Fraud, see ACTION OR SUIT, 6.

Necessary Parties in Action for Breach of Warranty, see ACTION OR SUIT, 12.

Parol Evidence that Purchaser was Surety only, see EVIDENCE, 15.

Agent's Authority to Waive Condition as to Notice of Breach of Warranty, see PRINCIPAL AND AGENT, 2.

Question for Jury as to Breach of Warranty, see TRIAL, 4, 5.

4. Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale; and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered. *Baker v. McDonald* (Neb.) 474

5. One who sells goods in reliance upon a false representation by the purchaser as to

a material matter may, upon discovering the fraud, elect to continue the contract, or he may rescind the contract and reclaim his property, or so much of it as is still in the hands of the purchaser; in which case he must give notice to the purchaser of his election to rescind, and of his determination to reclaim the goods sold, and return or tender back anything received by him in payment. *Silvey v. Tift* (Ga.) 386

6. A purchaser has a right to return the machine, and his remedy is not limited to an action for damages, under a contract for the purchase of a machine warranted to do good work, and requiring the purchaser to give written notice if, after two days' trial, it appears not to be as represented. *First Nat. Bank v. Dutcher* (Iowa) 142

7. The requirement of a contract for sale of a machine that notice of its failure to work must be given within two days of its receipt is waived by the continued and persistent efforts of the seller's agents, including the one who made the sale, to make the machine work after the expiration of the time limited. Id.

8. Delay in returning a machine which does not fulfil the warranty is justified so long as the seller's agent continues to work upon it and hold out encouragement to the buyer that it will be made as warranted; and its return within a few days thereafter is sufficient. Id.

SALVAGE.

Recovery for, on Insurance Policy, see INSURANCE, 15, 16.

1. The owners of a tug whose fault causes the wreck of its tow are not entitled to salvage for services rendered in raising and bringing the wreck into a port of refuge, although such services are rendered by another vessel belonging to them. *The Pine Forest* (C. C. App. 1st C.) 873

2. A formal agreement will not entitle a vessel in fault to salvage for services rendered to one injured. Id.

3. The owners of a vessel whose fault causes a wreck cannot, by taking advantage of the statute for the limitation of liability after they have rendered services in raising and taking the sunken vessel into a port of refuge, entitle themselves to salvage, although the entire value of the ship in fault is consumed in satisfaction of the claim of the injured vessel, and the denial of the salvage claim will in effect give the injured party the value of the salvage services in addition to the amount allowed by the statute. Id.

4. A towage contract cannot be converted. under the admiralty law, into a salvage service under conditions brought about by the fault of the tug. Id.

5. The captain of a United States revenue cutter has no authority, even in a port where no court is sitting, to determine a question of salvage, unless the matter is submitted to him, by the parties, as arbitrator. *L.R.A. (N.S.)*

trator. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. (C. C. App. 9th C.) 1095

SALVORS.

Injury to, While Removing Unsafe Walls, see MASTER AND SERVANT, 7, 8, 16, 17.

SATISFACTION PIECE.

Necessity of Executing, on Payment of Mortgage, see MORTGAGE, 7.

SAWDUST.

Prohibition against Casting into Stream, see COMMISSIONERS; CONSTITUTIONAL LAW, 7; FISHERIES; WATERS, 4.

SCHOOLS.

Contract With Foreign Corporation to Supply Text-Books, see CORPORATIONS, 6.

SEALED INSTRUMENTS.

Blanks in, Presumption of Intent as to Filling, see EVIDENCE, 2.

SEEPAGE.

From Irrigation Ditch, Evidence as to Damages by, see EVIDENCE, 34.

From Irrigation Ditch, see WATERS, 11, 12.

SEPARATE ESTATE.

Of Wife, see HUSBAND AND WIFE, 1, 2.

SET-OFF.

Of Private Accounts against Partnership Debt, Invalidity of Agreement for, see PARTNERSHIP, 1.

The expense which a father has been compelled to incur to repair the clothing of his minor daughter and restore her to health, and the value of the services lost during her illness, may be set up by him as a counterclaim when sued for damages for whipping one who conspired with a third person to secure the elopement of the daughter, and assisted in taking the daughter from home under circumstances from which it might reasonably be supposed that her clothing would be injured and her health impaired. *Shoemaker v. Jackson* (Iowa) 137

SETTLEMENT.

Of Partnership after Death of One Partner, see PARTNERSHIP, 4-7.

SEWERS.

Liability of Municipality for Injuries by Defects in, see MUNICIPAL CORPORATIONS, 11-15.

See also DRAINS AND SEWERS.

SHIPPING.

Salvage, see SALVAGE.

SIDEWALKS.

Right of Abutting Owner, see HIGHWAYS.

SIGN.

Revocation of License to Display on Wall, see LICENSE, 1, 2.

SIGNALS.

At Overhead Crossing, see RAILROADS, 5.

SLEEPING-CAR COMPANY.

Release of Railroad Company from Liability for Injury to Employees of, see CARRIERS, 3; CONTRACTS, 2, 7.

Porter of, as Servant of Railroad Company, see MASTER AND SERVANT, 1.

SMOKE.

From Railway Engine, as Nuisance, see NUISANCES, 3, 7.

Liability of Public Official for Causing, see OFFICERS, 4-6.

SOLE STOCKHOLDER.

See CORPORATIONS, 1.

SPARK ARRESTER.

In Threshing Engine, see FIRES, 2, 3.

SPECIAL LEGISLATION.

See STATUTES, 6.

SPECIFIC LEGACY.

See WILLS, 14, 15.

SPECIFIC PERFORMANCE.

Of Contract to Furnish Electricity, see INJUNCTION, 5.

SPEED.

Of Automobiles, see CONSTITUTIONAL LAW, 15.

Of Automobile, Sufficiency of Statute as to, see STATUTES, 4.

STABLE.

Revocation of License to Erect, see LICENSE, 7.

STATE.

Costs against, see COSTS, 1.

Preference in Assets of Insolvent Insurance Company, see INSURANCE, 2.

Title to Treasure-Trove Vesting in, see TREASURE-TROVE, 1.

No suit lies to cancel a tax sale to the state as a cloud on title, since the state cannot be sued, and the result cannot be reached indirectly by making the officers of the state parties defendant. *Sanders v. Saxton* (N. Y.) 727

STATION.

Duty to Keep Platform Lighted, see CARRIERS, 1.

STATUTE OF FRAUDS.

See CONTRACTS, 4.

STATUTES.**Invalidity in part.**

1. An entire statute will not be annulled 1 L.R.A. (N.S.)

by the insertion therein of an unconstitutional provision if it is so far independent of other provisions that the object of the statute will not be affected by its absence. *Fite v. State ex rel. Snider* (Tenn.) 520

Sufficiency of title.

2. A constitutional provision as to the entitling of statutes is not superseded by a provision that "provision may be made by law for the removal from office of any civil officer for malfeasance or misfeasance in the performance of his duties." *Bell v. Esmeralda County First Judicial Dist. Ct.* (Nev.) 843

3. The trial of an officer, after his election, for malfeasance in office, his removal, and the appointment of his successor, are not properly covered by a statutory title "Elections." Id.

4. A provision of a statute requiring automobiles to come to a stop upon meeting a horse frightened by their presence is within the title "An Act to Regulate the Speed of Automobiles." *Christy v. Elliott* (Ill.) 215

5. A title, An Act Relating to Fees of Officers, Witnesses, and Jurors, will not cover a provision exacting an ad valorem charge or tax from the property of estates coming before the probate courts. *State ex rel. Nettleton v. Case* (Wash.) 152

Local and special legislation.

6. Local laws applicable to one county may be passed with respect to the regulation of the liquor traffic. *State v. Barrett* (N. C.) 623

Construction; retrospective.

Constitutionality of Retrospective Statute, see CONSTITUTIONAL LAW, 3.

Of Statute Forbidding Hunting, see HOMICIDE, 2.

7. Sections under a title of a statute "Probate of Foreign Wills" must be held to refer to such wills, since the title will be read into them. *Re Clark* (Cal.) 996

8. A statute providing that no action shall be brought on a claim for usury after two years from the time the cause of action arose will be given a prospective effect; and it will therefore not affect rights of action which accrued prior to its passage. *Slover v. Union Bank* (Tenn.) 523

Repeal.

9. Merely providing for service of process on a state official in actions against a non-resident corporation does not repeal the statute exempting such actions from the operation of the statute of limitations. *Green v. Hartford L. Ins. Co.* (N. C.) 623

STILL SLOP.

Prohibiting Sale of Milk from Cows Fed by, see CONSTITUTIONAL LAW, 20.

STOCK.

See also CORPORATIONS.

Equitable Relief against Fraudulent Reduction of, see CORPORATIONS, 2

STREET RAILWAYS.

Enjoining Breach of Contract to Furnish Electricity for, see **INJUNCTION**, 5.

Requiring Use of Particular Fender, see **MUNICIPAL CORPORATIONS**, 5.

STRIKING OUT.

See **PLEADING**, 6.

SUBAGENT.

Signature to Agent's Contract by, Effect, see **ACTION OR SUIT**, 2.

SUBPOENA DUCES TECUM.

Power to Punish for Contempt, see **CONTEMPT**.

Mandamus to Compel Obedience to, see **MANDAMUS**, 1.

SUCCESSION TAX.

See **TAXES**, 8.

SUM AT RISK.

What is, see **INSURANCE**, 13.

SUPERSEDEAS.

See **APPEAL AND ERROR**, 5, 6.

SUPERVISION.

See **MASTER AND SERVANT**, 2.

SUPPLEMENTAL BILL.

See **REVIEW**.

SURFACE SUPPORT.

In Mines, Jurisdiction to Prevent Removal of, see **EQUITY**, 1.

SURVEY.

Official, Presumption of Correctness of, see **EVIDENCE**, 7.

SURVIVING PARTNER.

Rights of, see **PARTNERSHIP**, 4-7.

TAXES.

Sufficiency of Title of Statute as to, see **STATUTES**, 5.

Credit on Tax Bills for Water Furnished to City, see **WATERS**, 23.

Uniformity; what taxable.

Taxation of Water Company Owned by City, see **MUNICIPAL CORPORATIONS**, 18.

1. A statute requiring payment of fees upon property coming before the probate court in proportion to the value of the estate, which are to be turned into the county treasury, and become part of the public funds, provides a tax on property within the meaning of a constitutional provision that the rate shall be equal and uniform. *State ex rel. Nettleton v. Case (Wash.)* 152

2. The principle of equal taxation requires the taxation of the property of a water company organized to sell water to private consumers at the lowest rates, although all its stock is owned by the municipal corporation itself, where only a fraction of the inhabitants of the city patronize the company. *L.R.A. (N.S.)*

pany; since its exemption would cast a portion of the burden which should rest on the patrons of the company upon all the inhabitants of the city. *Louisville v. McAteer (Ky.)* 766

3. The easement acquired by the laying of pipes in the streets of a city under the franchise of a gas company is property distinct from the franchise, which may become the subject of taxation separate from the tax on the capital stock, which is intended to include the value of the franchise. *Consolidated Gas Co. v. Baltimore (Md.)* 283

Assessment.

Presumption in Favor of, see **EVIDENCE**, 9.

4. A valuation, for taxation, of the property of a corporation, which is arrived at by arbitrary manipulation of figures to reach a preconceived result, is void. *Id.*

5. The bonded indebtedness of a corporation cannot be included in the assessment of its property for taxation where the statutes provide for the assessment of such indebtedness to the holders of the obligations. *Id.*

6. Property cannot be classified according to the value of its owner's estate, so that it shall bear a greater percentage of taxation than is assessed against similar property which forms part of a smaller estate. *State ex rel. Nettleton v. Case (Wash.)* 152

7. The court may review the valuation placed on property for taxation where the record shows that it was imposed in a whimsical, capricious, or unwarrantable way, instead of by the exercise of judgment, since such valuation would be no assessment. *Consolidated Gas Co. v. Baltimore (Md.)* 283

Succession tax.

8. The value of real estate in other states, which it is necessary to sell under authority vested in the executors to sell real estate to pay pecuniary legacies, is subject to collateral inheritance tax at testator's domicile. *Vanuxem's Estate (Pa.)* 400

TAXING DISTRICT.

Delegating Power to Fix Boundaries of, see **CONSTITUTIONAL LAW**, 8.

TEACHER.

Abandonment of Contract by, see **CONTRACTS**, 14.

TELEGRAPHS.

Minor Bound by Stipulation as to Telegram, see **INFANTS**.

TELEPHONE.

License for Use of Streets for Telephone Poles, see **MUNICIPAL CORPORATIONS**, 9.

TENDER.

Necessity of, before Seller Can Maintain Replevin, see **REPLEVIN**.

TERMINAL COMPANY.

Nuisance in Location of Railroad Terminals, see **NUISANCES**, 2, 4.

TESTS.

Evidence of, see EVIDENCE, 11.

THEATER.

Remedy for Breach of Contract for Seat in, see ACTION OR SUIT, 5.

Validity of Condition on Ticket to, see CONTRACTS, 8.

Right to Enjoin Proprietor from Interfering with Ticket Broker's Business, see INJUNCTION, 2.

1. The licensing of theaters and ticket brokers neither imposes any duties upon the one, nor confers any rights upon the other, with reference to tickets, in addition to those conferred by the contract under which a ticket is sold. *Collister v. Hayman* (N. Y.) 1183

2. The proprietor of a theater is under no obligation to admit all who may apply, a breach of which will sustain an action for tort. *Horney v. Nixon* (Pa.) 1184

3. The operation of a theater is not a business affected with a public interest which deprives the proprietor of the right to control it as a private business. *Collister v. Hayman* (N. Y.) 1188

4. An action of trespass will not lie for breach of a contract on the part of a theater manager to permit a person to occupy the seat called for by a ticket which he has purchased. *Horney v. Nixon* (Pa.) 1184

THRESHING MACHINE.

Effect of Failure to File Statutory Bond, on Right of Action, see ACTION OR SUIT, 1.

Presumption of Negligence from Fires Set by, see EVIDENCE, 6.

Duty to Avoid Fire, see FIRES.

Question for Jury as to Care to Avoid Fire from, see TRIAL, 9.

TICKET.

To Theater, see ACTION OR SUIT, 5; THEATERS.

To Theater, Validity of Condition on, see CONTRACTS, 8.

TICKET BROKER.

Right to Enjoin Interference with Business of, see INJUNCTION, 2.

TIDE LANDS.

Title to, see WATERS, 1-3.

TIME.

Evidence of Custom as to System of Reckoning, see EVIDENCE, 28.

Meaning of Word "Noon" in Insurance Policy, see INSURANCE, 4.

Question for Jury as to Adoption of System for Reckoning, see TRIAL, 6.

The legal fiction that there are no fractions of a day has no application to cases where the statute expressly requires that notice shall be taken of the precise time an official act is done, and that a record thereof be made. *Brady v. Gilman* (Minn.) 835

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TITLE.

Cloud on, see CLOUD ON TITLE.

Of Ordinance, see MUNICIPAL CORPORATIONS, 1, 2.

When Passes on Sale, see SALE, 1-3.

Of Statute, see STATUTES, 2-5.

To Treasure-Trove, see TREASURE-TROVE.

To Land under Water, see WATERS, 1-3.

TOTAL LOSS.

See INSURANCE, 16, 17.

TOWAGE.

Converting Towage Contract into Salvage Contract, see SALVAGE, 4.

TRADE FIXTURES.

Tenant's Right to, see LANDLORD AND TENANT.

TRADEMARK.

1. A trademark adopted to designate a brand of cigars of a particular manufacturer is not assignable separate from the goodwill of the business to which it was attached. *Falk v. American West Indies Trading Co.* (N. Y.) 704

2. A judgment for infringement in favor of a transferee of a trademark is not sustained by the evidence where there is nothing to show the transfer to him of anything but the naked trademark. Id.

TRADE NAME.

Injunction as to, see INJUNCTION, 7-9.

TRANSFER TAXES.

See TAXES, 8.

TRAVAIL.

Evidence of Declarations during, see EVIDENCE, 22.

TREASURE-TROVE.

1. Gold-bearing quartz found hidden in the earth, where it has been placed by some person not discovered, is not treasure-trove, so that the title to it will vest in the state. *Ferguson v. Ray* (Or.) 477

2. Property hidden in the earth near a marked tree is not regarded as lost, so that the title will vest in the finder as against the owner of the soil, although it has remained there so long as to indicate that the owner is dead or has forgotten it. Id.

TRESPASS.

For Breach of Contract in Theater Ticket, see THEATERS, 4.

TRIAL.

Error in Refusing to Require Election between Counts, see APPEAL AND ERROR, 24.

Order of reception of evidence.

1. Where the signature to a note upon which suit is brought is denied in the answer, evidence to prove its genuineness is part of the plaintiff's case in chief, and cannot be brought forward in rebuttal. *Yakima Valley Bank v. McAllister* (Wash.) 1073

Questions for jury.

2. A case cannot be taken from the jury if there is evidence which would warrant a recovery on the part of plaintiff. *Christy v. Elliott* (Ill.) 215

3. Whether the consent of a patient to an operation upon her left ear should be implied from the circumstances is a question for the jury, where the evidence shows that she consulted a physician concerning a difficulty with her right ear; that he examined the same and advised an operation, to which she consented; that after being placed under the influence of anesthetics defendant examined her left ear, with which she had not previously experienced any difficulty, and found it in greater need of an operation than the right ear; that he called such fact to the attention of her family physician, who attended the operation at her request, and finally concluded to operate upon the left instead of the right ear, to which the family physician made no objection. *Mohr v. Williams* (Minn.) 439

4. Whether or not a warranted machine is returned within a reasonable time after the seller's abandonment of attempts to make it fulfil the warranty is a question for the determination of the jury. *First Nat. Bank v. Dutcher* (Iowa) 142

5. The question of breach of warranty that a machine is of good material and workmanship, and will, when properly adjusted and operated, do good work, is, upon conflicting evidence, for the jury. *Id.*

6. The question whether or not a system for reckoning time in a particular locality has been adopted by such universal custom as to raise the presumption that a particular contract was made with reference to it is for the jury. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* (Ky.) 364

7. Whether or not insured has made the effort required by a marine insurance policy to minimize the loss is a question for the jury. *Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co.* (C. C. App. 9th C.) 1095

8. The jury must determine the question of the duty of the keeper of a place of amusement to keep clear of articles which will fall therefrom, the platform of a band stand which is erected above seats, provided for patrons. *Williams v. Mineral City Park Asso.* (Iowa) 427

9. The jury must determine what is ordinary care to avoid setting fire from a threshing-machine engine, under all the circumstances of the case. *Martin v. McCrary* (Tenn.) 530

10. Whether or not it is negligence for a manufacturer who employs boys to perform part of his work to permit the floor to become so slippery in close proximity to exposed gears as to afford insecure footing is a question for the jury. *Mundhenke v. Oregon City Mfg. Co.* (Or.) 278

11. An employee who shows that, having shifted the belt running the machinery

which he was operating, he attempted to clean the machine by putting his hand inside, when the machine suddenly started from a cause of which he has no knowledge, and injured him; and who further shows that the belt shifter was imperfect, the accident being one which, in the ordinary course of things, does not happen if those who have the management of the business use due care,—has a right to have the jury say whether, in the light of the rule *res ipsa loquitur*, he has made out actionable negligence on the part of his employer. *Ross v. Double Shoals Cotton Mills* (N. C.) 298

Instructions.

12. A person cannot complain of the refusal of an instruction, if the court, at his instance, gives another which embodies all that is material in the one refused. *Christy v. Elliott* (Ill.) 215

13. In admitting evidence which is competent against one party to a joint action, but not against the other, the court should caution the jury as to its proper limitation. *Illinois C. R. Co. v. Houchins* (Ky.) 375

14. The court should, upon request, instruct the jury that a mortality table introduced in the evidence upon the question of expectation of life shows merely the probable duration of life, and should be considered in connection with the other proof in the case for what it is worth. *Id.*

15. The court cannot, in instructing the jury, single out and give undue emphasis to particular evidence upon a matter in controversy, where there is as much testimony on one side of the question as on the other. *Christy v. Elliott* (Ill.) 215

16. In an action by a trustee in bankruptcy against defendants as preferred creditors, who had taken with reasonable ground to believe that a preference was made, the jury should not be instructed that they could consider, only for the purpose of impeaching the bankrupt who was a witness for the plaintiff, a statement by him to the defendants prior to the appointment of the trustee, that he had made a material misrepresentation on purchasing goods from them, whereupon they rescinded the sale and retook the goods. *Silvey v. Tift* (Ga.) 386

17. When an instruction is given on punitive damages in an action for a personal injury, the court should clearly tell the jury that the allowance of such damages is a matter for their discretion. *Illinois C. R. Co. v. Houchins* (Ky.) 375

18. The right to consider the wealth or poverty of the parties is not included in an instruction, in an action to recover damages for injuries caused by the fright of a horse by an automobile, to the effect that the jury might, in determining whether defendant was exercising reasonable care and diligence, take into consideration the situation and condition of the parties, where there is

no evidence of the financial condition of the parties in the case. *Christy v. Elliott* (Ill.)

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19. Mentioning in an instruction one precaution which a railroad company might take in backing a train over a street crossing, to warn travelers on the highway, does not interfere with the province of the jury to determine what precautions were required, where the instruction immediately continues, "or use some other reasonably safe means" to give warning. *Illinois C. R. Co. v. Coley* (Ky.)

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20. The court may explain to the jury what constitutes ordinary care as matter of law, and instruct them that, to recover for alleged negligent injury, plaintiff must show that he was exercising reasonable care and diligence for his own safety. "as explained in the instructions;" and such instruction cannot be regarded as making the question of negligence one of law. *Christy v. Elliott* (Ill.)

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TRICK.

Larceny in Securing Money by, see LARCENY.

TRUSTS.

In Deposit in Bank, see BANKS, 2-7.

In Intended Gift, see GIFT, 1.

Stating Cause of Action as Trustee against Defendant Named Individually in Title, see PLEADING, 17.

1. A voluntary, express trust is not created by a letter from a widow to the *cestui que trust*, stating that her husband has conveyed their homestead to her on condition that at her death it shall go to the *cestui que trust*, where the law gave her, upon the death of the husband, an absolute title to the property by right of survivorship. *Loomis v. Loomis* (Cal.)

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Executed trust.

2. A valid, executed trust is established by depositing a fund in bank, and, upon advice as to the method of transferring the fund to the *cestui que trust*, taking back and indorsing to him a certificate of deposit, and then notifying the bank and *cestui que trust* that the certificate is held by the depositor for the latter, although the depositor retains the right to use the income during life. *Harris Bkg. Co. v. Miller* (Mo.)

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Constructive trusts.

3. No constructive trust arises under a deed by a man to his wife of the homestead property with a proviso that after her death it is to go to another, where, under the law, she takes, upon his death, absolute title to the property by right of survivorship. *Loomis v. Loomis* (Cal.)

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Parol trusts.

4. A trust in a fund in bank may be established by parol. *Harris Bkg. Co. v. Miller* (Mo.)

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Trustees.

Indorsement of Certificate of Deposit by, see BILLS AND NOTES, 7.

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Removal or Change of Number of, see TRUSTS, 5-7.

5. Unsuitable trustees may be removed from the exercise of the office, in the sound discretion of the court. *Barker v. Barker* (N. H.)

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6. The removal of a trustee is not prevented by the fact that he will thereby be deprived of the opportunity of passing upon his own qualification to take a benefit under the terms of the trust. Id.

7. Equity may change the number of trustees from that designated by the originator of the trust if changed conditions in the estate render it necessary. Id.

TUGS.

Right of Tug at Fault to Salvage, see SALVAGE, 4.

UMPIRE.

Conclusiveness of Decision of, see CONTRACTS, 9-12.

UNFAIR COMPETITION.

Injunction against, see INJUNCTION, 8, 9.

UNIFORMITY.

In Taxation, see TAXES, 1, 2.

USAGE.

See CUSTOM.

USURY.

Limitation of Action against Right to Recover for, see LIMITATION OF ACTIONS, 1.

VALUATION.

Of Property for Taxes, see TAXES, 4-7.

VALUE.

Opinion Evidence as to, see EVIDENCE, 16.

VARIANCE.

Between Pleading and Proof, see EVIDENCE, 45.

VENDOR AND PURCHASER.

Adverse Possession by Grantee of Mortgage, see ADVERSE POSSESSION, 2, 3.

VENUE.

Of Action, see ACTION OR SUIT, 13.

Of Bastardy Proceedings, see JUSTICE OF THE PEACE.

For Probate of Foreign Will, see WILLS, 2.

VESTED REMAINDERS.

Passing by Deed of Trust for Creditors, see INSOLVENCY.

See also WILLS, 8-11.

VOTERS AND ELECTIONS.

Unnumbered ballots are not void under a statute merely providing that each ballot shall be numbered to correspond with the

name of the person voting the same on the poll list, although omission to number the ballots is made a misdemeanor. *Montgomery v. Henry* (Ala.) 656

WAIVER.

- Of Privilege as to Confidential Communications, see EVIDENCE, 25-27.
- Of Failure to Give Notice of Loss, see INSURANCE, 9.
- Of Forfeiture of Mining Lease, see MINES.
- Of Notice of Breach of Warranty, see SALE, 7.

WALLS.

- Injury to Servant by Fall of, see MASTER AND SERVANT, 7, 8 16, 17.

WARNING.

- Master's Duty to Warn Servant, see MASTER AND SERVANT, 4, 5.

WARRANTY.

- Agent's Authority to Waive Condition as to Notice of Breach of, see PRINCIPAL AND AGENT, 2.
- Purchaser's Remedy on Breach of, see SALE, 6-8.
- Question for Jury as to Breach of, see TRIAL, 4, 5.

WASTE.

- Of Water, see WATERS, 21.

WATCHMAN.

- At Railroad Crossing, see RAILROADS, 4.

WATER COMPANY.

- Taxation of, when Stock Owned by City, see MUNICIPAL CORPORATIONS, 18.
- Liability to Taxation, see TAXES, 2.

WATER COURSE.

- What is, see WATERS, 5.

WATERS.

- Recovery Back of Rates Paid, see AS-SUMPSIT.
- As to Drains and Sewers, see DRAINS AND SEWERS.
- Reclamation of Land by Irrigation as Public Purpose, see EMINENT DOMAIN, 5.

Title to land under water.

1. Prior to the admission of a state into the Union, Congress has power to grant tide land lying between high and low water marks within its boundaries. *Kneeland v. Korter* (Wash.) 745
2. Land to which a right to a patent has attached, as well as that actually patented at the time of the admission of a state into the Union, is included in a constitutional provision disclaiming title to tide land which has been patented by the Federal government. *Id.*
3. The title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor on such 1 L.R.A. (N.S.)

stream are bounded by the banks of the river. *Kinkead v. Turgeon* (Neb.) 762
Rights as between individuals generally.

Prohibition against Casting Sawdust into Stream, see COMMISSIONERS; CONSTITUTIONAL LAW, 7; FISH-ERIES.

4. That the act of public authorities in forbidding the casting of sawdust from a particular mill into a particular stream is not a general regulation does not make it a judicial act, which will entitle the mill owner to a hearing. *Com. v. Sisson* (Mass.) 752

5. Water flowing in one direction over the surface of the ground without a well-defined channel, from a swamp fed by springs, to the channel of a stream, is a water course, which cannot be diverted to the injury of a riparian owner on the stream. *Harrington v. Demaris* (Or.) 756

6. Where the owners of several parcels of land on a stream remove a barrier, and turn water from another source into the stream, it becomes subject to the rules of law applicable to riparian ownership. *Id.*

7. A riparian owner has no ground to complain of a decree awarding him one half the water flowing in the stream, as against the claims of a lower riparian owner, where the matter is settled solely by the riparian rights of the parties. *Id.*

Irrigation ditch; injury by leakage or discharge from.

Evidence as to, see EVIDENCE, 33, 34.

8. A portion of a gulch, which, by means of a dam, is converted into a section of an irrigation ditch, in which the water stands over an area 2,000 feet long, nearly 400 feet wide and in places 12 or 15 feet deep, and the connection between which and the outlet ditch can be closed so that it can be used as a storage place, is a reservoir, within the meaning of a statute providing that owners of reservoirs shall be liable for leakage therefrom. *Howell v. Big Horn Basin Colonization Co.* (Wyo.) 596

9. The owner of an irrigation ditch is liable for the injury done by wilfully and knowingly discharging water therefrom through spillways upon adjoining property. *Id.*

10. The liability of insurers does not attach to persons conveying water in ditches for irrigation purposes; nor are they liable for injuries to adjoining property, not attributable to some fault or neglect on their part. *Id.*

11. Failure of a statute specifically to require the observance of care in constructing and grading the bottom of an irrigation ditch will not exempt the owner from liability for injury to adjoining lands through seepage caused by negligence in that respect. *Id.*

12. Constructing an irrigation ditch through sand banks, and forming the bottom by sand and gravel loosely scraped together, and permitting such condition to continue after notice of its insufficiency, by reason of

which the water seeps through the bottom to the injury of adjoining land, is evidence of negligence. *Id.*

13. A landowner waives his right to recover for the injury done to his land by the casting of water thereon by authorizing and directing the defendant to cast it there. *Id.*
Title by adverse user.

Prescriptive Right to Cast Sawdust into Stream, see *FISHERIES*, 2.

14. Use of water by a lower riparian owner without a recognition by the upper owner of the right is not adverse to the latter. *Harrington v. Demaris (Or.)* 756

15. The right of a riparian owner to the flow of the stream through his land is not affected by adverse use where the use shown is not sufficient to enable the one making it to invoke the statute of limitations in his favor. *Id.*

Water supply.

Consumer's Right to Enforce Water Company's Contract, see *ACTION OR SUIT*, 3.

Mandamus to Compel Supply at Reasonable Rates, see *MANDAMUS*, 2.

City Compelling Payment of Water Rates, see *MUNICIPAL CORPORATIONS*, 10.

Taxation of Water Company, All of Whose Stock is Owned by City, see *MUNICIPAL CORPORATIONS*, 18.

16. A water company taking the benefit of a contract between a town and its promoters is bound by the obligations of the contract. *Robbins v. Bangor R. & Electric Co. (Me.)* 963

17. One who, for the purpose of securing a hydrant contract with a town for fire purposes, agrees to furnish water to its inhabitants at certain rates after obtaining the benefit of the contract is bound to fulfill the agreement as to service and rates to individual water takers. *Id.*

18. The quantity of water used, and the cost of the individual service, are the principal elements for consideration in fixing the charges for water supply, as between individual takers or classes of takers. *Id.*

19. To make the original classification of a building for purposes of water rates, which was continued for a long period of time, controlling as to the rate to be applied at a particular time, on the ground of usage, the circumstances must appear to have remained the same. *Id.*

20. A water company may change from a flat to a meter rate if no contract prevents, and the new rates are reasonable and do not discriminate. *Id.*

21. For unnecessary waste of water, a consumer may be required to pay reasonable meter rates. *Id.*

22. A contract for water supply, at specified rates, to a dwelling house containing a family, does not apply to a building used primarily as a boarding house, although the family of the keeper lives in it. *Id.*

23. A water company taxed for municipal

purposes may credit upon the tax bills the reasonable price of water which has been furnished to and used by the city for the years for which the tax is asserted. *Louisville v. McAteer (Ky.)* 766

WEIGHTS AND MEASURES.

Unfair Measurement of Property Sold, see *SALE*, 2.

WHIPPING.

Justification for, see *ASSAULT AND BATTERY*, 3.

Counterclaim in Action for, see *SET-OFF AND COUNTERCLAIM*.

WILD GAME.

See *GAME*.

WILLS.

Direction as to Crops in, see *CROPS*.

Attestation.

1. Attestation of a will in another room, out of range of testator's vision, is not within a statutory requirement that it shall be in his presence; and the defect is not cured by a subsequent acknowledgment by the witnesses, or ratification and approval by the testator. *Calkins v. Calkins (Ill.)* 393

Probate; foreign wills.

See also *STATUTES*, 7.

2. Under statutes providing that wills must be proved in the county of which the deceased was a resident at the time of his death, and that foreign wills allowed in other states may be allowed in the county in which testator left real estate, the will of a resident cannot be probated elsewhere than in the state, and then brought into the state for secondary or ancillary administration. *Re Clark (Cal.)* 996

3. The duty of a state to give full faith and credit to the judgments of other states does not require it to permit the will of one of its residents to be probated first in another state, and then grant ancillary administration within the state on the foreign record. *Id.*

4. The probate of the will of a nonresident who dies, leaving property within the state, extends only to its effect upon property within the jurisdiction, and has no effect upon the validity of the will itself. *Id.*
Effect of codicil.

5. A gift once made by will is not to be cut down by a subsequent codicil, unless the intention of the testator to that effect appears clearly or by necessary implication. *Re Sigel (Pa.)* 397

6. The right of an heir under a clause in a will directing the residue to be divided between testator's heirs is not cut down by a subsequent codicil giving him a specific legacy. "and no more." *Id.*

Remainder over.

7. There may be a valid devise to one for life with power of disposition, which will not affect the remainder over unless the power is exercised as authorized. *Roberts v. Roberts (Md.)* 782

Vested or contingent interests.

8. The remainder created by a clause in a will which, after giving the estate to testator's wife for life with power of disposition, disposes of the estate "remaining at her death," is not necessarily contingent. *Id.*

9. An intention to create a contingent remainder is not shown by a clause in a will which, after giving an estate with power of disposition, and providing that the estate remaining at the death of the life tenant shall be distributed among testator's children, share and share alike, directs that the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share its or their parent would have been entitled to if living. *Id.*

10. A vested remainder is created by a will giving testator's widow authority, for the maintenance of herself and children, to spend principal and income of the estate, and providing that at her death "then that all of my property which she may possess shall be disposed of equally among all of my surviving children," where a preliminary clause of the will gives the property therein provided for "to my sons and daughters, should they be living at the time of my decease, or any of them that may be alive." *Ball v. Holland (Mass.)* 1005

11. Vested, and not contingent, remainders are created by a will which gives testator's estate to his wife during life in trust for the use of herself and "her children," with power to sell property and invest the proceeds, and lease real estate, and use whatever is necessary for support and education, and make advancements; and directs that all property "remaining at her death" shall be divided among such children, share and share alike, the child of a deceased child to stand in its parent's stead and receive and have the share which its parent would be entitled to if living. *Roberts v. Roberts (Md.)* 782

Election.

12. The renunciation, by the widow, of the provision made for her in her husband's will, entitles her to her share of the estate after the debts are paid from the entire estate, under a statute providing that she shall be entitled to such part of the estate as she would have been entitled to if he had died intestate; and it does not make only the property going to her intestate, so as to throw the entire debts upon it. *Gordon v. James (Miss.)* 461

13. A statutory provision that, in case a widow renounces the provision made for her in her husband's will, she may have the difference between her separate estate and what she would be entitled to in case of intestacy made up to her notwithstanding the will, does not deprive her of her rights in the separate parcels of property, and require her portion to be made up to her in money, where the further provision for the distribution of the estate declares that she shall have her lawful portions of the lands 1 L.R.A. (N.S.)

and her distributive share of the personality. *Id.*

14. A devisee of land, who, before the renunciation by the widow of the provisions of the will, has accepted the devise with the condition that he pay the encumbrance on the property, cannot compel the widow to share in the satisfaction of such encumbrance, but she will recover her share of the property free from the encumbrance; the doctrine of purchase for value not applying in favor of the devisee. *Id.*

Contribution between legatees.

See also *supra*, 14.

15. Specific devises of land do not share with specific bequests of personalty, in contribution towards payment of the debts of the estate, where the statutes plainly indicate that the land is to stand charged only for such debts as the personalty may not be sufficient to pay. *Id.*

Lapse of legacy.

16. A legacy given in payment of a debt by the express terms of the will does not lapse by the death of the legatee before the testator; but when, by the terms of the will, it appears that the intention of the testator was to confer a bounty, it is not competent to show a different intent, and to prevent a lapse by proof that the legacy was given in payment of a debt. *McNeal v. Pierce (Ohio)* 1117

WITNESSES.

Cross-Examination of Prosecutrix for Rape, see *APPEAL AND ERROR*, 32.

Power of Committing Magistrate to Punish, for Contempt, see *CONTEMPT*.

Right of Accused to Meet, see *CRIMINAL LAW*, 3.

Evidence of Confidential Disclosures to Physicians, see *EVIDENCE*, 25-27.

Mandamus to Compel Production of Papers by, see *MANDAMUS*, 1.

Privilege of witnesses.

Due Process as to, see *CONSTITUTIONAL LAW*, 16.

1. The immunity afforded by the Kansas anti-trust law of 1897, § 10, to a witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of that law, is coextensive with the constitutional privilege that no person shall be a witness against himself. *State v. Jack (Kan.)* 167

2. A witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of the Kansas anti-trust law cannot refuse to give his evidence on the ground that the immunity provided by § 10 of such act does not afford protection against the use of his evidence in a prosecution against him for violations of the Federal anti-trust laws. *Id.*

3. The exemption provided by the Kansas Bill of Rights, § 10, Kan. Gen. Stat. 1901, § 92, that no person shall be a witness

against himself, cannot be claimed by a witness when, by the terms of the statute, the immunity afforded is coextensive with the constitutional privilege of silence. *Id.*

Impeachment of.

4. An admission by a servant whose negligent act caused an injury, made long after the accident, may, in case proper foundation is laid, be admitted in evidence in an action against his master to discredit him as a
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witness. *Illinois C. R. Co. v. Houchins*
(Ky.) 375

WRIT AND PROCESS.

Due Process in Service on Foreign Corporation, see *CONSTITUTIONAL LAW*, 14.

Sufficiency of Service by Publication to Sustain Judgment, see *JUDGMENT*, 7.



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